

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

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 :
 JOHN HARRIS : NO. 02-105-2

SURRICK, J.

JANUARY 4, 2005

MEMORANDUM & ORDER

Presently before the Court is the Motion for Reconsideration of Sentence (Doc. No. 68) filed by Defendant John Harris acting pro se. For the following reasons, we will deny Defendant's Motion.

I. BACKGROUND

Pursuant to a Guilty Plea Agreement, Defendant entered a plea of guilty to Counts 1, 2, 3, 5, and 6 of the Indictment (Doc. No. 50).¹ Count One charged conspiracy to commit carjacking, robbery affecting interstate commerce, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 371. Count Two charged carjacking in violation of 18 U.S.C. § 2119. Count Three charged robbery in violation of 18 U.S.C. § 1951(a). Count Five charged brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c).² Count Six

¹The plea was entered before the Honorable Herbert J. Hutton on February 27, 2003. The case was reassigned to this Judge on April 27, 2004, because of the illness of Judge Hutton.

²Count Five carries a mandatory minimum sentence of seven years that must run consecutively to all other sentences. 18 U.S.C. §§ 924(c)(1)(A), (c)(1)(A)(ii) (2000).

charged convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).³

The plea agreement also called for Defendant's cooperation in return for the Government's filing of a motion for downward departure under Section 5K1.1 of the Sentencing Guidelines and/or Federal Rule of Criminal Procedure 35. The agreement specifically provided, however, that the Government would not move for a departure under 18 U.S.C. § 3553(e), ensuring that Defendant would serve the mandatory minimum seven (7) year consecutive sentence on Count Five.

At the sentencing hearing held on September 24, 2004, it was agreed that Defendant's Total Offense Level was thirty-one (31) and his Criminal History Category was VI. Thus, Defendant's Guideline Range was 188 to 235 months, plus the eighty-four (84) consecutive months on Count Five, for a total of 272 to 319 months. At the conclusion of the sentencing hearing, we granted the Government's Motion under Section 5K1.1 and Defendant was sentenced to a total period of incarceration of 178 months.⁴ He was also placed on supervised release for a period of five (5) years. No fine was imposed. (Doc. No. 69 Tr. 9/24/04 at 27-28.)

II. ANALYSIS

Defendant filed this Motion without a supporting memorandum of law, and he does not

³Because Defendant had five (5) prior convictions for robbery, a violent felony, he could have been charged under 18 U.S.C. § 924(e), which carries a mandatory minimum sentence of imprisonment of fifteen (15) years. He was not. We have no insight into whether this was part of the plea negotiation.

⁴As a result of the Court granting the 5K1.1 downward departure motion, Defendant received a sentence of ninety-four (94) months on Counts 2, 3, and 6, to run concurrently with each other, and sixty (60) months on Count 1, to run concurrently with Counts 2, 3, and 6. He also received the mandatory eighty-four (84) months (seven (7) years) on Count 5, to run consecutively to the sentences imposed on Counts 1, 2, 3, and 6.

cite any procedural rule to invoke the Court’s authority to grant his requested relief. When a motion fails to reference any procedural mechanism for relief, “and the district court [does not] grant a hearing, the court ‘must look to the motion’s substance, including the relief requested, in order to properly characterize it.’” *United States v. Wisch*, 275 F.3d 620, 625 (7th Cir. 2001) (quoting *United States v. Morillo*, 8 F.3d 864, 867 (1st Cir. 1993)).⁵ Harris captions his Motion as one for Reconsideration of Sentence and raises three arguments to support it. Each of these arguments is presented in a superficial manner. He simply asks the Court to reduce his sentence based on (1) the substantial assistance he provided to the Government, (2) the danger and risk of injury resulting from that assistance, and (3) various mitigating factors that the Defendant’s attorney failed to present to the Court.

We will treat Defendant’s Motion as pled and will not recharacterize it. Harris makes very brief mention of alleged deficient performance on the part of his former counsel. A defendant’s cognizable claim based on ineffective assistance of counsel must be raised under 28 U.S.C. § 2255. *See United States v. Pultrone*, 241 F.3d 306, 308 (3d Cir. 2001). However, we will not construe Defendant’s Motion as raising a constitutional issue regarding ineffective assistance of counsel because there is no discussion whatsoever as to what mitigating factors his prior counsel failed to present to the Court. *See United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993) (“[M]ere conclusory allegations on a critical issue are insufficient to raise a constitutional issue.”) (quoting *United States v. Woods*, 870 F.2d 285, 288 n.3 (5th Cir. 1999)).⁶

⁵Neither party requested a hearing on the Motion.

⁶We recognize that “[t]he risk of harming the litigant always exists when the court recharacterizes into a first § 2255 motion a claim that is procedurally or substantively deficient in the manner filed.” *Castro v. United States*, 124 S. Ct. 786, 794 (2003) (Scalia, J., concurring).

Instead, Defendant's Motion simply references the "mitigating factors" that his former counsel failed to raise at his sentencing. (Doc. No. 68 at 1, 2.) Thus, even though we will deny Defendant's Motion, Defendant may still file a petition under 28 U.S.C. § 2255.⁷

When a defendant's sentence involves a term of imprisonment, a federal district court's discretion is quite limited with regard to the modification of that sentence. Under 18 U.S.C.A. § 3582, a court may only alter a term of imprisonment (1) upon motion of the Director of the Bureau of Prisons, (2) as allowed under Federal Rule of Criminal Procedure 35, or (3) when the Sentencing Commission lowers a sentencing range on which the defendant's sentence was based. 18 U.S.C.A. § 3582(c) (West 2002). Here, the Director of the Bureau of Prisons has not requested that the Court modify Defendant's sentence, and the Sentencing Commission has not modified the sentencing range on which Defendant's sentence was based.

To prevail on his Motion, Harris must satisfy the requirements of Federal Rule of Criminal Procedure 35(a), which provides that "the court may correct a sentence that resulted from arithmetical, technical, or other clear error."⁸ According to the Advisory Committee Note on Rule 35:

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would most certainly result in a remand of the case to the trial court for further action The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing

⁷Because the Court declines to treat Defendant's Motion as one arising under § 2255, the notice requirements announced in *Castro, id.* at 792, are inapplicable.

⁸Rule 35(a) was formerly Federal Rule of Criminal Procedure 35(c).

guidelines.

Fed. R. Crim. P. 35 advisory committee's note. None of Defendant's arguments implicate arithmetical, technical, or other clear error.⁹ Moreover, we perceive no "arithmetical, technical, or other clear error" in the sentence imposed.

Even if Rule 35(a) did apply to the reasons supporting Defendant's motion, we do not have the authority to alter Defendant's sentence at this point. Under the Rule, a court must correct any arithmetical, technical, or clear error of defendant's sentence within seven (7) days of sentencing. Fed. R. Crim. P. 35(a).¹⁰ If a court does not correct the sentence within this seven-day period, it lacks jurisdiction to alter defendant's sentence. *See, e.g., United States v. Harris*, Crim. A. No. 02-385, 2004 U.S. Dist. LEXIS 1789, at *3-4 (E.D. Pa. Feb. 10, 2004); *United States v. Black*, Crim. A. No. 00-400, 2002 U.S. Dist. LEXIS 22664, at *2-3 (E.D. Pa. Nov. 21, 2002) (citations omitted). Defendant was sentenced by this Court on September 24, 2004. Since more than seven (7) days have elapsed since Defendant's sentencing, this Court lacks the authority to grant this Motion.

An appropriate Order follows.

⁹Defendant is concerned that his cooperation with the Government was not sufficiently taken into account when his sentence was imposed. However, we granted the Government's downward departure motion, which rewarded Harris for his substantial cooperation with the Government. During the sentencing hearing, we also gave Defendant an opportunity to present pertinent information to the Court. (Doc. No. 69 Tr. 9/24/04 at 21.) Harris noted that his then-attorney "basically covered all the bases," (*id.* at 22), and chose not to address any of the issues raised in his Motion. (*Id.* at 22-23.)

¹⁰A court may also reduce a defendant's sentence for substantial assistance upon the Government's motion under Fed. R. Civ. P. 35(b). Since the Government has not filed such a motion in this case, Defendant Harris's sentence cannot be reduced under Rule 35(b).

