

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	No. 04-0029-2
MICHELLE FOISY	:	

MEMORANDUM AND ORDER

Schiller, J.

January 6, 2006

In a superseding indictment, the Government charged Defendant Michelle Foisy with one count of conspiracy, one count of producing child pornography and one count of distribution and receipt of child pornography. Prior to Defendant's sentencing, the Government filed a motion seeking a downward departure from the mandatory minimum sentence. The Court granted that motion. Presently before the Court is the Government's motion for a further reduction in Defendant's sentence. The Court now finds, based on the new facts presented by the Government, that a further reduction in sentence is warranted.

I. BACKGROUND

Defendant faced a mandatory sentence of ten years imprisonment for taking a single photograph of the genitals of her five-year old relative, which she gave to her boyfriend at the time. (Presentence Investigation Report at 8; Gov't's Rule 35(b) Mot. for Reduction of Sentence and Mem. of Law at 1-2 (Nov. 29, 2005) [hereinafter Gov't's Rule 35(b) Mot.].) In July 2004, she pled guilty to charges of conspiracy, production of child pornography, and distribution and receipt of child pornography. (See Gov't's Change of Plea Mem. (July 2, 2004); Guilty Plea Agreement (July 6, 2004).) Based upon Defendant's substantial assistance and significant cooperation, the Government requested a downward departure from the guideline sentencing range and from the mandatory

minimum sentence for those crimes. (*See* Gov't's Mot. to Permit Departure from Guideline Sentencing Range and from Mandatory Minimum Sentence (Nov. 23, 2004).) The Court granted the motion and sentenced Defendant to thirty-six months imprisonment, three years supervised release, a \$1,000 fine and a \$300 special assessment. (*See* Order Granting Mot. to Permit Departure from Guideline Sentencing Range (Nov. 23, 2004); J. as to Michelle Foisy (Nov. 24, 2004).) The Court further recommended to the Bureau of Prisons that Defendant "shall participate in a mental health treatment program." (J. as to Michelle Foisy at 2.)

In November 2005, the Government filed a Rule 35(b) motion for a further reduction in Defendant's sentence. A hearing on this motion was originally scheduled for December 19, 2005. Upon learning that the victim's parents had not been notified of the hearing, the Court rescheduled the hearing to provide them an opportunity to voice their opinion on the potential reduction of Defendant's sentence. On January 3, 2006, the Court held a hearing on the Government's motion. Although they had been contacted by the Government, the victim's parents did not respond or attend the hearing. (R. at 2-3 (Jan. 3, 2006).)

II. STANDARD OF REVIEW

Pursuant to 18 U.S.C. § 3582, a court may modify a term of imprisonment once it has been imposed. *See* 18 U.S.C. § 3582(c)(1)(B) (2005) (allowing modification as permitted by Fed. R. Crim. P. 35). Rule 35 of the Federal Rules of Criminal Procedure permits a court to reduce a sentence if the government moves for reduction based on the defendant's substantial assistance in the investigation or prosecution of another individual's offenses. *See* FED. R. CRIM. P. 35(b) (2005).

If the government files a Rule 35(b) motion more than one year after the defendant's sentence, a court may reduce the sentence provided that the defendant's substantial assistance involved "information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing" FED. R. CRIM. P. 35(b)(2)(B). A Rule 35(b) motion for reduction of sentence is directed to the discretion of the district court. *See Diggs v. United States*, 740 F.2d 239, 249 (3d Cir. 1984) ("[Rule 35(b)] motions are addressed entirely to the discretion of the district judge; the judge can deny such motions for virtually any reason or for no reason at all."); *United States v. Vento*, 700 F. Supp. 823, 823-24 (E.D. Pa. 1988) ("It is well established that the granting or denial of a Rule 35(b) motion for reduction of sentence is addressed to the sound discretion of the district court.").

III. DISCUSSION

The Government now argues in its Rule 35(b) motion that Defendant is entitled to a greater reduction in her sentence because she has provided the Government with further substantial assistance. (*See Gov't's Rule 35(b) Mot.*) The Government argues that "although defendant Foisy provided the information [at issue] as soon as she was approached by federal agents, the government did not know how useful the information was until the forensic examination of [redaction] was completed."¹ (*Gov't's Rule 35(b) Mot.* at 2-3.) The Court agrees that this information is new and consequently could not have served as the basis for the Government's previous motion for reduction in sentence. (*R.* at 3.) Thus, the new information was not taken into account in Defendant's original

¹ The Government filed its Rule 35(b) motion under seal, and accordingly the Court has redacted sensitive information.

sentence. To date, the new information has led the Government to obtain a search warrant for the residence of an individual who possessed child pornography. (*Id.* at 3, 20.) The Court finds that with this new information the Defendant has provided the Government substantial assistance in investigating another individual's offense. Defendant provided truthful and useful information without delay, and therefore the Court concludes that Defendant's substantial assistance warrants a further reduction in her sentence.

In ruling on a Rule 35(b) motion, a court also may consider factors beyond the limited facts of new assistance provided to the government. *See United States v. Fredericks*, 787 F. Supp. 79, 82-83 (D. N.J. 1992) (in evaluation of Rule 35(b) motion considering factors such as punishment, deterrence, protection of society, encouraging cooperation with law enforcement, number of victims, duration of crime, and repetitious nature of criminal acts). "As is the case when a defendant is originally sentenced, a meaningful determination of a Rule 35(b) motion involves an 'inquiry broad in scope, largely unlimited either as to the kind of information [the sentencing judge] may consider, or the source from which it may come.'" *Vento*, 700 F. Supp. at 824 (*quoting United States v. Grayson*, 438 U.S. 41, 50 (1978)). A court also may take into account facts developed subsequent to the original sentencing. *Id.*

Many facts help to support a further reduction in Defendant's sentence. First, while incarcerated Defendant has exhibited good behavior, has taken classes in Spanish, health, anger management, and weight management, and has also taught a history class. (R. at 8.) Second, Defendant has greatly improved her communication skills and self-control. (*Id.* at 23.) Third, Defendant has already paid in full the \$1,000 fine and \$300 special assessment imposed by her sentence. (*Id.* at 9.) Fourth, the Court notes that the victim's parents elected not to attend the

hearing or speak out against the potential reduction in Defendant's sentence.

Additionally, in its original sentence, the Court had recommended to the Bureau of Prisons that Defendant participate in a mental health treatment program. (J. as to Michelle Foisy at 2.) At the January 3rd hearing, the Court learned from Defendant's attorney, Ms. Haly, and from Defendant that she has not been well-served by her detention at the Federal Detention Center (FDC) in Philadelphia rather than in an appropriate facility equipped to provide her proper mental health treatment. (*Id.* at 11-13, 21-23.) The Court is disappointed that Defendant has not received the mental health treatment the Court had envisioned in its original sentence. Accordingly, the Court now orders Defendant to participate in a mental health treatment program as recommended by her probation officer.

Having considered the unique facts of Defendant's crime and situation, the Court concludes that the punitive and deterrent goals of the Court's original sentence have already been fulfilled. Therefore, requiring that Defendant spend additional time in prison will not serve the public interest. Rather, the Court concludes that the public interest is best served by crediting Defendant for time served, ensuring that she obtains steady employment, and, most importantly, allowing her to receive intensive mental health treatment.

IV. CONCLUSION

For the reasons discussed above, the Court is exercising its discretion and is reducing the sentence as stated in the accompanying order.

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ORDER

AND NOW, this 6th day of **January, 2006**, following a hearing on the Government's Rule 35(b) Motion on January 3, 2006, it is hereby **ORDERED** that:

1. Defendant is sentenced to time served and thirty-six months supervised release.
2. While on supervised release, Defendant shall not commit another federal, state, or local crime, and shall comply with the thirteen standard conditions that have been adopted by this Court.
3. Of the thirty-six months supervised release, Defendant shall serve twelve consecutive months with home electronic monitoring to begin as soon as is practicable and to be paid for by Defendant. During the electronic monitoring period, Defendant may leave home to maintain employment and to attend a mental health treatment program.
4. Defendant shall participate in a mental health treatment program as recommended by the probation officer, and such a program may require urine testing. The Court will monitor Defendant's participation in a mental health treatment program.
5. Defendant shall cooperate in DNA collection as directed by the probation officer.

BY THE COURT:

Berle M. Schiller, J.

