

NOT RECOMMENDED FOR PUBLICATION

No. 20-1684
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 08, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
) ON APPEAL FROM THE UNITED
v.) STATES DISTRICT COURT FOR
) THE WESTERN DISTRICT OF
MARJUAN SHONDELL FLEMING,) MICHIGAN
)
Defendant-Appellant.)

ORDER

Before: McKEAGUE, DONALD, and READLER, Circuit Judges.

Marjuan Shondell Fleming, a pro se federal prisoner, appeals a district court order denying his motion for a reduction of sentence pursuant to the First Step Act of 2018 (“the Act”), Pub. L. No. 115-391, 132 Stat. 5194. This case has been referred to a panel of this court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

In 2011, a jury convicted Fleming of distribution of cocaine base, in violation of 21 U.S.C. § 841; and possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. § 841. Prior to trial, the government filed a notice of sentence enhancement pursuant to 21 U.S.C. § 851 based on Fleming’s prior felony drug convictions. Fleming was also determined to be a career offender under USSG § 4B1.1. Based on a total offense level of 37 and a criminal history category of VI, Fleming’s applicable guidelines range was 360 months to life imprisonment. During his sentencing hearing, Fleming requested that the district court sentence him under the Fair Sentencing Act (“FSA”), using the lowered total offense level of 34 and resulting guidelines range of 262 to 327 months. The district court agreed and sentenced Fleming

No. 20-1684

- 2 -

to 276 months of imprisonment. We affirmed. *United States v. Fleming*, No. 11-2094 (6th Cir. Jan. 30, 2013) (order).

In January 2019, Fleming filed a motion for a sentence reduction, requesting that the district court apply the lower statutory maximums set forth in § 401 of the Act and sentence him using a total offense level of 29 and a resulting guidelines range of 151 to 188 months. Fleming acknowledged that he had been sentenced under the FSA. In an amendment to his motion, Fleming argued that he is also entitled to a downward variance because § 401 of the Act changed the requirements for prior convictions that may qualify as predicates for enhancement under 21 U.S.C. § 841(b)(1)(C).

The district court denied the motion, concluding that Fleming had already received the benefits afforded under the FSA and that § 404(c) of the Act prohibits courts from further reducing the sentence of defendants sentenced under the FSA.

On appeal, Fleming reasserts his arguments in support of a reduction and variance and contends that the denial of his motion results in unwarranted sentencing disparities.

Fleming's eligibility for a sentence reduction is reviewed *de novo*. *United States v. Boulding*, 960 F.3d 774, 778 (6th Cir. 2020). Section 404 of the Act authorizes district courts to reduce the sentence of a defendant who did not receive the benefit of the FSA because he committed his offense before the FSA became effective. *See id.* at 777-78. But § 404 specifically prohibits district courts from reducing a defendant's sentence if "the sentence was previously imposed . . . in accordance with" the FSA. First Step Act § 404(c), 132 Stat. at 5222; *see Boulding*, 960 F.3d at 777-78. Because Fleming's sentence was imposed in accordance with the FSA, the district court correctly concluded that he is not eligible for a reduction under § 404.

Nor can Fleming obtain a reduced sentence under § 401 of the Act. For one thing, that section of the Act is not retroactive. *See* § 401(c); *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 1237 (2020). For another thing, contrary to Fleming's argument, the Act "did not alter the definition of 'felony drug offense[s]' that serve as qualifying convictions under 21 U.S.C. § 841(b)(1)(C)." *Wiseman*, 932 F.3d at 417.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
-v-) No. 1:10-cr-301
MARJUAN SHONDELL FLEMING,)
Defendant.) Honorable Paul L. Maloney

ORDER DENYING DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE

Defendant Fleming seeks relief under the First Step Act of 2018 and asks the Court to reduce his sentence. (ECF No. 61.) Defendant has also filed a motion to amend his First Step Act motion. (ECF No. 68.) The motions will be denied.

In April 2011, a jury found Defendant guilty of the two counts brought against him at trial. Judge Robert Holmes Bell sentenced Defendant on August 30, 2011. The Fair Sentencing Act was enacted on August 3, 2010, after Defendant committed the crimes and before his conviction and sentencing. At sentencing, defense counsel requested the Court apply the Fair Sentencing Act to Defendant. (ECF No. 53 Sent. Trans. at 5 PageID.395.) The Court granted the motion and calculated Defendant's guideline range using the Fair Sentencing Act revisions to the Sentencing Guidelines. (*Id.* at 11 PageID.401.)

This Court cannot provide Defendant any relief under the First Step Act. The Act allows, but does not require, a court to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed." Pub. Law No. 115-391§ 404(b); 132 Stat. 5222.

The Act prohibits a court from granting any relief "if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 . . ." *Id.* § 404(c). Defendant acknowledges that Judge Bell applied the changes contained the Fair Sentencing Act when determining Defendant's sentence. (ECF No. 61 Def. Br. at 2 ¶ 6 PageID.514.)

Defendant already received the benefit of the changes made in the Fair Sentencing Act. The First Step Act, therefore, does not provide any relief and explicitly prohibits this Court from reducing Defendant's sentence.

Defendant's motion for reduction of sentence (ECF No. 61) and his motion to amend (ECF No. 68) are **DENIED. IT IS SO ORDERED.**

Date: June 17, 2020

/s/ Paul L. Maloney

Paul L. Maloney
United States District Judge