

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 SEAN ROGERS : NO. 08-41-1

MEMORANDUM

Bartle, J.

July 25, 2019

On March 25, 2009, defendant Sean Rogers ("Rogers") pleaded guilty to one count of conspiracy to distribute 50 grams or more of cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c), and one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). He was sentenced to a total term of 180 months in prison and five years of supervised release. Before the court is the motion of Rogers for resentencing pursuant to the Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018).

I

On March 11, 2018, a grand jury returned a superseding indictment charging Rogers and fifteen others with various crack cocaine and firearm offenses. Specifically, Rogers was charged with: (1) one count of conspiracy to distribute "50 grams or

more, that is 15 kilograms" of crack, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846 (Count I); (2) one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count II); and (3) one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) (Count III). On July 28, 2008, the government filed an information pursuant to 21 U.S.C. § 851 to establish Roger's prior felony drug conviction, which at that time had the effect under 21 U.S.C. § 841(b)(1)(A) of increasing Roger's statutory mandatory minimum sentence from 10 years to 20 years imprisonment.

On March 25, 2009, Rogers pleaded guilty to the charged offense pursuant to a cooperation plea agreement with the government. In the plea agreement, Rogers stipulated that his offense involved 15 kilograms of crack. The government agreed that it would withdraw the § 851 information at sentencing if Rogers fulfilled his cooperation obligations.

The United States Probation Office determined that Rogers was responsible for distribution of 27.5 kilograms of crack. At the time, an offense involving more than 4.5 kilograms of crack carried a base offense level of 38 under United States Sentencing Guidelines § 2D1.1. After a three-level reduction for acceptance of responsibility, Roger's total offense level was 35. With a criminal history category of

IV, his Guidelines range was 235 to 293 months imprisonment, plus a consecutive sentence of 60 months imprisonment on the § 924(c) offense.

Prior to sentencing, the government filed a motion for a downward departure based on Roger's substantial assistance. See U.S.S.G. § 5K1.1. It did not file a motion for a departure from the statutory mandatory minimum sentence. See 18 U.S.C. § 3553(e). However, the government withdrew the § 851 enhancement notice as promised, thereby reducing the applicable mandatory minimum sentence from 20 to 10 years imprisonment.

On June 30, 2009, this court held a sentencing hearing at which it adopted the Guidelines range of 235 to 293 months imprisonment set forth in the presentence report and granted the government's motion for a downward departure under § 5K1.1 of the Guidelines. The court sentenced Rogers to the mandatory minimum of 120 months imprisonment on the drug and § 922(g) charges (Counts I and III) and a consecutive sentence of 60 months imprisonment on the § 924(c) charge (Count II), for a total term of imprisonment of 180 months.

## II

Section 404 of the First Step Act makes retroactive Sections 2 and 3 of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372, 2372 (2010). The Fair Sentencing Act of 2010 was enacted in response to widespread criticism of the

relatively harsh treatment of crack cocaine offenses compared to offenses involving powder cocaine. See Dorsey v. United States, 567 U.S. 260, 268 (2012). Prior to passage of the Fair Sentencing Act, federal law provided for a five-year mandatory minimum for a defendant convicted of distributing five grams of crack and a ten-year mandatory minimum for a defendant convicted of distributing 50 grams of crack. See 21 U.S.C. § 841(b)(1)(A) (2009). Section 2 of the Fair Sentencing Act increased the drug amounts triggering these mandatory minimums. Specifically, it increased the amount triggering the five-year mandatory minimum from five grams to 28 grams and the amount triggering the ten-year mandatory minimum from 50 grams to 280 grams. See id. at 269. Section 3 of the Fair Sentencing Act eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine. See id.

The First Step Act permits a court that imposed a sentence for a "covered offense" to exercise its discretion to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentence Act of 2010" were in effect at the time the "covered offense" was committed. First Step Act, § 404(b). A "covered offense" is "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act," that was committed before August 3, 2010. First Step Act, § 404(a).

The government contends that Rogers is not entitled to relief under the First Step Act. According to the government, Rogers not only pleaded guilty to, but was charged in the indictment with, conspiracy to distribute 15 kilograms of crack, an amount far in excess of the 280 grams of crack that would now warrant the ten-year mandatory minimum under 21 U.S.C.

§ 841(b)(1)(A). It thus maintains that the penalties applicable to Roger's crime both before and after passage of the Fair Sentencing Act are identical.

Rogers counters that the government is bound by the language of the statute as charged in the superseding indictment. He reasons that, under the First Step Act, any defendant who was convicted of a "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010" is eligible for a full resentencing. In other words, his eligibility for a reduced sentence depends on the drug quantity element of the statutory offense to which Rogers pleaded guilty, not the amount actually involved as set forth in the Presentence Report. Rogers was charged with and pleaded guilty to a violation of § 841(b)(1)(A), which at that time required only 50 grams of crack. Under the First Step Act, a quantity of 50 grams would

trigger only the five-year mandatory minimum set forth in § 841(b)(1)(B).

In support of his position, Rogers relies on Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, 570 U.S. 99 (2013), which hold that any fact such as drug quantity which increases a statutory maximum or minimum sentence must be charged in the indictment and either proven to a jury or admitted by the defendant. He asserts that reliance by this court when assessing Roger's eligibility under the First Step Act on a quantity greater than that charged and proven to a jury or admitted at a guilty plea would violate his constitutional rights under the Fifth and Sixth Amendments to the United States Constitution. See Alleyne, 570 U.S. at 103; Apprendi, 530 U.S. at 477-85, 490.

Courts are currently divided on this question. Some courts have look to the amount of crack actually involved in the offense to determine whether a defendant is eligible for relief under the First Step Act. See, e.g., United States v. Banuelos, No. 02-084, 2019 WL 2191788, at \*2 (D.N.M. May 21, 2019); United States v. Glover, 377 F. Supp. 3d 1346, 1361 (S.D. Fla. 2019); United States v. Blocker, 378 F. Supp. 3d 1125, 1129 (N.D. Fla. 2019). Other courts have concluded that it is the statute of conviction, not the defendant's actual conduct, that controls eligibility under the First Step Act. See, e.g.,

United States v. Rose, 379 F. Supp. 3d 223, 228 (S.D.N.Y. 2019); United States v. Allen, No. 96-00149, 2019 WL 1877072, at \*3 (D. Conn. Apr. 26, 2019); United States v. Davis, No. 07- 245, 2019 WL 1054554, at \*3 (W.D.N.Y. Mar. 6, 2019).

However, this debate is immaterial here. As explained above, the superseding indictment here did not simply charge Rogers with a quantity in excess of 50 grams. It explicitly charged Rogers with "50 grams or more, that is 15 kilograms" of crack. Rogers also stipulated to responsibility for 15 kilograms of crack in his guilty plea agreement. Thus, Rogers was in fact charged by the grand jury with and was convicted of a crime involving more than 280 grams of crack, as required to trigger the ten-year mandatory minimum under the First Step Act. Unlike many of the cases cited by Rogers, we therefore need not and do not rely on the drug quantity as calculated in the Presentence Report to reach this result. Because the statutory penalty applicable to his crime was not altered, he is not entitled to relief under the First Step Act.

Any other interpretation would be nonsensical. The unambiguous purpose of the First Step Act was to place those with convictions for crack cocaine offenses who were sentenced before August 3, 2010 in the same position as similarly-situated offenders who were sentenced later. If mandatory minimum sentences for crack offenses are now lowered simply for anyone

who was previously convicted of an offense under § 841(b)(1)(A), an enormous disparity will be created. Many defendants who committed crack offenses prior to the adoption of the First Step Act would be subject to lower penalty ranges than would identical later offenders.

Accordingly, the motion of Rogers for reduction of sentence pursuant to the First Step Act will be denied.<sup>1</sup>

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1. The parties also dispute whether the First Step Act authorizes a plenary resentencing. Because we have determined that Rogers is ineligible for relief under the First Step Act, we need not consider his request for a sentencing hearing and revised presentence report.

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ORDER

AND NOW, this 25th day of July, 2019, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that the motion of defendant for resentencing pursuant to the First Step Act of 2018 (Doc. # 593) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.