

No. 19-3368
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 16, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DON NELL HAWKINS,

Defendant-Appellant.

O R D E R

BEFORE: SILER, ROGERS, and LARSEN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX-D

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 19-3368

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**
Jun 17, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
) ON APPEAL FROM THE UNITED
 v.) STATES DISTRICT COURT FOR
) THE NORTHERN DISTRICT OF
 DON NELL HAWKINS,) OHIO
)
 Defendant-Appellant.)
)
)

A M E N D E D
O R D E R

Before: SILER, ROGERS, and LARSEN, Circuit Judges.

Don Nell Hawkins, a federal prisoner, appeals pro se a district court order granting in part and denying in part his motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(1)(B) and the First Step Act. 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).*

In 2007, Hawkins entered a guilty plea to a charge of possession with intent to distribute cocaine base. His career-offender sentencing guideline range was 262 to 327 months of imprisonment, but the sentencing court adopted the government's recommendation set forth in the plea agreement that Hawkins should be sentenced to 240 months, which was also the statutory mandatory minimum sentence. A supervised release term of ten years was imposed. The First Step Act allows the retroactive application of the Fair Sentencing Act of 2010 to sentences imposed

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before 2010. Applying that Act in this case, Hawkins was subject to a mandatory minimum sentence of 120 months and a minimum supervised release term of eight years. Hawkins therefore filed a motion through counsel for a sentence reduction to time served and eight years of supervised release.

The district court granted the motion in part, reducing the supervised release term to eight years. However, the court denied the motion to reduce the term of imprisonment, noting that the guideline sentencing range remained at 262 to 327 months. On appeal, Hawkins argues that the district court erroneously believed that Hawkins was not eligible for a sentence reduction because the guidelines range was unchanged; that we should therefore review the district court's order *de novo*; that his original sentence was not based on the guidelines range but on the statutory mandatory minimum; that the district court erred in failing to discuss the other sentencing factors, including post-sentencing history; and that the explanation given by the district court was insufficient for our review. Hawkins also raises a new claim that he is not subject to a career-offender guideline because a prior Ohio conviction is no longer a controlled substance offense, citing *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc).

Hawkins cites *United States v. McClain*, 691 F.3d 774, 777 (6th Cir. 2012), for the proposition that we should review the district court's order *de novo* because the district court believed that Hawkins was not eligible for a sentence reduction where his guideline sentencing range had not changed. However, it does not appear that the district court found Hawkins ineligible for a sentence reduction because it did grant the motion in part, reducing the term of supervised release. Therefore, we do not read the district court as saying it could not—as opposed to would not—reduce Hawkins' sentence under § 404 of the First Step Act. We will review the district court's order for an abuse of discretion. *Id.* at 776.

Hawkins also cites *United States v. Jackson*, 678 F.3d 442, 444 (6th Cir. 2012), for his argument that his original sentence was based on a range other than the career-offender guideline, namely the statutory mandatory minimum. However, in *Jackson*, the sentencing court calculated a lower guideline range and based the sentence on it, thus allowing the conclusion that the sentence was not based on the career-offender guideline. Here, the court simply found that the

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government's recommendation of 240 months, as contemplated in the plea agreement, was reasonable. The court did not state that it was basing the sentence on the statutory mandatory minimum. Therefore, there was no abuse of discretion in determining that, given the guidelines range of 262 to 327 months, a reduction to time served was not warranted.

The argument that the district court failed to consider other sentencing factors, including post-sentencing history, is not persuasive. The district court used an AO form to explain its decision that stated the court had considered the defendant's motion and the sentencing factors in 18 U.S.C. § 3553(a). Hawkins' motion for a reduced sentence under the First Step Act argued that the court should reduce his term of imprisonment because the 240-month mandatory minimum no longer applies, Hawkins is older, and Hawkins has taken advantage of Bureau of Prisons classes and programs. Accordingly, the form indicates that the district court considered Hawkins' post-sentencing conduct, as this was part of Hawkins' motion and the court did give not any indication that it did not consider this argument or viewed itself as being precluded from considering Hawkins' post-sentencing conduct. *Cf. United States v. Allen*, 956 F.3d 355, 357–58 (6th Cir. 2020).

The argument that this case should be remanded because the district court's explanation of its decision was insufficient is also unpersuasive. A lengthy explanation is not needed where it is clear that the sentence has a reasoned basis. *See Chavez-Meza v. United States*, 138 S. Ct. 1959, 1966–67 (2018); *United States v. Smith*, 958 F.3d 494, 501 (6th Cir. 2020). Here, the district court indicated at the original sentencing proceeding that the agreed below guideline 240-month sentence was reasonable given the criminal history and the seriousness of the offense. The change of the statutory mandatory minimum does not require a different result.

Finally, the new claim attacking a prior conviction as an insufficient predicate offense for career offender status based on a decision of this court may not be raised under 18 U.S.C. § 3582(c)(1)(B), which allows a modification of a sentence only if expressly permitted by statute.

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For all the above reasons, we **AFFIRM** the district court's order.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DON NELL HAWKINS, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2019 U.S. App. LEXIS 34087
No. 19-3368
November 14, 2019, Filed

Notice:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.United States v. Hawkins, 278 Fed. Appx. 629, 2008 U.S. App. LEXIS 11439 (6th Cir.), 2008 FED App. 292N (6th Cir.) (6th Cir. Ohio, May 23, 2008)

Counsel For United States of America, Plaintiff - Appellee: Daniel R. Ranke, Assistant U.S. Attorney, Office of the U.S. Attorney, Cleveland, OH.

Don Nell Hawkins, Defendant - Appellant, Pro se, Lisbon, OH.

Judges: Before: SILER, ROGERS, and LARSEN, Circuit Judges.

Opinion

ORDER

Before: SILER, ROGERS, and LARSEN, Circuit Judges.

Don Nell Hawkins, a federal prisoner, appeals pro se a district court order granting in part and denying in part his motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(1)(B) and the First Step Act. 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).

In 2007, Hawkins entered a guilty plea to a charge of possession with intent to distribute cocaine base. His career-offender sentencing guideline range was 262 to 327 months of imprisonment, but the sentencing court adopted the government's recommendation set forth in the plea agreement that Hawkins should be sentenced to 240 months, which was also the statutory mandatory minimum sentence. A supervised release term of ten years was imposed. The First Step Act allows the retroactive application{2019 U.S. App. LEXIS 2} of the Fair Sentencing Act of 2010 to sentences imposed before 2010. Applying that Act in this case, Hawkins was subject to a mandatory minimum sentence of 120 months and a minimum supervised release term of eight years. Hawkins therefore filed a motion through counsel for a sentence reduction to time served and eight years of supervised release.

The district court granted the motion in part, reducing the supervised release term to eight years.

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APPENDIX - A

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However, the court denied the motion to reduce the term of imprisonment, noting that the guideline sentencing range remained at 262 to 327 months. On appeal, Hawkins argues that the district court erroneously believed that Hawkins was not eligible for a sentence reduction because the guidelines range was unchanged; that we should therefore review the district court's order de novo; that his original sentence was not based on the guidelines range but on the statutory mandatory minimum; that the district court erred in failing to discuss the other sentencing factors, including post-sentencing history; and that the explanation given by the district court was insufficient for our review. Hawkins also raises a new claim that he is not subject to a{2019 U.S. App. LEXIS 3} career-offender guideline because a prior Ohio conviction is no longer a controlled substance offense, citing *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc).

Hawkins cites *United States v. McClain*, 691 F.3d 774, 777 (6th Cir. 2012), for the proposition that we should review the district court's order de novo because the district court believed that Hawkins was not eligible for a sentence reduction where his guideline sentencing range had not changed. However, it does not appear that the district court found Hawkins ineligible for a sentence reduction because it did grant the motion in part, reducing the term of supervised release. Therefore, we will review the district court's order for an abuse of discretion. *Id.* at 776.

Hawkins also cites *United States v. Jackson*, 678 F.3d 442, 444 (6th Cir. 2012), for his argument that his original sentence was based on a range other than the career-offender guideline, namely the statutory mandatory minimum. However, in *Jackson*, the sentencing court calculated a lower guideline range and based the sentence on it, thus allowing the conclusion that the sentence was not based on the career-offender guideline. Here, the court simply found that the government's recommendation of 240 months, as contemplated in the plea agreement, was reasonable. The court did not state that it was basing the sentence on the statutory{2019 U.S. App. LEXIS 4} mandatory minimum. Therefore, there was no abuse of discretion in determining that, given the guidelines range of 262 to 327 months, a reduction to time served was not warranted.

The argument that the district court should have considered other sentencing factors, including post-sentencing history, is not persuasive. In *Dillon v. United States*, 560 U.S. 817, 831, 130 S. Ct. 2683, 177 L. Ed. 2d 271 (2010), the Supreme Court determined that, when deciding a motion to reduce sentence under 18 U.S.C. § 3582(c)(2), aspects of the original sentencing decision not affected by the changed guidelines range are outside the scope of the proceeding. The same logic applies here. The argument that this case should be remanded because the district court's explanation of its decision was insufficient is also unconvincing. A lengthy explanation is not needed where it is clear that the sentence has a reasoned basis. See *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1966, 201 L. Ed. 2d 359 (2018). Here, the district court indicated at the original sentencing proceeding that the agreed 240-month sentence was reasonable given the criminal history and the seriousness of the offense. The change of the statutory mandatory minimum does not require a different result.

Finally, the new claim attacking a prior conviction as an insufficient predicate offense for career offender status based{2019 U.S. App. LEXIS 5} on a decision of this court may not be raised under 18 U.S.C. § 3582(c)(1)(B), which allows a modification of a sentence only if expressly permitted by statute.

For all the above reasons, we **AFFIRM** the district court's order.

