

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JOSEPH STEINBRECHER

:
:
:
:
:

CRIMINAL ACTION

No. 99-725-1

ORDER - MEMORANDUM

AND NOW, this day of November, 2002, defendant Joseph Steinbrecher's oral request for modification of sentence is denied and the government's Rule 35(b) motion is dismissed as moot.

On December 16, 1999, defendant entered a plea of guilty to a three-count information charging conspiracy to commit bank and pharmacy burglary, 18 U. S. C. § 371; conspiracy to distribute pharmaceutical controlled substances, 18 U.S.C. § 846; and bank burglary, 18 U.S.C. § 2113. On January 27, 2000, the government's 5K1.1 motion for downward departure for substantial assistance was granted, and defendant was sentenced to 120 months custody.

On September 10, 2002, a hearing was held on the government's Rule 35(b) motion for a further reduction of defendant's sentence based on additional cooperation. Defense counsel informed the court that defendant had received a state sentence of 12 and one-half to 25 years to run concurrently with his federal sentence, that he did not want the Rule 35(b) reduction, and instead wants the previous 5k1.1 reduction vacated and his

custodial period increased.¹ Tr. 9/10/02 sentencing hearing at 2. Defendant, who is now incarcerated in a federal correctional institution, said that he does not want to serve any portion of the subsequently imposed state sentence in state prison because he fears for his safety. *Id.* There appears to be no authority that would allow an increase in the sentence given these circumstances.

A term of imprisonment once imposed may not be reduced except: 1) upon motion of the Bureau of Prisons where extraordinary and compelling reasons warrant a reduction or where a defendant is over 70 and has served at least 30 years; 2) as permitted under Rule 35(c); or 3) where a defendant was sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission. 18 U.S.C. § 3582(c). Rule 35(c) allows correction of a sentence within seven days of imposition where there is arithmetical, technical or other clear error. None of these provisions is available to defendant.²

Here, after almost three years from imposition of his sentence, defendant asks for an increase. Rule 35(c) is jurisdictional. *U.S. v. Sanchez*, 2002 WL 1431438 (E.D.Pa.

¹ Defendant said that he would "like to withdraw the 5K1 period or my whole plea agreement in general, because I would rather not have 5K1 on my paperwork because as I had wrote to your Court that my issues past with my other lawyer did not represent me in a fair way, and I know that is why you had appointed Mr. Lammendola to represent me. And I just felt as though my cooperation has hurt me more than helped me in at least every aspect, state and federal. So I would like to withdraw at least from any 5K1 from day one that they gave me, three points, four points, whatever, I would like to withdraw " Tr. 9/10/02 sentencing hearing at 4 -5.

² See *Lagorga v. U.S.*, 89 F.3d 834 (6th Cir. 1996); *United States v. Terrell*, 2000 WL 1459862 (W.D. Va.). The *Terrell* and *Lagorga* defendants sought to increase 12-month sentences by one day in order to become eligible for "good time" credit. Both requests were denied for lack of jurisdiction.

Jul 01, 2002). Any sentence imposed after the seven- day period would be a legal nullity. See United States v. Morrison, 204 F.3d 1091, 1093 (11th Cir.2000); United States v. Yost, 185 F.3d 1178, 1180 n. 3 (11th Cir.1999); United States v. Lopez, 26 F.3d 512, 518-19 (5th Cir.1994) (per curiam); United States v. Fahm, 13 F.3d 447, 453 (1st Cir.1994); United States v. Townsend, 33 F.3d 1230, 1231 (10th Cir.1994).³

Edmund V. Ludwig, J.

³ Claims for ineffective assistance of counsel may not be considered in the posture of a sentencing. U.S. v. Robinson, 2002 WL 2023877 *3 (E.D. Pa. 2002). See also U.S. v. Pultrone, 241 F.3d 306, 308 (3d. Cir. 2001) (ineffective assistance of counsel claim must be raised under 28 U.S.C. § 2255).