

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10741
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
January 8, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ENRIQUE GAMINO-PEREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 4:13-CR-12-4

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:*

Enrique Gamino-Perez appeals the denial of his motion under 18 U.S.C.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX
(B)

§ 3582(c)(2) to reduce his sentence for possession with intent to distribute a controlled substance. Gamo-Perez sought a modification of his sentence based on Amendment 794 to the Sentencing Guidelines.

“This court reviews a district court’s decision whether to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(2) for abuse of discretion, its interpretation of the Guidelines de novo, and its findings of fact for clear error.” *United States v. Henderson*, 636 F.3d 713, 717 (5th Cir. 2011) (internal quotation marks, alteration, and citation omitted). “A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence.” *Id.* (internal quotation marks and citation omitted).

Gamo-Perez has failed to show that the court abused its discretion by concluding that Amendment 794 is not retroactively applicable and denying § 3582(c)(2) relief. *See Dillon v. United States*, 560 U.S. 817, 827 (2010); U.S.S.G. § 1B1.10(d), p.s. Gamo-Perez’s theory that Amendment 794 is a clarifying amendment and therefore can be applied retroactively is unavailing. *See United States v. Drath*, 89 F.3d 217–18 (5th Cir. 1996) (“Only on direct appeal, however, have we considered the effect of such a ‘clarifying’ amendment not in effect at the time the offense was committed.”); *see also United States v. Sanchez-Villareal*, 857 F.3d 714, 719–21 (5th Cir. 2017).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

§

V.

§

ACTION NO. 4:13-CR-012-Y-4

ENRIQUE GAMINO-PEREZ (04)

§

§

ORDER DENYING SECOND MOTION TO REDUCE SENTENCE

Pending before the Court is Defendant's pro se "Motion Pursuant to 18 U.S.C. § 3582 and U.S.S.G., Amendment 794" (doc. 149). After review of the motion and the record in this cause, the Court concludes that the motion should be and hereby is DENIED.

In 2013 Defendant pled guilty to possession with intent to distribute a controlled substance and was sentenced to 168 months' imprisonment and four years' supervised release. (J. (doc. 125) 1-2.) Defendant subsequently filed his first motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2), and the Court reduced his sentence to 135 months based on United States Sentencing Guideline Amendment 782. (Order Mot. Reduce Sentence (doc. 145) 1.) Defendant now seeks another reduction in sentence pursuant to § 3582(c)(2), requesting a mitigating-role adjustment under U.S.S.G. § 3B1.2¹ as clarified by U.S.S.G. Amendment 794.

¹ Defendant's brief identifies U.S.S.G. § 3B1.1, which provides for an aggravating role adjustment, as the relevant provision. However, it is clear from context that he intended §3B1.2, providing for a mitigating role adjustment.

APPENDIX (A)

Amendment 794 became effective on November 1, 2015, two years after Defendant was sentenced. It did not alter the language of U.S.S.G. § 3D1.2, but merely clarified that, when determining a defendant's role in criminal activity for purposes of § 3B1.2, the court should compare the defendant's role to other participants in the criminal activity at issue, not to persons participating in other similar crimes.

Under 18 U.S.C. § 3582(c) (2) a court may modify a previously imposed sentence if the defendant's applicable sentencing range under the Sentencing Guidelines has subsequently been lowered by the Sentencing Commission. See *United States v. Doublin*, 572 F.3d 235, 237 (5th Cir. 2009); see also U.S.S.G. § 1B1.10(a). Section 3582(c) (2) applies only to retroactive guidelines amendments, as set forth in the guidelines policy statement. See U.S.S.G. § 1B1.10(a).

Except on direct appeal, a clarifying amendment is not retroactively applied unless it is listed in U.S.S.G. § 1B1.10(d). See *United States v. Drath*, 89 F.3d 216, 217-18 (5th Cir. 1996); *United States v. Rodriguez*, 306 F. App'x 147, 148 (5th Cir. 2009). Amendment 794 is not listed in U.S.S.G. § 1B1.10(d) and therefore does not apply retroactively under § 3582(c). As a result, Defendant is not entitled to a reduction in his sentence.

ORDER DENYING DEFENDANT'S SECOND MOTION REDUCE SENTENCE
TRM/lnb

SIGNED June 8, 2018.

Terry R. Means

TERRY R. MEANS

UNITED STATES DISTRICT JUDGE

ORDER DENYING DEFENDANT'S SECOND MOTION REDUCE SENTENCE
TRM/lnb