

**UNITED STATES OF AMERICA, Plaintiff-Appellee, versus BRUCE WAYNE HARRISON, a.k.a.
Hopper, a.k.a. Grasshopper, a.k.a. Loose Bruce, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
741 Fed. Appx. 765; 2018 U.S. App. LEXIS 31006
No. 18-10852 Non-Argument Calendar
November 1, 2018, Decided**

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2018 U.S. App. LEXIS 1}Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 8:94-cr-00220-SCB-MAP-5.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Michelle Thresher Taylor, U.S. Attorney's Office, TAMPA, FL; U.S. Attorney, Service - Middle District of Florida, U.S. Attorney's Office, TAMPA, FL.

For BRUCE WAYNE HARRISON, Defendant - Appellant: Adam Paul Labonte, Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, ORLANDO, FL.

Judges: Before MARCUS, WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

CASE SUMMARYDistrict court lacked authority to reduce defendant's sentence under 18 U.S.C.S. § 3582(c) where he received a sentence below the guideline range that would have applied under Amendment 599 and his downward departure was not based on his substantial assistance to authorities.

OVERVIEW: HOLDINGS: [1]-The district court properly denied defendant's motion to reduce his sentence under 18 U.S.C.S. § 3582(c)(2), based on Amendment 599 to the Sentencing Guidelines and the operative policy statement on the effective date of the Amendment, U.S. Sentencing Guidelines Manual § 1B1.10 (2000), because the district court lacked authority to reduce defendant's sentence under § 3582(c) where he received a sentence below the guideline range that would have applied under Amendment 599 and his downward departure was not based on his substantial assistance to authorities, and U.S. Sentencing Guidelines Manual § 1B1.10, cmt., application n.8, instructed the court to use the version of the policy statement that was in effect on the date on which the court reduced defendant's term of imprisonment as provided by § 3582(c)(2).

OUTCOME: Judgment affirmed.

Opinion

{741 Fed. Appx. 766} PER CURIAM:

Bruce Harrison appeals the denial of his motion to reduce his sentence. 18 U.S.C. § 3582(c)(2). Harrison sought to reduce his sentence based on Amendment 599 to the Sentencing Guidelines and the operative policy statement on the effective date of the Amendment, United States Sentencing Guidelines Manual § 1B1.10 (Nov. 2000). The district court ruled that it was bound to apply the current policy statement, *id.* § 1B1.10 (Nov. 2011), which "d[id] not allow for [Harrison's requested] reduction." We affirm.

In 2017, Harrison moved to reduce the sentence of 292 months of imprisonment he had received in 1995 for one count of conspiring to possess with intent to distribute illegal drugs, 21 U.S.C. § 846, five counts of possessing with intent to distribute cocaine, {2018 U.S. App. LEXIS 2} *id.* § 841(a)(1), three counts of possessing with intent to distribute marijuana, *id.*, and two counts of using a firearm in relation to a drug trafficking crime, 18 U.S.C. § 924(c). The presentence investigation report calculated a total offense level of 44, which included a two-level increase for his possession of a firearm during his drug crimes, U.S.S.G. § 2D1.1(b)(1), and a criminal history of II. At sentencing, the district court found that Harrison had a criminal history of I and varied downward four levels before imposing sentence.

Harrison sought a reduction based on Amendment 599, which barred a defendant convicted of using a firearm during and in relation to a drug trafficking crime from receiving an enhancement of his base offense level for the underlying offense based on his use of a firearm. U.S.S.G. App. C, Amend. 599; *see also United States v. Brown*, 332 F.3d 1341, 1344-45 (11th Cir. 2003). Harrison acknowledged that he could not obtain relief based on Amendment 599 under the current policy statement, U.S.S.G. § 1B1.10 (2011), and argued that the district court had inherent equitable power to award a reduction by giving effect to the previous version of the policy statement, *id.* § 1B1.10 (2000). The 2000 version of Section 1B1.10 provided that the district court "[i]n determining whether, and to what extent [to grant] a reduction . . . should consider {2018 U.S. App. LEXIS 3} the term of imprisonment that it would have imposed had the amendment . . . been in effect at the time the defendant was sentenced, except that . . . the reduced term of imprisonment [could not] be less than" the total time he already had served. *Id.* Its third application note stated, "When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate . . ." *Id.* § 1B1.10 cmt. n.3.

The district court denied Harrison's motion. The district court acknowledged that, "[u]nder USSG Amendment 599, [Harrison] would not receive the two level enhancement pursuant to USSG § 2D1.1(b)(1) for possessing a firearm during a drug offense." Nevertheless, the district court ruled that Harrison was ineligible for a reduction under "Amendment 759 of the USSG" that became effective "in November 2011" and prohibited a court from "lower[ing] a defendant's sentence . . . if that term of imprisonment was less than the term of imprisonment provided" under the amended guideline range.

"We review *de novo* a district court's conclusions about the scope of its legal {741 Fed. Appx. 767} authority under § 3582(c)(2)." *United States v. Colon*, 707 F.3d 1255, 1258 (11th Cir. 2013) (quoting *United States v. James*, 548 F.3d 983, 984 (11th Cir. 2008)).

The district court correctly concluded that it lacked authority to reduce Harrison's sentence. {2018 U.S. App. LEXIS 4} A district court cannot modify a sentence except where expressly permitted by

statute or by Federal Rule of Criminal Procedure 35. 18 U.S.C. § 3582(c). "In a section 3582(c) proceeding, the Commission's policy statements are binding," *United States v. Maiello*, 805 F.3d 992, 998 (11th Cir. 2015), along with their commentary, *United States v. Gonzalez-Murillo*, 852 F.3d 1329, 1336 (11th Cir. 2017) (citing *Stinson v. United States*, 508 U.S. 36, 38, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993)). Because the commentary to Section 1B1.10 instructs that "the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2)," U.S.S.G. § 1B1.10 cmt n.8, the district court could not give effect to the 2000 version of Section 1B1.10. Under the current version of Section 1B1.10(b)(2), "the court shall not reduce the defendant's term of imprisonment under [section] 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range," *id.* § 1B1.10(b)(2)(A), unless the defendant received a sentence below the guidelines range "to reflect [his] substantial assistance to authorities," *id.* § 1B1.10(b)(2)(B). At sentencing, the district court departed downward from level 44 to level 40 for the stated reason that Harrison's case fell "outside the heartland of cases in that the government controlled the amount of drugs and the amount paid to the defendant for his participation." As Harrison concedes, because he received a sentence below the guideline range that would have{2018 U.S. App. LEXIS 5} applied under Amendment 599 and his downward departure was not based on his substantial assistance to authorities, the district court lacked authority to reduce Harrison's sentence under section 3582(c).

We **AFFIRM** the denial of Harrison's motion to reduce his sentence.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

CASE NO: 8:94-CR-220-T-24MAP

BRUCE WAYNE HARRISON

ORDER

THIS CAUSE comes before this Court on Defendant's pro-se Motion for Modification of Sentence under 18 U.S.C. § 3582(c)(2) based on USSG Amendments 599 and 782, made retroactive per USSG § 1B1.10. (Dkt. 3009 filed April 3, 2017). The Federal Public Defender's Office was appointed to represent Defendant. Later the Federal Public Defender filed a Motion for Sentence Reduction under USSG Amendment 599 (Dkt. 3027 filed December 4, 2017). The Government filed a response in opposition (Dkt. 3031)

Defendant was sentenced on December 19, 1995 on one count of conspiracy with intent to distribute cocaine, methamphetamine and marijuana, five counts of possession with intent to distribute cocaine, three counts of possession with intent to distribute marijuana, and two counts of use of a firearm in relation to a drug trafficking crime. He was sentenced to a term of imprisonment of 292 months as to the drug counts and a consecutive sentence of twenty-five years on the gun counts. The sentence of 292 months was the result of a four level downward departure from a Guidelines sentencing range of life based on the Court's determination that the case was outside the heartland of cases.

Amendment 782

On May 5, 2017, the probation office filed a memorandum/retroactive 2014 drug guidelines amendment assessment stating that Defendant was not eligible for a sentence reduction because the drug quantity table remains at a level 38 under 18 U.S.C. § 3582(c)(2) and Amendment 782 because the drug quantity he was held accountable for at sentencing exceeded the eligibility threshold. At sentencing, Defendant was held accountable for 296,651.5 kilograms of marijuana equivalent. His base offense level was a 38. After Amendment 782 under USSG § 2D1.1, possession of 90,000 kilograms or more of marijuana is still a level 38. As a result, the amendment does not have the effect of lowering Defendant's base offense level or his USSG range.

Therefore Defendant's motion to the extent it is based on Amendment 782 is **DENIED**.

Amendment 599

Defendant was sentenced on December 19, 1995. He received a consecutive 25 year sentence as to the firearm counts, and in addition, he received a two level enhancement pursuant to USSG § 2D1.1(b)(1) for possessing a firearm during the drug offenses. Amendment 599 of the USSG, which was in effect from November 1, 2000 to November 1, 2011, provided in relevant part:

If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use or discharge of a firearm when determining the sentence for the underlying offense.

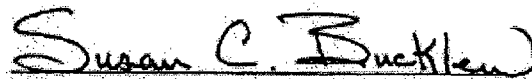
Under USSG Amendment 599, Defendant would not receive the two level enhancement pursuant to USSG § 2D1.1(b)(1) for possessing a firearm during a drug offense.

However, in November 2011, Amendment 759 of the USSG went into effect. It revised USSG § 1B1.10 by limiting a court's discretion to lower a defendant's sentence below the term of imprisonment imposed if that term of imprisonment was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing. In Defendant's case, the Court departed downward at sentencing from a level 44 to a level 40. Therefore, as a result of Amendment 759 to the USSG, Defendant is no longer entitled to any relief.

Defendant's counsel, understanding that Defendant is not legally entitled to any relief, asks the Court to exercise its equitable powers to grant Defendant a two-level reduction afforded him under Amendment 599 by applying the version of USSG § 1B1.10 in effect from November 2000 to November 1, 2011. However USSG § 1B1.10 is binding on the courts, and it does not allow for the reduction. **Therefore** the motion for sentence reduction under Amendment 599 of the USSG is **DENIED**.

DONE AND ORDERED at Tampa, Florida, on the 21st day of February, 2018.

COPIES FURNISHED TO:
Counsel of Record
U.S. Probation
Defendant Bruce Wayne Harrison


SUSAN C. BUCKLEW
United States District Judge