Appx A"

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12175
Non-Argument Calendar

D.C. Docket No. 4:08-cr-00038-RH-GRJ-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KEVIN LAMAR RATLIFF,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(September 14, 2020)

Before WILSON, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

Kevin Ratliff, a federal prisoner proceeding *pro se*, appeals the district court's denial of his motion to reduce sentence under 18 U.S.C. § 3582(c)(2). The district

court concluded that Ratliff was ineligible for a sentence reduction because, as his guideline range was based on his career offender enhancement, Amendment 782 did not lower his guideline range. The government has moved for summary affirmance and to stay the briefing schedule.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).[1]

When appropriate, we will review *de novo* the district court's legal conclusions about the scope of its authority under 18 U.S.C. § 3582(c)(2). *United States v. Lawson*, 686 F.3d 1317, 1319 (11th Cir. 2012). However, if § 3582(c)(2) applies, we review the district court's decision to grant or deny a sentence reduction only for abuse of discretion. *United States v. Caraballo-Martinez*, 866 F.3d 1233, 1238 (11th Cir. 2017). Claims not briefed on appeal are deemed abandoned and issues raised for the first time on appeal are deemed waived. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330-31 (11th Cir. 2004).

[1] We are bound by cases decided by the former Fifth Circuit before October 1, 1981. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

A district court may modify a defendant's term of imprisonment if the defendant was sentenced based on a sentencing range that has subsequently been lowered by the Sentencing Commission. 18 U.S.C. § 3582(c)(2). A defendant is eligible for a sentence reduction under § 3582(c)(2) when an amendment listed in U.S.S.G. § 1B1.10(d) lowers his guideline range as calculated by the sentencing court. U.S.S.G. § 1B1.10 comment. (n.1(A)). Under § 3582(c)(2), a district court must first recalculate the defendant's sentence under the amended guideline range and, in doing so, "[a]ll other guideline application decisions made during the original sentencing remain intact." *United States v. Bravo*, 203 F.3d 778, 780 (11th Cir. 2000).

A district court is not authorized to reduce a defendant's sentence under § 3582(c)(2) where a retroactively applicable guidelines amendment reduces his base offense level but does not alter the guideline range upon which his sentence was based. *United States v. Moore*, 541 F.3d 1323, 1330 (11th Cir. 2008). Specifically, when a drug offender is sentenced under the career offender guideline in § 4B1.1, his guideline range is calculated based on § 4B1.1, not § 2D1.1. *Lawson*, 686 F.3d at 1321. Because an amendment to § 2D1.1 does not affect a career offender's guideline range, he is ineligible for a sentence reduction under § 3582(c)(2) based on an amendment to that guideline. *See id.* (affirming the denial

of a § 3582(c)(2) motion based on Amendment 750 to the Sentencing Guidelines, U.S.S.G. App. C., Amend. 750 (2011)).

Section 2D1.1(c) of the Sentencing Guidelines provides base offense levels for drug offenses based on the type and quantity of drug involved. *See* U.S.S.G. § 2D1.1(c). Amendment 782 to the Sentencing Guidelines altered the base offense levels applicable to certain drug offenses. *See* U.S.S.G. App. C, Amend. 782 (2014).

As an initial matter, Ratliff has abandoned any challenge to the district court's denial of his § 3582(c)(2) motion based on Amendments 706 and 750[2] by failing to present any arguments as to those amendments on appeal. *See Access Now, Inc.*, 385 F.3d at 1330-31. Ratliff also waived our consideration of his *Alleyne v. United States*[3] and *Molina-Martinez v. United States*[4] argument by raising it for the first time on appeal. *See Access Now, Inc.*, 385 F.3d at 1330-31. And we may not consider the arguments based on *Sessions v. Dimaya*[5] and *United States v. Davis*[6] that Ratliff raised for the first time in response to the government's motion to dismiss. *See Access Now, Inc.*, 385 F.3d at 1330-31.

---

[2] U.S.S.G. App. C, Amend. 706, 750.

[3] 570 U.S. 99 (2013).

[4] 136 S. Ct. 1338 (2016).

[5] 138 S. Ct. 1204 (2018).

[6] 139 S. Ct. 2319 (2019).

Even if we considered these arguments, however, they are without merit. Section 3582(c)(2) authorizes only a limited resentencing based on an amendment to the applicable guideline range and, therefore, the district court was without authority to consider claims based on Supreme Court decisions in such a proceeding. *See Bravo*, 203 F.3d at 780-81.

Moreover, the government's position that Ratliff was ineligible for a sentence reduction based on Amendment 782 due to his career offender enhancement is correct as a matter of law. *See Groendyke Transp., Inc.*, 406 F.2d at 1162. Ratliff is correct that Amendment 782 may have reduced his base offense level under § 2D1.1 as it was calculated based on attributable drug quantity. However, his guideline range was unaffected by Amendment 782 because his total adjusted offense level and criminal history category were determined under § 4B1.1 rather than § 2D1.1. *See Lawson*, 686 F.3d at 1321. Thus, because Amendment 782 did not impact the career offender guideline in § 4B1.1, Ratliff was ineligible for a sentence reduction under § 3582(c)(2) based on that amendment. *See Moore*, 541 F.3d at 1330.

There is no substantial question that the district court lacked authorization to reduce Ratliff's sentence based on Amendment 782 and properly denied Ratliff's § 3582(c)(2) motion. *See Groendyke Transp., Inc.*, 406 F.2d at 1162. We therefore

GRANT the government's motion for summary affirmance and DENY AS MOOT its motion to stay the briefing schedule.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 4:08cr38-RH

KEVIN LAMAR RATLIFF,

Defendant.

_____/

ORDER DENYING A SENTENCE REDUCTION UNDER AMENDMENTS 706 AND 782

The defendant Kevin Lamar Ratliff has moved to reduce his sentence under United States Sentencing Guidelines Amendments 706 and 782. But Mr. Ratliff was sentenced as a career offender, not based on the drug guideline that was reduced by Amendments 706 and 782 (as well as by Amendment 750). He is not eligible for a reduction. This order denies relief.

The Sentencing Guidelines establish a guideline range for each defendant. The range is based on the defendant's "total offense level" and "criminal history category." The total offense level is based on the defendant's "base offense level" with increases or decreases based on specific offense characteristics. For drug offenses, the base offense level ordinarily turns on the type and quantity of drugs

properly attributed to the defendant. *See* U.S. Sentencing Guidelines Manual § 2D1.1 (2014). For a defendant who is a "career offender," however, the base offense level is the greater of the drug offense level or the career-offender level. *See id.* § 4B1.1(b).

Amendments 706, 750, and 782 reduced the base offense level for many drug offenses. The amendments did not, however, affect the separate career-offender offense level. The offense level of a career offender was and still is determined under a wholly separate guideline. A district court may reduce the sentence of a defendant "who has been sentenced to a term of imprisonment *based on a sentencing range that has subsequently been lowered by the Sentencing Commission.*" 18 U.S.C. § 3582(c)(2) (emphasis added). But a district court must not reduce the sentence of a defendant whose range has not been lowered. Because the career-offender guideline range has not been changed, Mr. Ratliff is not eligible for a reduction.

The Eleventh Circuit has squarely so held. *See United States v. Berry*, 701 F.3d 374, 376 (11th Cir. 2012) (Amendment 750); *United States v. Moore*, 541 F. 3d 1323, 1327 (11th Cir. 2008) (Amendment 706). *See also United States v. Allen*, 623 F. App'x 529, 530 (11th Cir. 2015) (unpublished) ("[The defendant] was not eligible for a reduction in sentence because Amendment 782 did not have the effect

of reducing his sentence range under the Guidelines due to his status as a career offender and the operation of § 4B1.1.").

Mr. Ratliff has also moved to appoint an attorney. Because the result is clear, appointing an attorney would serve no purpose. But a copy of this order will be provided to the Federal Public Defender, who has represented Mr. Ratliff on other issues. The Federal Public Defender may, if he wishes, move to be appointed to represent Mr. Ratliff and may move to reconsider this order.

For these reasons,

IT IS ORDERED:

1. The motion to reduce the sentence, ECF No. 192, is denied.

2. The motion to appoint an attorney, ECF No. 193, is denied.

3. The clerk must provide a copy of this order to Mr. Ratliff himself by mail and to the attorneys of record and the Federal Public Defender through the electronic filing system.

SO ORDERED on May 29, 2020.

s/Robert L. Hinkle
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,	)
	) *Case No. 4:08cr38-RH*
Plaintiff,	)
	) *Tallahassee, Florida*
vs.	) *December 18, 2008*
	) *1:24 P.M.*
KEVIN LAMAR RATLIFF,	)
	)
Defendant.	)
	)

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE ROBERT L. HINKLE,
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
Thomas F. Kirwin
Acting United States Attorney
By: MICHAEL T. SIMPSON
Assistant U.S. Attorney
111 North Adams Street
Tallahassee, Florida 32301

For the Defendant:
Randolph P. Murrell
Federal Public Defender
By: WILLIAM R. CLARK, JR.
Asst. Federal Public Defender
227 North Bronough Street
Tallahassee, Florida 32301

And then with respect to the drug amount, it is true that the jury found that the amount involved, with which Mr. Ratliff was involved was less than 50 grams. I disregard Mr. Simpson's statement that he has been called by jurors who said that it was a compromise. Under Rule 606, anything like that is inadmissible, so I disregard it.

Parenthetically, I'm not sure which way it cuts. If it's a compromised verdict, it seems to me it cuts against upholding the verdict, and would call not for a change in the drug amount, but for a new trial.

But, again, jurors say things after trials for all kinds of reasons. Some of the 12 have a different perspective than the others. Rule 606 is in the book for a very good reason; precisely, so we don't get into that kind of inquiry.

Now, I do think the presentence report has correctly calculated the drug amount. The jury's verdict is based on the standard of proof beyond a reasonable doubt. The Supreme Court in the *Watts* decision has made it clear that an acquittal of a defendant does not mean that the charged conduct cannot be held against the defendant for purposes of sentencing on other counts or for sentencing on charges of which the defendant is convicted, and the reason is the burden of proof.

The fact that the proof is not sufficient to establish guilt beyond a reasonable doubt does not mean that