

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
KAREEM DARBY	:	NO. 06-220-1
	:	
	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

JANUARY 6, 2011

Presently before this Court is Petitioner Kareem Darby’s (“Darby”) pro se Motion to Reduce Sentence, pursuant to 18 U.S.C. § 3582(c)(2), based on a recent amendment to the Sentencing Guidelines which lowered the base levels applicable to cocaine base offenses. For the reasons set forth below, this Motion is denied.

I. PROCEDURAL HISTORY

Darby was charged by a federal grand jury with the following crimes: one count of possession of five or more grams of cocaine base (“crack”) in violation of 21 U.S.C. § 846 (a)(1); possession of a firearm in furtherance of a drug trafficking crime in violation of 21 U.S.C. § 924(c); and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922 (g)(1). On February 5, 2007, Darby appeared before this Court and entered a guilty plea.¹

Darby entered the plea pursuant to a written guilty plea agreement with the government. The parties agreed, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), that Darby should be sentenced to 120 months imprisonment for the offenses. Darby agreed that, with very

¹A more detailed account of the underlying facts of this case can be found in this Court’s Memorandum Opinion dated January 4, 2011. United States v. Darby, No. 06-220-1, 2011 WL 13570, at *1 (E.D. Pa. Jan. 4, 2011).

few limited exceptions, he would neither appeal nor present any collateral challenge to his conviction or sentence.²

On May 23, 2007, Darby filed two pro se motions— one for the withdrawal of his guilty plea and the second for the appointment of new counsel. On May 31, 2007, Darby’s Motion for Appointment of New Counsel was granted. On October 1, 2007, a hearing was held on the

²Specifically, the appellate waiver in the plea agreement stated:

In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant’s conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law hold cannot be waived.

a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.

b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:

(1) the defendant’s sentence on any count exceeds the statutory maximum for that count as set forth in paragraph 4 above;

(2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines;

(3) the sentencing judge, exercising the Court’s discretion pursuant to United States v. Booker, 125 S. Ct. 738 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

Motion to Withdraw the Guilty Plea. In a Memorandum Opinion dated November 16, 2007, we denied the Motion. See United States v. Darby, No. 06-220, 2007 WL 4081218, at *1 (E.D. Pa. Nov. 16, 2007). We held a sentencing hearing on December 4, 2007, and determined that the offense level under the advisory Sentencing Guidelines was 152 to 175 months imprisonment. Nonetheless, we imposed the parties' recommended sentence of 120 months imprisonment, and a term of supervised release of five years. On December 7, 2007, Darby appealed our denial of his Motion to Withdraw his Guilty Plea to the Third Circuit Court of Appeals, and on April 16, 2009, that court affirmed our decision. See United States v. Darby, 322 Fed. Appx. 122 (3d Cir. 2009). On July 13, 2010, Darby filed a pro se Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. We denied this Motion on January 4, 2011. See United States v. Darby, No. 06-220-01, 2011 WL 13570 at *1 (E.D. Pa., Jan. 4, 2011). Darby appealed this decision, and on July 7, 2011, the Court of Appeals declined to issue a certificate of appealability. United States v. Darby, No. 11-1576 (July 7, 2011). Darby filed the instant Motion on October 31, 2011, and the Government filed a Response on December 2, 2011.

II. DISCUSSION

As noted, Darby claims in this instant Motion that he is eligible for a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2), based on a recent amendment to the Sentencing Guidelines. However, Darby is not eligible for a sentence reduction because his sentence was not based on a sentencing range that has been lowered as a result of a retroactive amendment.

Section 3582(c)(2) provides:

[I]n 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), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce their term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582 (c)(2).

In Section 1B1.10 of the Guidelines³, the Sentencing Commission has identified the amendments which may be applied retroactively pursuant to this authority, and articulated the proper procedure for implementing the amendment in a concluded case. The version of Section 1B1.10 applicable in this case became effective on November 1, 2011 (the date on which the retroactive amendment the defendant seeks to apply is effective), and states in relevant part:

- (1) In General.- In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subdivision (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) Exclusions.- A reduction in the defendant's term of imprisonment is not consistent with this policy and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if-
 - (A) none of the amendments listed in subsection (c) is applicable to the defendant; or
 - (B) an amendment listed in subsection (c) does not have the effect of lowering the

³A guideline amendment may be applied retroactively only when expressly listed in Section 1B1.10(c). See United States v. Zembra, 403 Fed. Appx. 649, 650 (3d Cir. 2010); United States v. Gill, 68 Fed. Appx. 354, 355 (3d Cir. 2003); United States v. Thompson, 70 F.3d 279, 281 (3d Cir. 1995).

defendant's applicable guideline range.

- (3) Limitation.- Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(Sentencing Guidelines, Section 1B1.10.)

The Supreme Court of the United States in Dillon v. United States, 130 S.Ct. 2683 (2010), addressed the process for application of a retroactive guideline amendment, emphasizing that Section 1B1.10 is binding. The Court stated that “[a]ny reduction must be consistent with applicable policy statements issued by the Sentencing Commission.” Id. at 2688. The Court held that a two-step approach must be followed:

At step one, § 3882(c)(2) requires the court to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized. Specifically, § 1B1.10(b)(1) requires the court to begin by “determin[ing] the amended guideline range that would have been applicable to the defendant” had the relevant amendment been in effect at the time of the initial sentencing. “In making such determinations, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.” Ibid.

Consistent with the limited nature of § 3582(c)(2) proceedings, § 1B1,10(b)(2) also confines the extent of the reduction authorized. Courts generally may “not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) . . . to a term that is less than the minimum of the amended guideline range” produced by the substitution. § 1B1.10(b)(2)(A) . . .

At step two of the inquiry, § 3582(c)(2) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case.

Dillon, 130 S. Ct. at 2691-92.

In the present matter, the amendment at issue is part A of Amendment 750, which altered the offense levels in Section 2D1.1 applicable to crack cocaine offenses, and which the Sentencing Commission added to Section 1B1.10(c) as a retroactive amendment. As the Government notes: “The Sentencing Commission lowered the crack cocaine offense levels pursuant to the Fair Sentencing Act of 2010, which changed the threshold quantities of crack cocaine which trigger mandatory minimum sentences under 21 U.S.C. § 841(b), and directed the Commission to implement comparable changes in the pertinent guideline.” (Govt.’s Resp. at 4-5.)

The Government asserts that Darby’s guideline range is not affected by the retroactive amendment. The Government argues that Darby’s sentence did not rest on the Section 2D1.1 guideline range, but on an express stipulation in his plea agreement, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), as to the final sentence. According to the Government, that stipulation was not tied to the Section 2D1.1 range but was tied to the required mandatory minimum sentence of 120 months. (Id.) We agree.

As noted, Darby entered the plea pursuant to a written guilty plea agreement with the government. The parties agreed, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), that Darby should be sentenced to 120 months imprisonment for the offenses. Section 3582(c)(2) provides, in conjunction with Sentencing Guidelines § 1B1.10, that a defendant is eligible for a sentence reduction based on a retroactive guideline amendment if the defendant’s sentence was “based on” the subsequently amended range and the amendment had the effect of lowering that range. 18 U.S.C. § 3582(c)(2).

In Freeman v. United States, 131 S.Ct. 2685 (2011), the United States Supreme Court considered whether a defendant who pleads guilty in exchange for a specific sentence pursuant to a Rule 11(c)(1)(C) or “type C” agreement is eligible for a Section 3582(c)(2) sentence reduction. The Court, however, rendered a split opinion. A plurality of the Court concluded that a district court can always grant § 3582(c)(2) relief to a defendant who enters into a type C plea agreement. Id. at 2692-93. However, in contrast, a four-Justice dissent determined that a district court can never grant § 3582(c)(2) relief to such defendants because their sentences are based, not on a sentencing range, but on their plea agreements. Id. at 2700-01. In a concurring opinion, Justice Sotomayor opined that district courts can sometimes grant § 3582(c)(2) relief to a defendant who entered into a type C plea agreement. Justice Sotomayor agreed with the dissent that a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement is based on the agreement and, therefore, § 3582(c)(2) relief is usually not available. Justice Sotomayor opined that the fact that a judge may consult the Sentencing Guidelines when deciding whether to accept a Rule 11(c)(1)(C) plea agreement is irrelevant. She stated that “[P]lea bargaining necessarily occurs in the shadow of the sentencing scheme to which the defendant would otherwise be subject. The term of imprisonment imposed by the district court, however, is not ‘based on’ those background negotiations; instead . . . it is based on the binding agreement produced by those negotiations.” Id. at 2697 (Sotomayor, J., concurring). However, Justice Sotomayor established an exception to this general rule- where the plea agreement itself expressly refers to and relies upon a Guidelines sentencing range. Justice Sotomayor wrote that this limited exception is defined as follows: “[I]f a (C) agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United

States Sentencing Commission, the term of imprisonment is ‘based on’ the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2). Id. at 2695. Under this split opinion of the Court, Justice Sotomayor’s rationale became the Court’s holding.⁴

Here, Darby’s sentence does not fall within Justice Sotomayor’s controlling standard in Freeman. Darby’s stipulated sentence was not tied to the guideline range of 137 to 156 months (77 to 96 months plus 60 months), but to the mandatory minimum penalty of 120 months. Accordingly, Darby is not eligible for a sentence reduction under Section 3582(c)(2) and Amendment 750.

Moreover, even if a reduction was not precluded by the Rule 11(c)(1)(C) plea, Darby would not be eligible for a reduction because he was sentenced to the 60 month mandatory minimum penalty. Darby claims that the Fair Sentencing Act of 2010 (“FSA”) applies to this case because it lowered the mandatory minimum penalties for crack offenses. However, it has been decided by a number of circuits, including our own, that the FSA only applies to defendants sentenced on or after August 3, 2010, the date of its enactment. See e.g., United States v. Glover, 398 Fed. Appx. 677, 680 (2d Cir. 2010), cert. denied, 131 S.Ct. 1582 (2011), United States v. Reevey, 631 F.3d 110, 113–15 (3d Cir. 2010); United States v. McAllister, 401 Fed. Appx. 818,

⁴It is well established, under Marks v. United States, 430 U.S. 188 (1977), that when a decision of the Court lacks a majority opinion, the opinion of the Justices concurring in the judgment on the “narrowest grounds” is to be regarded as the Court’s holding. Justice Sotomayor’s concurrence is the Court’s holding in Freeman because it is the narrowest opinion that was implicitly approved by at least five Justices who support the judgment. Every Justice who joined in the plurality opinion would agree with Justice Sotomayor that “when a (C) agreement expressly uses a Guidelines sentencing range to establish the term of imprisonment, and that range is subsequently lowered by the Commission, the defendant is eligible for sentence reduction under § 3582(c)(2).” Freeman, 131 S.Ct. at 2698 (Sotomayor, J., concurring).

820 (4th Cir. 2010) (per curiam); United States v. Doggins, 633 F.3d 379, 384 (5th Cir. 2011); United States v. Carradine, 621 F.3d 575, 580 (6th Cir. 2010), cert. denied, 131 S.Ct. 1706 (2011). Because Darby was sentenced on December 4, 2007, the original mandatory minimum penalty of 60 months remains applicable, and Darby's motion for a reduction of sentence is also denied on this basis.

An appropriate Order follows.

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ORDER

AND NOW, this 6th day of January, 2012, upon consideration of Petitioner Kareem Darby's Pro Se Motion to Reduce Sentence (Doc. No. 73), the Response in opposition thereto, and Petitioner's Reply, it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly _____
ROBERT F. KELLY
SENIOR JUDGE