

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DENNIS FREEMAN,

Defendant.

CRIMINAL NO. 00-692-01

MEMORANDUM

ROBERT F. KELLY, Sr. J.

NOVEMBER 10, 2008

Presently before the Court is Defendant Dennis Freeman's ("Freeman") Motion to Modify Term of Imprisonment pursuant to 18 U.S.C. § 3582(c)(1)(B)(2). For the reasons set forth below, the Motion is denied.

I. FACTS

On November 15, 2000, Freeman was charged in an eleven-count indictment with various crack cocaine and firearms offenses. On April 29, 2002, Freeman pled guilty to one count of conspiracy to distribute cocaine base, in violation of 18 U.S.C. § 846. Freeman was sentenced before this Court on November 22, 2002. At the time of sentencing, Freeman had a base offense level of 36, pursuant to Section 2D1.1 of the United States Sentencing Guidelines ("Guidelines"). Two additional points were added to this offense level for possession of firearms, bringing his offense level to 38.

Due to Freeman's past criminal history, he was also classified as a career offender under Section 4B1.1 of the Guidelines. However, Freeman's offense level under Section 4B1.1 was

calculated as 37, as opposed to an offense level of 38 under Section 2D1.1. Because his offense level under Section 2D1.1 exceeded his offense level under Section 4B1.1, Freeman's offense level was set by the higher Section 2D1.1 level of 38. This Court granted Freeman a three-point reduction for acceptance of responsibility, resulting in an overall offense level of 35.

Freeman's status as a career offender, along with the criminal history points assigned for his prior offenses, placed him in criminal history category VI. Freeman was assigned thirteen criminal history points, resulting from two prior convictions for possession with intent to deliver from 1990 and 1991 (3 points each), a conviction for simple possession from 1996 (2 points), and a contempt conviction from 1992 (2 points). Three additional points were added because Freeman was on parole and within two years of release from his prior offense. However, because two of these offenses took place when Freeman was still in his teenage years, this Court granted a departure for over-representation of his criminal history category, and reduced Freeman's criminal history category to V. Thus, with a total offense level of 35, and a criminal history category of V, the resulting Guideline range was 262 to 325 months. This Court sentenced Freeman to 270 months, a sentence at the low end of the Guideline range.

Since the time of Freeman's sentencing, the Sentencing Commission adopted Amendment 706, which altered Section 2D1.1 of the Guidelines and reduced the sentencing ranges applicable to crack cocaine offenses. See U.S.S.G. Supp. to App'x C, Amend. 706. The Amendment reduced by two levels the base offense level for most crack cocaine offenses under Section 2D1.1. On December 11, 2007, the Commission voted to make these revised crack Guidelines retroactive. See id. at 1160. As such, beginning March 3, 2008, any offender sentenced under Section 2D1.1 may move to have his sentence reduced pursuant to 18 U.S.C. §

3582. Id. Freeman now moves to have his sentence reduced pursuant to these recent amendments.

II. DISCUSSION

Both parties agree that Freeman is eligible for a reduction under Amendment 706; however, it is the extent of that reduction that forms the basis of the parties' dispute. Freeman argues that, in addition to a two-level reduction pursuant to Amendment 706, this Court should grant him a further reduction pursuant to the rule of Booker v. United States, 543 U.S. 220 (2005), and/or the rule of lenity. Under Freeman's view, Amendment 706 entitles him to a two-level reduction in his base offense level, bringing his base offense level from a 35 to a 33. Thus, with a base offense level of 33 and a criminal history category of V, the amended range would be 210 to 262 months. In addition to the reduction allowed by the Amendment, Freeman argues that any limitations that the Sentencing Commission has placed on this Court's authority to reduce sentences pursuant to 18 U.S.C. § 3582 are purely advisory after Booker, and therefore, this Court should grant Freeman an even greater reduction in his sentence than that allowed by Amendment 706.

In contrast, the government contends that, while Freeman is eligible for a reduction under Amendment 706, the extent of that reduction is limited by his status as a career offender. The government reasons that Freeman's initial base offense level was set at 36; however, it was increased to 38 when adjustment was made for possession of firearms. Because the offense level under Section 2D1.1 exceeded that of Section 4B1.1, the offense level of 38 under Section 2D1.1 was used. However, under Amendment 706, Freeman's base offense level is now 34. Adding two additional points for possession of firearms results in a base offense level of 36. Thus, the

base offense level under Section 4B1.1 now exceeds that of Section 2D1.1, and as such, the base offense level set by Section 4B1.1 now controls. Factoring in the three-level reduction for acceptance of responsibility, the government contends that Freeman's base offense level is now a 34. Thus, with a base offense level of 34 and a criminal history category of V, the government contends that Freeman's Guideline range is now 235 to 293 months. The government has no objection to a reduction to 235 months, but contends that this Court lacks authority to grant any further reduction.

We reject Freeman's argument that this Court has the authority to grant a reduction greater than that allowed by Amendment 706. "Generally, a district court may not alter a term of imprisonment once it has been imposed." U.S. v. Wise, 515 F.3d 207, 220 (3d Cir. 2008); see also 18 U.S.C. § 3582(c) (West 2008). A court may, however, modify a defendant's sentence **if** the sentence was based on a range that is later reduced by the Sentencing Commission. See 18 U.S.C. § 3582(c)(2). That statute states:

[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 the 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). Thus, in order to be eligible for a reduction under Section 3582, a defendant's sentence must have been "based on" a sentencing range that is later reduced by the Commission, and a reduction in sentence must be consistent with the Commission's policy

statement. Id. The Commission's policy statement relevant to the question at hand is contained in Section 1B1.10(b)(2)(A) of the Guidelines, which states:

Limitations and Prohibition on Extent of Reduction.-

- (A) In General.- Except as provided in subsection (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

U.S.S.G. § 1B1.10(b)(2)(A). Thus, the language of the Commission's policy statement explicitly prohibits the court from reducing a defendant's sentence to a term less than the minimum term set forth by the Amendment. In other words, courts do not have the authority to grant a greater reduction than that set forth in the statute. See U.S. v. Gentry, No. 02-579, 2008 WL 4442948, at *2 (E.D. Pa. Sept. 30, 2008); U.S. v. Wayne, No. 97-17, 2008 U.S. Dist. LEXIS 52133, at *7 (W.D. Pa. July 7, 2008); U.S. v. Strothers, No. 03-195, 2008 U.S. Dist. LEXIS 47630, at *5 (W.D. Pa. June 17, 2008).

The Booker decision does not affect the above analysis. Booker held that the Sentencing Guidelines were no longer mandatory. 543 U.S. 220, 263-64. Nonetheless, the majority of courts that have considered the issue have held that Booker does not apply to Section 3582(c) proceedings. See U.S. v. Rivera, 535 F. Supp. 2d 527, 531 (E.D. Pa. 2008); U.S. v. Wright, No. 93-386-5, 2008 WL 2265272, at *1 (E.D. Pa. June 3, 2008); Gentry, 2008 WL 4442948, at *2. Furthermore, with regard to Booker, the Third Circuit has explicitly stated that nothing in the Booker decision reduced Congress's authority to decide the circumstances under which a sentence could be reduced based on changes in the Guidelines. Wise, 515 F.3d at 221 n.11. While the Guidelines themselves may be advisory, Congress's directives with regard to how and

when sentences may be reduced remain mandatory. Rivera, 535 F. Supp. 2d at 531. Thus, where, as here, the statutory language speaks directly to the policy statement, courts remain bound to the directives contained in the policy statement. See Wise, 515 F.3d at 221 n.11. As the policy statement in Section 1B1.10 explicitly states that courts shall not reduce a defendant's sentence below that set forth by Amendment 706, this Court does not have authority under Booker to reduce Freeman's sentence beyond that set forth by the amended Guideline range. Id.

Additionally, the rule of lenity does not apply to this case. The rule of lenity applies only in cases where there is a "grievous ambiguity or uncertainty in the statute." Muscarello v. U.S., 524 U.S. 125, 138-39 (1995). The plain language of Section 3582 is clear and provides clear direction as to when and to what degree a sentence reduction is warranted under the statute. U.S. v. Rivera-Crespo, 543 F. Supp. 2d 436, 441 (E.D. Pa. 2008). As such, the rule of lenity does not apply.

As stated above, Freeman is entitled to a two-level reduction in his base offense level pursuant to Amendment 706. As such, his base offense level is set at 34. Two additional points must be added for possession of firearms, bringing his offense level to 36. We also find that Freeman's status as a career offender increases his offense level to 37 pursuant to Section 4B1.1. After affording Freeman a three-point reduction for acceptance of responsibility, Freeman's final offense level is 34. With an offense level of 34, and a criminal history category of V, the resulting Guideline range is 235 to 293 months. We hereby reduce Freeman's sentence from 270 months to 235 months imprisonment.

An appropriate Order follows.

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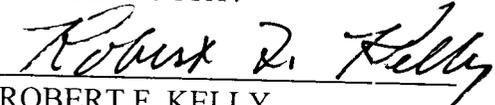
Defendant.

CRIMINAL NO. 00-692-01

ORDER

AND NOW, this 10th day of November, 2008, in consideration of the Motion to Modify Term of Imprisonment pursuant to 18 U.S.C. § 3582(c)(2) filed by Dennis Freeman (Doc. No. 130), and the Government's response thereto (Doc. No. 137), and the Defendant's reply thereto, (Doc. No. 140), it is hereby **ORDERED** that the Motion is **DENIED**. The Defendant's sentence is hereby reduced from 270 months to 235 months imprisonment, as authorized by the United States Sentencing Guidelines.

BY THE COURT:


ROBERT F. KELLY
SENIOR JUDGE