

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

UNITED STATES OF AMERICA,

v.

LEROY TAYLOR,
Defendant.

:
:
:
:
:
:
:

CRIMINAL

NO. 91-634

Memorandum and Order

YOHN, J.

November 10th, 2008

Defendant Leroy Taylor asks the court to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) in light of the decrease by the Sentencing Commission of the guideline range applicable to cocaine base (crack) offenses. Because Taylor’s sentence was based on his career offender status—and not on the guideline range for cocaine based offenses—this motion will be denied.

On July 9, 1992, a jury found Taylor guilty of two counts of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1), and one count of possession of ammunition by a convicted felon, in violation of 21 U.S.C. § 922(g)(1). He was sentenced on August 18, 1992 to 284 months’ imprisonment, four years’ supervised release, and a \$150 special assessment. (Sentence, No. 91-634, Aug. 18, 1992, Doc. No. 53.)

Taylor’s term of imprisonment was computed as follows. The court determined Taylor was a career offender under the Sentencing Guidelines (U.S.S.G. § 4B1.1) because: (1) at the time of the instant offenses in this case, Taylor was at least eighteen years old; (2) the instant offenses included a controlled substance offense as defined by U.S.S.G. § 4B1.2(b); and (3)

Taylor had two prior felony convictions for crimes of violence, as defined by U.S.S.G. § 4B1.2(a) and (c).¹ Under U.S.S.G. § 4B1.1, Taylor had an offense level of 34 and a criminal history category of VI. (Sentencing Tr. 4:9-13, Aug. 18, 1992.) The guideline range was thus 262 to 327 months' imprisonment. (*Id.*) From within this range, the court imposed a sentence of 284 months' imprisonment plus four years' supervised release, as required by 21 U.S.C. § 841, and a special assessment of \$150. (*Id.* 11:12-24.) In selecting Taylor's sentence, the court considered the Presentence Report, the parties' submissions and statements, the nature and circumstances of the offenses, the goals of deterrence and rehabilitation, and Taylor's history. (*Id.* 10:3-23.)

Had Taylor not been a career offender, his offense level pursuant to U.S.S.G. § 2D1.1 would have been 28 (26 plus a two-point upward adjustment because Taylor possessed a firearm during his offense). (Presentence Report 3-4.) The guideline range would have been 130 to 162 months' imprisonment. (Def.'s Supplemental Mem. Law Supp. Mot. Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c) at 2.)

On November 1, 2007, the United States Sentencing Commission adopted Amendment 706 to the Sentencing Guidelines, which decreased by two levels the base offense level of defendants being sentenced for crack offenses. *See United States v. Wise*, 515 F.3d 207, 219 (3d Cir. 2008) (citing U.S.S.G. § 2D1.1; U.S.S.G. Supp. to App'x C, Amend. 706). The Amendment was made retroactive.

On May 12, 2008, Taylor filed a pro se motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2). On June 30, 2008, Taylor filed a counseled supplemental memorandum of

¹ Taylor does not dispute that he qualifies as a career offender under U.S.S.G. § 4B1.1.

law in support of his motion for reduction of sentence. The government filed a response on July 8, 2008, and Taylor filed a counseled reply on July 25, 2008.

The issue central to the resolution of this motion is whether Taylor's sentence was "based on" the Guideline relevant to possession of crack with the intent to distribute, U.S.S.G. § 2D1.1. Because Taylor's sentence was based on his status as a career offender, but not on § 2D1.1, Taylor is not eligible for a reduction of his sentence under Amendment 706 and § 3582(c)(2).

A sentence may be reduced "in the case of a defendant who has been sentenced to a term of imprisonment *based on* a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o)." 18 U.S.C. § 3582(c)(2) (emphasis added). The "based on" language is the key: motions for reduction of sentence because of the amendment to the guideline range applicable to crack offenses turn on whether the defendant was sentenced "based on" U.S.S.G. § 2D1.1. *United States v. Biامي*, 548 F. Supp. 2d 661, 664 (E.D. Wisc. 2008) (not reducing the defendant's sentence where the judge "did not depart [from the career offender range] based on an overstatement in defendant's criminal history category . . . or any other basis," but instead "adopted the career offender guideline range and imposed sentence based on such range"); *United States v. Gutierrez*, No. 02-27, 2008 WL 927564, at *2 (D. Conn. April 4, 2008) (not reducing the defendant's sentence where "the court sentenced [the defendant] as a career offender pursuant to § 4B1.1" and the defendant "stipulated in his plea agreement that § 4B1.1, rather than § 2D1.1, would be used to calculate his guidelines range"); *United States v. Rivera*, 535 F. Supp. 2d 527, 529 (E.D. Pa. 2008) (holding that the defendant, who was sentenced as a career offender "is not eligible for a reduction under Amendment 706 because the Guidelines range applicable to him remains unchanged").

For example, when the sentencing judge concluded that the guideline range applicable to a career offender overrepresented the seriousness of the defendant's criminal history, and the judge therefore looked to U.S.S.G. § 2D1.1 for guidance as to the appropriate sentence, the defendant's resulting sentence is based on U.S.S.G. § 2D1.1, and a reduction is permissible under Amendment 706. *United States v. Poindexter*, 550 F. Supp. 2d 578, 580-81 (E.D. Pa. 2008). In that case, the court confirmed that a sentence is not "based on" U.S.S.G. § 2D1.1 if that guideline range did not "play a role in [the judge's] guideline calculation," *id.* at 581 (quoting *Gutierrez*, 2008 WL 927564, at *2), or if the defendant was not "actually sentenced" under that guideline range, *id.* (quoting *Biami*, 548 F. Supp. 2d at 664). After noting this, the *Poindexter* court reduced the defendant's sentence because the sentencing judge "did *not* sentence [the defendant] under the career offender guideline," but specifically "determined that the career offender designation 'overrepresents the total offense level in this case.'" 550 F. Supp. 2d at 580 (quoting Judgment and Commitment Order, at 8 (Jan. 24, 2001)). The sentencing judge therefore "reduced [the defendant's] offense level to that which he would have faced absent the career offender designation." *Id.* at 581. The court held that the defendant's sentence was "based on" § 2D1.1 and so could be reduced. *Id.* at 582.

However, when the sentencing judge applies the career offender guideline and imposes a sentence without consideration of the otherwise applicable guideline range under U.S.S.G. § 2D1.1, the sentence is based on the career offender guideline and not on U.S.S.G. § 2D1.1. In that case, the defendant is not eligible for a reduction of sentence under 18 U.S.C. § 3582(c)(2). *See, e.g., United States v. Perdue*, No. 1:99-cr-00334, 2008 WL 4404278, at *3 (N.D. Ohio Sept. 23, 2008) (acknowledging that "[a] number of courts have reached the conclusion that

Amendment 706 does not apply where the defendant's sentence is actually determined by his status as a career offender"); *United States v. Collier*, No. 4:05-CR-313CAS, 2008 WL 4204976, at *2 (E.D. Mo. Sept. 5, 2008) ("If [a] Court were to find that [a prisoner] was sentenced under the career offender guideline, Amendment 706 would not apply to his sentence.").

Defendant rationally argues that a sentence may have multiple bases² and that sentencing does not occur in a vacuum. (Def.'s Supplemental Mem. Law Supp. Mot. Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c) at 7.) He urges the court to consider a "gravitational pull" that § 2D1.1, as it existed at the time of Taylor's sentencing, may have exerted on the court as I selected Taylor's sentence from within the § 4B1.1 sentencing range. (*Id.*) It may be that there exists a species of career offender cases in which judges applying § 4B1.1 consider the underlying § 2D1.1 guideline such that the sentence ultimately selected from within the § 4B1.1 range is also "based on" § 2D1.1, but this is not such a case. In this case, I did not base Taylor's sentence on § 2D1.1 and made no reference to it. Even if the new lower guideline under § 2D1.1 had applied at the time of sentencing, his sentence as a career offender would have been the same, so that his sentence was not "based, even in part," on § 2D1.1, as defendant argues.

During the sentencing proceeding, I noted Taylor's "long career of criminal activity" (Sentencing Tr. 12:9-11) and that such activity was "all too frequent in the history of his life"

² Webster's Dictionary provides myriad definitions for "basis," including "the bottom of anything considered as a foundation for the parts above" and "fundamental ingredient." Webster's defines the verb form of "base" in numerous ways including "to make or form a foundation for" and "to serve as a base for." *Webster's Third New International Dictionary*, 180, 182 (1981).

(*Id.* 5:17-18).³ I also remarked that the second offense for which Taylor was then being sentenced occurred very shortly after he had been arrested for the first offense in this case and while he was released on bail. (*Id.* 10:19-23.) I did not even mention the guideline range under § 2D1.1 in explaining the sentence, making it difficult to suggest that the sentence imposed was “based on” § 2D1.1. Moreover, the sentence was somewhat higher than the sentencing guideline range under § 4B1.1, again emphasizing that § 2D1.1 was not a consideration.

Because Taylor’s sentence was not based on § 2D1.1, he is not entitled to a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). Therefore, his motion for reduction of sentence will be denied.

An appropriate order follows.

³ Taylor had four separate adjudications as a delinquent while a juvenile and five separate adult convictions. He had abused drugs since he was twelve years of age, yet refused to participate in a drug rehabilitation program. At sentencing, he showed no remorse and no interest in rehabilitation.

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

UNITED STATES OF AMERICA,

v.

LEROY TAYLOR,
Defendant.

:
:
:
:
:
:
:

CRIMINAL

NO. 91-634

Order

AND NOW, this 10th day of November 2008, upon careful consideration of defendant Leroy Taylor's motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) (Doc. No. 90), defendant's supplemental memorandum of law in support of his motion for reduction of sentence, the government's response thereto, and defendant's reply, **IT IS HEREBY ORDERED** that defendant's motion for reduction of sentence is **DENIED**.

William H. Yohn Jr., Judge