

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10550-E

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VICTORIANO VEGA-JIMENEZ,
a.k.a. Jose Raul Hernandez,
a.k.a. Victoriano Vega Jimenez,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

Before MARCUS and WILLIAM PRYOR, Circuit Judges.

BY THE COURT:

Victoriano Vega-Jimenez has filed a motion for reconsideration of this Court's order dated May 8, 2018, denying his motion for leave to proceed *in forma pauperis* in his appeal of the district court's denial of his 18 U.S.C. § 3582(c)(2) motion to reduce his sentence. Upon review, Vega-Jimenez's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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ORDER:

Victoriano Vega-Jimenez's motion for leave to proceed on appeal *in forma pauperis* is
DENIED because the appeal is frivolous. *See Pace v. Evans*, 709 F.2d 1428 (11th Cir. 1983).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CHAMBERS
U.S.D.C. - ATLANTA

JAN 26 2018

James M. Holton, Clerk

UNITED STATES OF AMERICA

CRIMINAL CASE NO.

v.

1:05-CR-156-ODE

VICTORIANO VEGA-JIMENEZ

ORDER

This closed criminal case is before the Court on Defendant Victoriano Vega-Jimenez's ("Defendant") Pro Se Motion to Reduce Sentence Under Amendment 782 [Doc. 44]. For the reasons stated below this motion is DENIED.

On July 3, 2017, Defendant filed the Motion to Reduce Sentence pursuant to 18 U.S.C. § 3582(c)(2) currently before the Court. Under § 3582(c)(2) this Court has discretion to reduce an already incarcerated defendant's term of imprisonment where the sentencing range upon which that defendant was sentenced has been subsequently lowered by the United States Sentencing Commission ("USSC"). The USSC did just that in promulgating Amendment 782, which amended the Sentencing Guidelines for drug offenses by lowering the base offense level by two levels in some, but not all cases. Amendment 782 applies retroactively where a defendant's sentence qualifies. Pertinent here, while the base offense level for possession of 1.5 kilograms of methamphetamine/"Ice" was previously level 38, post Amendment 782 possession of 1.5 kilograms of Ice now computes to a base offense level of 36.

The Court originally sentenced Defendant on April 12, 2006 to an imprisonment term of 250 months. At his sentencing the Court found that Defendant's base offense level was 38, and the guideline range

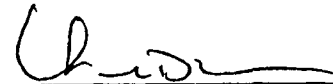
for his sentence was 240-293 months. Defendant's Presentence Report ("PSR") stated he was responsible for 535 kilograms of methamphetamine/"Ice" [see Doc. 44 at 6-7], but the Court did not on the record during sentencing explicitly state the quantity of drugs attributable to him [see Doc. 51]. Thus, Defendant argues that the amount of drugs ultimately attributed to him must have been 1.5 kilograms of Ice because that amount is consistent with a 240-293 month sentencing range and the Court never made any explicit quantity finding or explicitly adopted the PSR. Defendant also argues that the Probation Office provided a summary of drug quantities to this Court in which 1.5 kilograms of Ice was used to calculate Defendant's base offense level.

But, as Defendant next explains in his motion [Doc. 44 at 7-8], the Probation Office "also found that a total of 535 kilograms of 'Ice' were attributable to [Defendant]." Indeed the PSR is very clear that 535 kilograms of Ice were attributable to Defendant. The 1.5 kilogram number was only used when discussing Defendant's base offense level because at the time of sentencing, possession of anything more than 1.5 kilograms was a base offense level 38. As stated in the PSR, the Drug Quantity Table under U.S.S.G. § 2D1.1(c)(1) "sets a base Offense level of 38, based on 1.5 kilograms or more of 'Ice.' A total of 535 kilograms of 'Ice' is attributed to the defendant" [PSR at 11].

The quantity of Ice the Court ultimately attributed to Defendant is decisive to this Motion [Doc. 44] because possession of 1.5 kilograms of Ice now yields a base offense level of 36, but 535 kilograms of Ice yields a base offense level of 38 before and after Amendment 782. In other words, Amendment 782 has no effect on a

defendant held accountable for 535 kilograms of Ice, and the Court has no jurisdiction to reduce a sentence in that case. Here, the Court did not explicitly state the drug quantity attributable to Defendant at his sentencing hearing, but the Court did adopt the PSR's findings. Though Defendant objected to the PSR's findings regarding sentence enhancement for possession of a dangerous weapon, he made no objection before or during sentencing to the PSR's findings regarding the drug quantity calculation. Where a defendant does not object to a PSR finding he is deemed to have admitted that finding. See United States v. Wade, 458 F.3d 1273, 1277 (11th Cir. 2006); see also United States v. Shelton, 400 F.3d 1325, 1330 (11th Cir. 2005). And after resolving the objection to sentence enhancement, the Court implicitly adopted the rest of the PSR's findings, remarking that "I guess it leaves us right where we were, doesn't it" [Doc. 51 at 22]. Thus Defendant admitted to possessing, and was held accountable for possessing, 535 kilograms of Ice. As possession of 535 kilograms of Ice still yields a base offense level of 38 after Amendment 782, Defendant is not entitled to any sentence reduction. Defendant's Motion to Reduce Sentence [Doc. 44] is DENIED.

SO ORDERED this 26 day of January, 2018.


ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE