NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-5861

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
RAMON F. FLORES,	)	THE WESTERN DISTRICT OF
	)	KENTUCKY
Defendant-Appellant.	)	
	)	
	)	

ORDER

Before: GUY, GRIFFIN, and KETHLEDGE, Circuit Judges.

Ramon F. Flores, a pro se federal prisoner, appeals the order of the district court denying his motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Following a jury trial, Flores was found guilty of conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii). A presentence report determined that Flores was responsible for 842 kilograms of cocaine and calculated his guidelines range of imprisonment as 360 months to life based on a total offense level of 42 and criminal history category of I. On May 29, 2013, the district court sentenced Flores to 360 months of

imprisonment to be followed by five years of supervised release. We affirmed his conviction and sentence. *United States v. Flores*, No. 13-5763 (6th Cir. Sept. 29, 2014) (order).

In 2016, Flores filed a 28 U.S.C. § 2255 motion to vacate sentence, claiming the ineffective assistance of counsel, a Confrontation Clause violation, and improper mingling of conspiracies. The district court denied the motion. Flores did not seek a certificate of appealability from this court.

Flores filed this § 3582(c)(2) motion to reduce sentence in January 2018. In it, he argued that he was eligible for a sentence reduction pursuant to Amendment 782 to the Sentencing Guidelines, which became effective on November 1, 2014, and lowered the base offense levels for some drug offenses. He asserted that his total offense level should be lowered to 40, which would result in an amended guidelines range of 292 to 365 months of imprisonment; because he was sentenced at the low end of the original range, he argued that his sentence should be reduced to 292 months of imprisonment. The government filed a response, arguing that Flores was ineligible for a reduction because his guidelines range did not change after the application of Amendment 782.

After consideration, the district court denied Flores's motion, finding that Amendment 782 did not affect Flores's guidelines sentencing range. Specifically, the district court explained that, although the amendment lowers the offense level for most drug quantities, the highest level remained 38 for individuals found to be responsible for 450 kilograms or more of cocaine and Flores was held responsible for 842 kilograms of cocaine. The district court noted that, at sentencing, Flores objected to the drug quantity, but the court overruled the objection, concluding that the presentence report "did a credible job and arrived at 842 [kilograms]." Entertaining Flores's argument, however, the court explained that—at a minimum—Flores was responsible for thirty kilograms a month for the eighteen months from June 2007 and December 2008 (a total of 540 kilograms), plus an additional 42 kilograms in April 2010 for a total of 582 kilograms.[1] Based

[1] The district court noted that it misstated the calculation at the sentencing hearing by stating that 30 kilograms a month for 18 months equaled a total of 340 kilograms, when it actually totaled 540 kilograms.

on the court's finding that the drug quantity in Flores's case was greater than 450 kilograms, his base offense level remained 38 even with the application of Amendment 782. *See* USSG § 2D1.1(c)(1).

Flores now appeals. He argues that the district court's finding that he was responsible for the distribution of 582 kilograms of cocaine was clearly erroneous. He claims that the support for this finding—the presentence report, the trial testimony of Michael McCarthy, and the out-of-court statements of George Zavala—has "weaknesses or defects which severely undermines the[] reliability" of the district court's drug quantity determination. Alternatively, relying on the district court's misstatement of the drug quantity, he argues that the district court's "stated minimum" of 382 kilograms should take precedence over the "supposed intended" total of 582 kilograms. And, because 382 kilograms does not meet the 450-kilogram threshold for a base offense level of 38, he argues that he is entitled to a sentence reduction. He has also filed a motion to proceed in forma pauperis on appeal.

Generally, we review the district court's denial of a motion to modify a sentence under 18 U.S.C. § 3582(c)(2) for an abuse of discretion. *See United States v. Perdue*, 572 F.3d 288, 290 (6th Cir. 2009). When a district court finds, however, that it does not have the authority to reduce a sentence under § 3582(c)(2)—as it did here—our review is de novo. *United States v. Cook*, 870 F.3d 464, 467 (6th Cir. 2017) (citing *United States v. Curry*, 606 F.3d 323, 327 (6th Cir. 2010)).

Once a court has imposed a sentence, it does not have the authority to change or modify that sentence, unless such authority is expressly granted by statute. *United States v. Houston*, 529 F.3d 743, 748 (6th Cir. 2008) (citing *United States v. Ross*, 245 F.3d 577, 585 (6th Cir. 2001)). A motion under 18 U.S.C. § 3582(c)(2) is a narrow remedy which allows a challenge to an existing sentence only where doing so is consistent with United States Sentencing Commission policy statements and the original sentence was based on a sentencing range that has since been lowered. *See United States v. Johnson*, 564 F.3d 419, 421-22 (6th Cir. 2009).

The relevant policy statement, § 1B1.10 of the Sentencing Guidelines, states that a court may reduce a prison sentence if a subsequent amendment to the Guidelines Manual lowers the "guideline range applicable to that defendant." USSG § 1B1.10(a)(1). Courts are directed to

"determine the amended guideline range" that would have applied if the amendment was in effect when the defendant was sentenced. *Id.* § 1B1.10(b)(1). When making this determination, "other guideline applications decisions" made at the original sentencing "shall" be left "unaffected." *Id.* If no amendment listed in § 1B1.10(d) lowers the defendant's "applicable guideline range," then a sentence reduction is inconsistent with § 1B1.10 and, therefore, not authorized by § 3582(c)(2). *Id.* § 1B1.10(a)(2)(B).

Additionally, a motion under § 3582(c)(2) is a means for a prisoner to request only that the district court recalculate his sentence pursuant to a new retroactive guideline, using the factors that were determined at the time of the original sentencing; it is not "a means of challenging those factors." *United States v. Metcalfe*, 581 F.3d 456, 459 (6th Cir. 2009). A § 3582(c)(2) proceeding does "not constitute a full resentencing" at which a defendant may raise any sentencing issue. USSG § 1B1.10(a)(3); *see also Dillon v. United States*, 560 U.S. 817, 825-26 (2010).

The district court did not err by concluding that it lacked authority to reduce Flores's sentence. As explained by the district court, it previously adopted the finding in the presentence report that Flores was accountable for 842 kilograms of cocaine. At the sentencing hearing, the district court noted that, even taking "the most conservative values" of "the dealing between June of 2007 and the end of 2008 [30 kilograms a month] and add on 42 [kilograms], you're way far and above what is necessary for . . . level 38 to be brought into play." The district court also adopted the presentence report "without change." Although Flores now wishes to dispute the district court's finding as to the drug quantity, he did not challenge the district court's calculation on direct appeal and a motion for a sentence reduction is not the proper place to do so. Because the district court determined that Flores was responsible for 450 kilograms or more of cocaine, his base offense level remained 38 and his guidelines range remained 360 months to life imprisonment. As a result, a sentence reduction was not authorized by § 3582(c)(2).

Flores's motion to proceed in forma pauperis is **GRANTED** for the purposes of this appeal. The order of the district court is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk