

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

UNITED STATES OF AMERICA

v.

KENNETH WILLIAMS

:
: **CRIMINAL ACTION**
:
:
: **05-0125-1**
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:

Goldberg, J.

January 13, 2020

MEMORANDUM OPINION

Defendant Kenneth Williams has filed a motion, pursuant to Section 404 of the First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194 (“First Step Act”) to reduce a 50-month sentence he received after he violated supervised release. For the reasons that follow, I will deny Defendant’s motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 19, 2007, a jury convicted Defendant of possession of more than five grams of cocaine base (“crack”) with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). At his June 19, 2007 sentencing, Defendant, a “career offender,”¹ faced a term of imprisonment of 360 months to life. However, Judge John P. Fullam, who was previously assigned to this matter, granted a criminal history overrepresentation departure pursuant to U.S.S.G. § 4A1.3,² which resulted in a

¹ “The Sentencing Guidelines provide for an enhancement if the defendant qualifies as a career offender.” United States v. Robinson, 763 F. App’x 213, 215 (3d Cir. 2019). A career offender is defined as someone who (1) was at least eighteen years old when the instant offense was committed, (2) is being sentenced for “a felony that is either a crime of violence or a controlled substance offense,” and (3) “has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a).

² Under U.S.S.G. § 4A1.3(b)(1), “[i]f reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.”

range of 130 to 162 months' imprisonment. Judge Fullam then varied below that range and sentenced Defendant to 120 months' imprisonment. Judge Fullam also imposed the statutory minimum term of eight years of supervised release.

Defendant completed his 120-month sentence on September 28, 2016. Within a month of his release, Defendant engaged in two controlled sales of cocaine and was subsequently arrested on March 23, 2017, in possession of approximately 22 grams of cocaine. On January 23, 2018, Defendant pled guilty in the Montgomery County Court of Common Pleas to possession of cocaine with intent to deliver and was sentenced to 15 to 30 months' imprisonment. (See Report and Order of Probation Officer, ECF No. 132, at 2.)

On March 1, 2018, after a violation of supervised release ("VOSR") hearing, I revoked Defendant's supervised release and sentenced him to 50 months' imprisonment to run concurrently to his state sentence of 15 to 30 months.³ I also imposed an additional 10-month period of supervised release.

On April 5, 2019, Defendant filed a motion for resentencing under Section 404 of the First Step Act, seeking a reduction of his original sentence of 120 months' imprisonment, based on the Act's new range of 262 to 327 months. His attorney withdrew this motion upon realizing that Defendant had completed his original term of imprisonment and was incarcerated, not for his original conviction, but for a sentence for a violation of supervised release.

³ Under U.S.S.G. § 7B1.1(a)(1), at the time of Defendant's VOSR hearing, the applicable grade of supervised release violation was Grade A. Defendant's original offense was considered a Class A felony because it carried a maximum sentence of life imprisonment. See 18 U.S.C. § 3559(a)(1). Defendant's Criminal History Category was VI due to his status as a career offender, but Judge Fullam applied an unenhanced Criminal History Category of V. Therefore, Defendant's applicable Criminal History Category for his VOSR sentence was V. At the time of his VOSR hearing, a Grade A supervised release violation for a Class A felony with a Criminal History Category of V resulted in a Guidelines range of 46 months to 57 months' imprisonment. See U.S.S.G. 7B1.4(a). As noted above, I sentenced Defendant in the middle of that range.

Although he was still represented by counsel, Defendant then filed, *pro se*, a second motion for sentence reduction pursuant to the First Step Act, but, this time, regarding his VOSR Sentence. On December 5, 2019, I held a hearing on the motion, which was taken under advisement. Upon consideration of the evidence and argument presented at that hearing, I will deny Defendant's motion.

II. LEGAL STANDARD

A district court has limited authority to modify a sentence. However, 18 U.S.C. § 3582(c)(1)(B) allows a court to modify a sentence “to the extent otherwise expressly permitted by statute.” Section 404 of the First Step Act, which made retroactive portions of the Fair Sentencing Act, provides me with such discretion.

The Fair Sentencing Act, passed on August 3, 2010, is described as “[a]n Act [t]o restore fairness to Federal cocaine sentencing.” In reducing certain drug offense penalties, it reached into the 1986 Controlled Substances Act and increased the necessary quantity of crack cocaine that would trigger a mandatory minimum sentence. Whereas the Controlled Substances Act mandated a minimum sentence of five years for possession with intent to distribute or distribution of five or more grams of crack cocaine, the Fair Sentencing Act increased that threshold quantity to 28 grams or more. The Fair Sentencing Act further eliminated mandatory minimum sentences for simple possession of crack cocaine, which had been a term of five years if the quantity was five grams or more, plus a sliding scale of mandatory minimums for lesser quantities in the event the accused had prior drug convictions.

The First Step Act, passed on December 21, 2018, covered a broad range of topics related to incarceration, including sentencing reform (Section IV). The new statute includes the following sentencing reform provisions:

[T]he Act makes important changes to mandatory minimum penalties and to the safety valve provision (a provision that allows courts to sentence a defendant without regard to the mandatory minimum). Specifically, in relation to Title IV, the Act:

- reduces certain enhanced mandatory minimum penalties for some drug offenders (Section 401);
- broadens the existing safety valve at 18 U.S.C. § 3553(f), increasing the number of offenders eligible for relief from mandatory minimum penalties (Section 402);
- reduces the severity of the “stacking” of multiple § 924(c) offenses (Section 403); and
- *applies retroactively the Fair Sentencing Act of 2010 which reduced mandatory minimum penalties for crack cocaine offenses* (Section 404).

United States Sentencing Commission, Office of Education & Sentencing Practice, First Step Act, ESP Express Insider Special Edition, at 1 (Feb. 2019) (emphasis added). Section 404 of the First Step Act provides that:

A court that imposed a sentence for a covered offense *may*, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.

First Step Act § 404(b) (emphasis added). “Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggered mandatory minimum penalties.” See supra First Step Act, at 1. “Section 3 of the Fair Sentencing Act eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine.” Id.

If a district court determines that a defendant is eligible for relief under the First Step Act, it may exercise its discretion to reduce the defendant’s sentence. As expressly set forth in the First Step Act, “[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section.” First Step Act § 404(c). This provision has been interpreted to mean

that a district court has discretion whether to reduce a sentence imposed upon a defendant who was sentenced prior to the enactment of the Fair Sentencing Act. See, e.g., United States v. Hopson, No. 03-151, 2019 WL 4508943, at *3 (W.D. Pa. Sept. 19, 2019).

III. DISCUSSION

A. Eligibility for Relief

Before deciding whether to exercise my discretion to reduce Defendant’s VOSR Sentence, I must determine if he is eligible for relief under the First Step Act. As discussed above, Sections 2 and 3 of the Fair Sentencing Act are applicable if Defendant committed a “covered offense.” First Step Act § 404(b). Under Section 404(a), 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 of 2010 . . . that was committed before August 3, 2010.” Id.

Here, Defendant committed and was sentenced for his original offense before August 3, 2010. Therefore, his original offense would be covered by the First Step Act, a conclusion that neither party disputes.

But the sentence at issue here occurred as a result of a violation of supervised release. The Third Circuit has not yet addressed whether Congress intended “covered offense” to include a sentence for violation of supervised release, and district courts are divided on this question.⁴

⁴ Compare, e.g., United States v. Pettiford, No. 5:08-cr-220, Doc. 60 at 4 (N.D.N.Y. Apr. 10, 2019) (“It is not clear whether Congress intended a reduction of a defendant’s post-revocation sentence under these circumstances when it enacted the First Step Act of 2018. However, in light of the parties’ submissions and the Government’s withdrawal of its opposition to this argument, such an application will be made in this matter.”), and United States v. Wooters, No. 09-cr-40013, 2019 WL 1897085, at *3 n.3 (S.D. III. Apr. 29, 2019) (“Neither party has squarely addressed whether or how the First Step Act applies to revocation sentences. This Court assumes it would apply if retroactive application of § 2 of the Fair Sentencing Act changed a revocation sentencing range.”), with United States v. Coneway, No. CR 302-005-3, 2019 WL 4132559, at *2 (S.D. Ga. Aug. 29, 2019) (“[T]he United States Sentencing Commission has stated . . . [that] ‘[o]nly a term of imprisonment imposed as part of the original sentence is authorized to be reduced under [§ 1B1.10]. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.’”), and United States v. Smith, No. 5:96-033-DCR, 2019 U.S. Dist. LEXIS 85346, at *2 (E.D. Ky. May 21, 2019) (“Smith’s current term of imprisonment is not

In United States v. Venable, the Fourth Circuit—the only circuit court to have addressed this issue—held that a defendant’s revocation sentence is considered a component of his underlying original sentence. The Court reasoned that, for purposes of the First Step Act, because a revocation sentence is part of the penalty for the initial offense, a defendant seeking reduction of a post-revocation sentence is still serving his sentence for the underlying “covered offense.” United States v. Venable, 943 F.3d 187, 192–93 (4th Cir. 2019). I agree with this reasoning and, in light of the Government’s acknowledgement that Defendant is eligible for a sentence reduction under the First Step Act, (First Step Act Resentencing Tr., 12/5/19, at 5:20), I will apply Sections 2 and 3 of the Fair Sentencing Act to Defendant’s VOSR Sentence.

The maximum sentence of imprisonment for Defendant’s violation of supervised release is set by the maximum penalty for his original offense. See 18 U.S.C. § 3583(e)(3). Before the Fair Sentencing Act, 21 U.S.C. § 841(b)(1)(B) provided that an offense involving five grams or more of crack triggered a statutory minimum term of imprisonment of five years and carried a maximum term of 40 years’ imprisonment. Section 2 of the Fair Sentencing Act changed that threshold quantity under § 841(b)(1)(B) to 28 grams.

As Defendant was indicted based on the threshold quantity of five grams or more of crack and not 28 grams or more, his statutory penalties under the Fair Sentencing Act are no longer set by § 841(b)(1)(B), but rather § 841(b)(1)(C). Because Defendant had a prior felony drug conviction, his statutory maximum term of imprisonment under § 841(b)(1)(C) is now 30 years. Id. An offense which carries a maximum sentence of 25 years or more is a Class B felony. 18 U.S.C. § 3559(a)(1)-(2). The applicable maximum revocation sentence for a Class B felony is three years. Id.

based on his original cocaine conviction but as a result of his violation of supervised release which is not a covered offense.”).

Here, because Defendant's original offense now qualifies as a Class B felony, his VOSR Guidelines range is reduced from 46 to 57 months to 30 to 37 months. See U.S.S.G. § 7B1.4(a). And his maximum revocation sentence is three years' imprisonment. 18 U.S.C. § 3559(a)(1)-(2).

For these reasons, and as agreed by the parties, I find that Defendant may be eligible for a reduction of his VOSR Sentence based on a range of 30 to 36 months' imprisonment.

B. Exercise of Discretion

In order to determine whether to exercise my discretion and reduce Defendant's VOSR Sentence, I will consider the factors set forth in 18 U.S.C. § 3553(a). See, e.g., United States v. Lewis, 398 F. Supp. 3d 945, 974 (D.N.M. 2019) (collecting cases) ("The Court concludes that, although the First Step Act does not require a full resentencing with the defendant present, the First Step Act permits a court to consider the 18 U.S.C. § 3553(a) factors in determining whether a First Step Act-eligible defendant's circumstances warrant a sentence reduction, and to what extent the court should reduce his or her sentence."). "Nothing in the First Step Act or § 3582(c)(1)(B) nullified the mandate in § 3553(a) that '[t]he court, in determining the particular sentence to be imposed, shall consider' the § 3553(a) factors." See Hopson, 2019 WL 4508943, at *3 ("If the court exercises its discretion to resentence Hopson, it must consider the factors set forth in 18 U.S.C. § 3553(a) when reducing the sentence.").

In imposing sentence for his violation of supervised release on March 1, 2018, I considered various § 3553(a)(1) factors favorable to Defendant that I again consider here, including the circumstances of the offense and the history and characteristics of Defendant. (See VOSR Sentencing Tr., 2/22/18, at 10:9-13:1, 20:10-21:13 (discussing Defendant's cleaning business, Defendant's explanation of the circumstances of the offense,⁵ and his desire to be a responsible

⁵ Defendant claims that he transferred drugs from a close friend to a friend of his aunt's as a "favor," even though he was not dealing drugs at the time. (VOSR Sentencing Tr., 2/22/18, at 10:18-11:9.)

father.) Defendant introduced additional evidence in support of these § 3553(a)(1) factors at the First Step Act hearing, including that (1) he completed parenting and reentry classes while in state custody and an additional reentry class while in federal custody; (2) he has had no disciplinary violations while in federal custody; and (3) he will have significant support from family members upon reentry (Defendant's mother's residence has already been approved for his supervision).

However, I find that this favorable evidence is outweighed by other § 3553(a) factors, including the seriousness of the VOSR offense, the need to afford adequate deterrence to criminal conduct of this defendant and others, and the need to protect the public from further crimes of Defendant.

Importantly, less than a year, and possibly even less than a month, into his supervised release term, Defendant engaged in the same conduct for which he was originally convicted, distributing crack cocaine to an informant. See 18 U.S.C. § 3553(a)(2)(A)–(B) (requiring a sentence to reflect seriousness of the offense, promote respect for the law, and afford adequate deterrence to criminal conduct). Despite Judge Fullam's conclusion that Defendant's career offender status overrepresented his criminal history, that background is still significant and includes two prior convictions for possession with intent to distribute crack cocaine. See id. at § 3553(a)(2)(B)–(C) (afford adequate deterrence to criminal conduct and protect the public from further crimes of defendant). Defendant's willingness to re-offend almost immediately after release from custody demonstrates that he has yet to be deterred from this conduct. See id. at § 3553(a)(2)(B). And, while he has not incurred any disciplinary violations while in federal custody and has completed a few self-improvement classes, Defendant's own words at the recent First Step Act hearing continue to demonstrate that he has not fully accepted responsibility for his crimes (see id. at § 3553(a)(2)(B)–(C) (protect the public from further crimes of defendant)):

I just wanted it to be clear, which I already stated in the original hearing, but I think I should state it again, that I know what I did was wrong, but -- and one thing that I'm not is a drug dealer. I actually was just used as a scapegoat and I middle manned it, so I just wanted to make that clear. And I understand where I went wrong. It was a close family member that actually used me, so I just wanted to make that clear.

(First Step Act Resentencing Tr., 12/5/19, at 24:5-12.) Defendant's continued failure to take full responsibility for his recidivist drug dealing demonstrates that there is an ongoing need to protect the public from further crimes of Defendant. See id. at § 3553(a)(2)(C).

Therefore, based on the foregoing application of the § 3553(a) factors, I decline to reduce Defendant's VOSR Sentence.

IV. CONCLUSION

Defendant's motion raises a question as to whether the First Step Act applies, not only to a reduction of sentence for an original offense, but also a sentence imposed for a violation of supervised release. For the reasons set forth above, I conclude that Defendant is eligible for relief under the First Step Act. I will, however, decline to exercise my discretion to further reduce his term of imprisonment and supervised release and will deny Defendant's Motion for Resentencing under the First Step Act.

An appropriate Order follows.

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ORDER

AND NOW, this 13th day of January, 2020, upon consideration of Defendant’s *pro se* “Motion for Resentencing Under the First Step Act” (ECF No. 163), the Government’s response thereto (ECF No. 164), and Defendant’s reply (ECF No. 165), it is hereby **ORDERED** that Defendant’s Motion for Resentencing is **DENIED**.

IT IS FURTHER ORDERED that Defendant’s *pro se* “Motion Pursuant to 28(j)” (ECF No. 168) is **DENIED AS MOOT**.

BY THE COURT:

/s/ Mitchell S. Goldberg
MITCHELL S. GOLDBERG, J.