Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11126
Non-Argument Calendar

D.C. Docket No. 8:05-cr-00044-SCB-JSS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY L. FORD,
a.k.a. BoBo,
a.k.a. Bo,
a.k.a. Big Head,

Defendant-Appellant.

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

(May 26, 2021)

Before NEWSOM, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

Tony Ford appeals the district court's orders (1) denying his motion for a sentence reduction under section 404 of the First Step Act of 2018[1] and (2) denying his motion for reconsideration of that denial. No reversible error has been shown; we affirm.

In 2005, a jury found Ford guilty of (1) conspiracy to possess with intent to distribute 5 kilograms or more of powder cocaine and 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A)(ii) and (iii), 846 (Count 1); (2) 5 counts of possession with intent to distribute and distribution of cocaine and crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B), (b)(1)(C) (Counts 2, 4, 5, 6, 7); and (3) possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g) (Count 11).

The Presentence Investigation Report ("PSI") calculated Ford's base offense level as 38, based on the quantity of drugs involved in Ford's offenses. The PSI applied a four-level enhancement for Ford's leadership role in the offense. The PSI also designated Ford as a career offender -- under U.S.S.G. § 4B1.1 -- because Ford had two prior felony convictions for controlled-substance offenses. Based on

[1] First Step Act of 2018, Pub. L. 115-391, § 404(b), 132 Stat. 5194, 5222.

the resulting total offense level of 42 and on a criminal history category of VI, Ford's advisory guidelines range was 360 months to life imprisonment.

Ford, however, also qualified for enhanced statutory penalties -- under 21 U.S.C. §§ 841(b) and 851 -- based on his two prior felony drug convictions. In pertinent part, Ford was subject to a statutory mandatory sentence of life imprisonment on Count 1. As a result, Ford's guidelines range also became life imprisonment under U.S.S.G. § 5G1.1(c)(2).

The district court sentenced Ford to (1) life imprisonment on Count 1; (2) 360 months' imprisonment on each of Counts 2, 4, 5, 6, and 7; and (3) 120 months' imprisonment on Count 11, all to run concurrently.

In March 2019, Ford -- through his lawyer -- moved to reduce his sentences pursuant to Section 404 of the First Step Act.[2]

The district court denied Ford's motion in March 2020. The district court concluded that Ford was ineligible for a reduced sentence because -- given the 5 kilograms of powder cocaine involved in Count 1 -- Ford remained subject to a mandatory sentence of life imprisonment. The district court later denied Ford's motion to reconsider that denial.

[2] Only Ford's life sentence on Count 1 is at issue in this appeal.

We review de novo whether a district court had the authority to modify a term of imprisonment under the First Step Act. See United States v. Jones, 962 F.3d 1290, 1296 (11th Cir. 2020). "We review for abuse of discretion the denial of an eligible movant's request for a reduced sentence under the First Step Act." Id.

The First Step Act "permits district courts to apply retroactively the reduced statutory penalties for crack-cocaine offenses in the Fair Sentencing Act of 2010 to movants sentenced before those penalties became effective." Id. at 1293. Under section 404(b) of the First Step Act, "a district court that imposed a sentence for a covered offense [may] impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act were in effect at the time the covered offense was committed." Id. at 1297 (quotations and alterations omitted).

To be eligible for a reduction under section 404(b), a movant must have been sentenced for a "covered offense" as defined in section 404(a). Id. at 1298. We have said that a movant has committed a "covered offense" if the movant's offense triggered the higher statutory penalties for crack-cocaine offenses in 21 U.S.C. § 841(b)(1)(A)(iii) or (B)(iii): penalties that were later modified by the Fair Sentencing Act. See id. A multi-drug conspiracy offense involving both crack cocaine and another controlled substance constitutes a "covered offense" as long as

the quantity of crack cocaine triggered an increased statutory penalty. See United States v. Taylor, 982 F.3d 1295, 1300 (11th Cir. 2020).

In determining whether a movant has a "covered offense" under the First Step Act, the district court "must consult the record, including the movant's charging document, the jury verdict or guilty plea, the sentencing record, and the final judgment." Jones, 962 F.3d at 1300-01. The pertinent question is whether the movant's conduct satisfied the drug-quantity element in sections 841(b)(1)(A)(iii) (50 grams or more of crack cocaine) or 841(b)(1)(B)(iii) (5 grams or more of crack cocaine) and subjected the movant to the statutory penalties in those subsections. Id. at 1301-02. If so -- and if the offense was committed before 3 August 2010 (the effective date of the Fair Sentencing Act) -- then the movant's offense is a "covered offense," and the district court may reduce the movant's sentence "as if" the applicable provisions of the Fair Sentencing Act "were in effect at the time the covered offense was committed." See First Step Act § 404(b); Jones, 962 F.3d at 1301, 1303.

Here, the quantity of crack cocaine involved in Ford's multi-drug conspiracy offense in Count 1 -- which the jury found was 50 grams or more -- triggered the enhanced statutory penalties in section 841(b)(1)(A)(iii). Because Ford's drug

conspiracy offense in Count 1 was committed before 3 August 2010, his offense qualifies as a "covered offense" under the First Step Act.

Having concluded that Ford satisfied the "covered offense" requirement, we next consider whether a sentence reduction was available. We have said that the "as if" qualifier in section 404(b) of the First Step Act imposes two limitations on the district court's authority to reduce a sentence under the First Step Act. See Jones, 962 F.3d at 1303. First, the district court cannot reduce a sentence where the movant "received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." Id. "Second, in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." Id. In other words, a district court lacks the authority to reduce a movant's sentence when the sentence would necessarily remain the same under the Fair Sentencing Act. See id.

Applying these limitations, the district court had no authority under the First Step Act to reduce Ford's life sentence. The Fair Sentencing Act amended only the statutory penalties applicable to offenses involving crack cocaine; the statutory penalties applicable to offenses involving powder cocaine remained unchanged. Both before and after passage of the Fair Sentencing Act, section 841(b)(1)(A)(ii)

imposed a mandatory life sentence for offenses involving five kilograms or more of powder cocaine committed by defendants with two or more prior felony drug convictions. Compare 21 U.S.C. § 841(b)(1)(A)(ii) (2009), with id. § 841(b)(1)(A)(ii) (2010).

Based on Ford's two prior felony drug convictions and the jury's finding that Ford was responsible for 5 kilograms of powder cocaine, Ford's sentence of life imprisonment is still the lowest possible penalty that would be available to him under the Fair Sentencing Act.

That Ford might be subject to a lower statutory mandatory sentence under the most recent version of section 841(b)(1)(A) is immaterial. In ruling on a defendant's motion under section 404 of the First Step Act, a district court has limited authority to reduce a sentence "as if" sections 2 and 3 of the Fair Sentencing Act were in effect. A district court "is not free . . . to reduce the defendant's sentence on the covered offense based on changes in the law beyond those mandated by sections 2 and 3." United States v. Denson, 963 F.3d 1080, 1089 (11th Cir. 2020) (emphasis added). "[T]he First Step Act does not authorize the district court to conduct a plenary or de novo resentencing." Id.

We affirm the district court's determination that Ford was ineligible for a reduced sentence under the First Step Act. We also affirm the district court's denial of Ford's motion for reconsideration of that denial.

AFFIRMED.[3]

[3] To the extent Ford contends that our decisions in Jones and in Denson are wrongly decided, we must decline to consider those arguments in this appeal. See United States v. Johnson, 981 F.3d 1171, 1192 (11th Cir. 2020) ("Under our prior precedent rule, we must follow the precedent of earlier panels unless and until the prior precedent is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc.").

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 26, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-11126-CC
Case Style: USA v. Tony Ford
District Court Docket No: 8:05-cr-00044-SCB-JSS-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, CC

at (404) 335-6179.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:05-cr-44-T-24TBM

TONY L. FORD,

Defendant.
_____/

O R D E R

Defendant Tony L. Ford ("Ford"), represented by counsel, filed a Motion to Reduce Sentence Pursuant to the First Step Act of 2018. (Doc. 509). The Government filed a response in opposition. (Doc.512). The United States Probation Office filed a memorandum addressing the application of the First Step Act in which they determined Ford was not eligible for a sentence reduction because one of the offenses at conviction, conspiracy to possess with intent to distribute and to distribute more than 5 kilograms of cocaine & more than 50 grams of cocaine base remains punishable under 21 U.S.C. § 841(b)(1)(A)(ii) based on the powder cocaine. (Doc. 498).

I. Background

Ford was convicted by a jury of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine & 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841 (b)(1)(A)(ii) and 841 (b)(1)(A)(iii)—Count One, possession with the intent to distribute and distribution of cocaine—Count Two, possession with intent to

distribute and distribution of cocaine base in violation of 21 U.S.C. 841 (a)(1) and 841 (b)(1)(C)—Count Four, possession with intent to distribute and distribution of 5 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B)---Counts Five, Six and Seven, and convicted felon in possession of a firearm---Count Eleven. He was sentenced to life imprisonment on November 4, 2005. The sentence consists of a term of life imprisonment on Count One, terms of imprisonment of 360 months on Counts Two, Four, Five, Six, and Seven, and 120 months on Count Eleven, all to run concurrent to each other. Prior to trial, the Government filed an information and notice of Ford's prior convictions, pursuant to 21 U.S.C. §851, subjecting him to a mandatory minimum of life imprisonment.

II. Arguments

On September 30, 2019, Ford, represented by counsel, filed a motion to reduce sentence pursuant to the First Step Act of 2018, in which he asserts that he is eligible for a reduction under The First Step Act and he requests that the Court reduce his sentence to time served and his supervised release to four years.

The United States filed a response to Defendant's motion and argues that the United States Probation Office correctly states Ford is not eligible for relief because he was convicted of a conspiracy that included 5 kilograms or more of powder cocaine, and the First Step Act has no impact on the statutory penalties for cocaine offenses.

III. Discussion

The First Step Act of 2018 ("2018 FSA") makes retroactive, to defendants sentenced before August 3, 2010, sections 2 and 3 of the Fair Sentencing Act of 2010 ("2010 FSA"), which lowered statutory penalties for certain offenses involving crack cocaine. *See* First Step Act, Pub. L. No. 115-391, § 404. The 2018 FSA is an extension of the 2010 FSA, designed only to afford relief to a narrow group of defendants to whom relief under the 2010 FSA was previously unavailable because the statute was not retroactive. Congress enacted the 2010 FSA on August 3, 2010, to reduce the disparity between the amount of powder cocaine and the amount of crack cocaine required to trigger mandatory minimums. *Dorsey v. United States*, 567 U.S. 260, 264 (2012). The 2018 FSA authorizes, but does not require, a district court to impose a reduced sentence to eligible defendants.

Section 404(a) of the 2018 FSA defines "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 that was committed before August 3, 2010." A covered offense, therefore, is a violation for which the penalties have been modified. *See*. *United States v. Wyatt*, 2020 WL 897400. As both the Government and the Probation Office point out, Count One charges a conspiracy that includes both powder cocaine and cocaine base---conspiracy to possess with intent to distribute more than 5 kilograms of cocaine and more than 60 grams of cocaine base—and, based on the 5

kilograms or more of cocaine and the 21 U. S. C. §851 notice filed by the Government, the mandatory term of imprisonment remains life.

Finally, if this Court is incorrect and Ford does qualify for a reduction, this Court **would reduce** his sentence down from the life sentence imposed on November 18, 2008, to 300 months in the Bureau of Prisons.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Defendant Tony L. Ford's Motion for Reduction of Sentence pursuant to The First Step Act (Doc. 509) is **DENIED**.

It is so **ORDERED** at Tampa, Florida this 6th day of March 2020.

SUSAN C. BUCKLEW
United States District Judge

Copies to:
Counsel of record

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 13, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-11126-CC
Case Style: USA v. Tony Ford
District Court Docket No: 8:05-cr-00044-SCB-JSS-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Carol R. Lewis, CC/lt
Phone #: (404) 335-6179

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11126-CC

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

TONY L. FORD,
a.k.a. BoBo,
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Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: NEWSOM, ANDERSON, and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46