UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6586

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KUNTA KENTA REDD,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. James C. Dever III, District Judge. (7:08-cr-00043-D-1)

Submitted: July 23, 2020 Decided: July 28, 2020

Before WILKINSON, MOTZ, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kunta Kenta Redd, Appellant Pro Se. Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kunta Kenta Redd appeals the district court's order denying his motions seeking a sentence reduction under the First Step Act of 2018 (the act), his motions filed under various rules, his motion seeking a reduction of sentence under Fed. R. Crim. P. 35(b), and his motion seeking recusal and reassignment of the case to another district judge. Redd confines his appeal to the district court's denial of relief under the act and its denial of his recusal and reassignment request. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *United States v. Redd*, No. 7:08-cr-00043-D-1 (E.D.N.C. Apr. 3, 2020). We deny Redd's motions to appoint counsel and for a certificate of appealability and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: July 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6586, US v. Kunta Redd
7:08-cr-00043-D-1

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourt.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

RECEIVED
SEP - 4 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:08-CR-43-D

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	ORDER
	)	
KUNTA KENTA REDD,	)	
	)	
Defendant.	)	

On February 25 and March 18, 2019, Kunta Kenta Redd ("Redd") moved pro se for a sentence reduction under the First Step Act, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 [D.E. 139, 141]. On May 29, 2019, Redd (through counsel) moved for a sentence reduction under the First Step Act [D.E. 151]. On June 12, 2019, the United States responded in opposition [D.E. 153]. On July 31, 2019, Redd replied [D.E. 155]. As explained below, the court denies Redd's motions.

I.

On August 18, 2008, pursuant to a plea agreement, Redd pleaded guilty to conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base (crack) and a quantity of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. See [D.E. 15]. On July 8, 2009, the court held Redd's sentencing hearing. See [D.E. 34, 38]; Sent. Tr. [D.E. 47]. At the hearing, the court denied Redd's motion to withdraw his guilty plea. See Sent. Tr. at 3–13. The court adopted the facts set forth in the Presentence Investigation Report ("PSR"), except as to matters in dispute in the addendum. See id. at 13–14; Fed. R. Crim. P. 32(i)(3)(A)–(B). The court received evidence and resolved the objections. See Sent. Tr. at 14–58. As part of that process, the court found that Redd continued to deal crack cocaine after pleading guilty and being released on conditions pending his federal sentencing.

See id. The court calculated Redd's total offense level to be 36, his criminal history category to be IV, and his advisory guideline range to be 262 to 327 months. See id. at 58–59. During Redd's sentencing hearing, Redd perjured himself. See id. at 62–65, 70. After thoroughly considering all relevant factors under 18 U.S.C. § 3553(a), the court sentenced Redd to 324 months' imprisonment. See id. at 68–73. On June 24, 2010, the United States Court of Appeals for the Fourth Circuit affirmed Redd's conviction and sentence. See United States v. Redd, 384 F. App'x 279, 280–82 (4th Cir. 2010) (per curiam) (unpublished).

On May 9, 2011, Redd filed a motion to vacate under 28 U.S.C. § 2255 [D.E. 54]. On January 25, 2013, the court dismissed Redd's motion to vacate [D.E. 64]. On April 23, 2013, the Fourth Circuit denied a certificate of appealability. See United States v. Redd, 519 F. App'x 173, 173 (4th Cir. 2013) (per curiam) (unpublished). On October 7, 2013, the United States Supreme Court denied certiorari. See Redd v. United States, 571 U.S. 911 (2013).

On May 15, 2014, Redd moved for a sentence reduction under 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10(c) [D.E. 75]. On August 8, 2014, the court denied the motion [D.E. 76]. On December 23, 2015, the Fourth Circuit affirmed the court's order. See United States v. Redd, 627 F. App'x 228, 229 (4th Cir. 2015) (per curiam) (unpublished).

On February 25, 2016, Redd moved for a sentence reduction under 18 U.S.C. § 3582(c)(2), U.S.S.G. § 1B1.10, and Amendment 782 to the Sentencing Guidelines. See [D.E. 91]. On November 11, 2016, the court denied Redd's motion [D.E. 103]. On November 17, 2017, President Obama commuted Redd's sentence to 188 months' imprisonment. [D.E. 113] 2.

II.

On August 3, 2010, Congress enacted the Fair Sentencing Act of 2010 ("Fair Sentencing Act"), Pub. L. No. 11-220, 124 Stat. 2371, 2372 (codified as amended at 21 U.S.C. § 801, et seq.). Section

2 of the Fair Sentencing Act reduced statutory penalties by increasing the drug quantities necessary to trigger certain statutory minimums and maximums. For example, the amount of crack cocaine necessary to trigger a 5 to 40 year sentence increased from 5 to 28 grams. Likewise, the amount of crack cocaine necessary to trigger a 10 year to life sentence increased from 28 grams to 280 grams. See id., § 2, 124 Stat. at 2372.

The First Step Act makes the Fair Sentencing Act's reductions in mandatory minimum sentences apply retroactively to defendants who committed their "covered offense" of conviction before August 3, 2010. See First Step Act § 404, 132 Stat. at 5222. If a defendant qualifies, courts may consider a motion for a reduced sentence only if the defendant did not previously receive a reduction pursuant to the Fair Sentencing Act and did not have a motion under the First Step Act denied "after a complete review of the motion on the merits." Id., § 404(c), 132 Stat. at 5222. "Nothing in this section," however, "shall be construed to require a court to reduce any sentence pursuant to this section." Id.; see, e.g., United States v. Gravatt, No. 19-6852, 2020 WL 1327200, at *2 (4th Cir. Mar. 23, 2020); United States v. Wirsing, 943 F.3d 175, 184–86 (4th Cir. 2019); United States v. Latten, No. 1:02CR00011-012, 2019 WL 2550327, at *1–4 (W.D. Va. June 20, 2019) (unpublished).

The court has discretion to reduce Redd's sentence. See Gravatt, 2020 WL 1327200, at *2; Wirsing, 943 F.3d at 184–86; Latten, 2019 WL 2550327, at *2–4.[1] The court has completely reviewed the entire record and all relevant factors under 18 U.S.C. § 3553(a). Redd engaged in serious criminal conduct and was responsible for possessing with intent to distribute 3.5 kilograms of powder cocaine and two kilograms of cocaine base (crack). See PSR [D.E. 105] ¶¶ 1–3, 5–9. Moreover, Redd has a deplorable criminal record, including convictions for resisting a public officer, trafficking in cocaine

[1] The court rejects the government's argument that this court lacks discretion under the First Step Act to reduce a commuted sentence. See First Step Act § 404, 132 Stat. at 5222.

(four counts), possession with intent to sell and deliver cocaine (three counts), and selling cocaine (three counts). See id. at ¶¶ 11–12. Redd also dealt crack cocaine while on release awaiting sentencing in this case, and perjured himself at his sentencing hearing. See Sent. Tr. at 14–70. Although Redd has taken some positive steps while incarcerated, he sustained a disciplinary infraction in December 2018 for possessing a hazardous tool (i.e., a cellphone). See [D.E. 155-1] 2; cf. Pepper v. United States, 562 U.S. 476, 480 (2011). Possessing a cellphone in prison is very serious misconduct. Cf. United States v. Melton, 761 F. App'x 171, 173–77 (4th Cir.), cert. denied, 140 S. Ct. 507 (2019). That Redd possessed the cellphone in 2018 suggests to this court that Redd will not comply with the law when he is ultimately released. In light of Redd's serious criminal conduct, serious criminal record, criminal conduct on release in this case, perjury at his sentencing hearing, serious misconduct while incarcerated, the need to promote respect for the law, and the need to incapacitate Redd, the court declines to reduce Redd's sentence under the First Step Act. See, e.g., Latten, 2019 WL 2550327, at *4.

Redd also has filed various motions under "Rule 75" [D.E. 149, 156, 160], "Rule 83.7G" [D.E. 163], and "Rule 83.4" [D.E. 164]. The motions are baseless and are denied.

Redd also seeks a sentence reduction under Rule 35(b) of the Federal Rules of Criminal Procedure [D.E. 169]. The text of Rule 35(b), however, requires the government to file a motion under Rule 35. Fed. R. Crim. P. 35(b). The government never filed a Rule 35(b) motion for Redd, and nothing in the record suggests any impropriety in the government's failure to do so. Cf. Wade v. United States, 504 U.S. 181, 186–87 (1992); United States v. Wallace, 22 F.3d 84, 87–88 (4th Cir. 1994). Thus, the court denies Redd's Rule 35(b) motion.

Finally, Redd seeks to have the court recuse and reassign this case to another judge [D.E. 168]. The court has reviewed 28 U.S.C. § 455, governing precedent, and the record. See, e.g., Liteky v.

United States, 510 U.S. 540, 548 (1994); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858–59 (1988); Belue v. Leventhal, 640 F.3d 567, 572–76 (4th Cir. 2011); United States v. Black, 490 F. Supp. 2d 630, 645–68 (E.D.N.C. 2007). No reasonable outside observer, cognizant of all the facts and circumstances, would reasonably question this court's ability to fairly, throughly, and impartially handle Redd's case. Although Redd is upset about this court's rulings, litigants cannot use recusal motions as "a form of a brushback pitch" to "hurl at judges who do not rule in their favor." Belue, 640 F.3d at 574. This court has based its rulings on the record and governing law. Cf. Liteky, 510 U.S. at 555; Belue, 640 F.3d at 572–76. Thus, the court denies Redd's motion to reassign [D.E. 168].

III.

In sum, the court DENIES Redd's motions for reduction of sentence [D.E. 139, 141, 151], motions under various rules [D.E. 149, 156, 160, 163, 164, 167, 169], and motion to reassign [D.E. 168].

SO ORDERED. This 3 day of April 2020.

JAMES C. DEVER III
United States District Judge