

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LEE DALE WHITE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

June 25, 2021

Lyle W. Cayce
Clerk

No. 20-10557
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LEE DALE WHITE,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CR-33-1

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

Lee Dale White appeals the district court's denial of his motion for a reduction in sentence under Section 404 of the First Step Act of 2018. The district court concluded that White was eligible for a reduction but exercised its discretion and denied the motion.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 20-10557

White argues that the district court abused its discretion by declining to grant him a reduction in sentence under the First Step Act because the 24-month revocation sentence is substantively unreasonable based on the totality of the circumstances. However, as White concedes, his claim is foreclosed by our caselaw. *See United States v. Batiste*, 980 F.3d 466, 479-80 (5th Cir. 2020). The substantive reasonableness standard does not apply to motions under Section 404 of the First Step Act. *Id.*

The Government has filed an unopposed motion for summary affirmance and, alternatively, requests an extension of time to file its brief. Because White concedes that the issue asserted on appeal is foreclosed, summary affirmance is proper. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Thus, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED as moot, and the judgment of the district court is AFFIRMED.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA)	
)	
v.)	No. 3:18-CR-33-N-1
)	
LEE DALE WHITE,)	
Defendant.)	

ORDER

This matter is before the Court following a limited remand from the Fifth Circuit Court of Appeals. *See* (ECF No. 33). The issues have now been fully briefed, and the matter is ripe for ruling. For the reasons addressed below, the Court finds that Lee Dale White is eligible for a sentence reduction under Section 404 of the First Step Act, but in the Court's discretion, a reduction will be denied.

Background

On February 23, 2010, White was sentenced in the Eastern District of Texas. (ECF No. 1 at 1.) He received 120 months' imprisonment and 5 years of supervised release for conspiracy to distribute and to possess with intent to distribute crack cocaine in violation of 21 U.S.C. § 846. (*Id.*)

White began serving supervised release on February 1, 2017. (*Id.*) On January 9, 2018, his supervision was transferred to the Northern District of Texas. (*Id.*) On September 9, 2019, his supervision was revoked for the following violations: manufacturing/delivering a controlled substance (one gram), manufacturing/delivering a controlled substance (four grams), possession of marijuana (less than four ounces), and unlawful possession of a firearm by a felon. (ECF No. 3 at 2; ECF No. 20.) At that time, a revocation term of 24 months' imprisonment was imposed,

and it was ordered to run consecutive to the sentence imposed in Case Number 3:17-cr-638-N (N.D. Tex.). (ECF No. 20 at 2.)

White's supervised release violations also led to new federal charges and convictions for possession of a firearm by a felon and possession with intent to distribute a controlled substance. (*See* Case Number 3:17-cr-638-N, ECF No. 1.) He received a 94-month term of imprisonment for those convictions, and the sentence was ordered to run consecutive to the 24-month revocation term. (*See* Case Number 3:17-cr-638-N, ECF No. 38.)

On January 20, 2020 and May 7, 2020, White filed motions seeking a sentence reduction under Section 404 of the First Step Act of 2018 ("First Step Act"). *See* (ECF Nos. 23, 25). On May 15, 2020, the motions were denied. (ECF No. 27.) The basis for the denial was the fact that White was "currently in prison because [he] violated [his] supervised release." (*Id.*) White appealed the denial to the Fifth Circuit Court of Appeals. (ECF No. 29.)

On October 9, 2020, the Fifth Circuit entered an order granting the Government's opposed motion for a limited remand to this Court to consider whether White was eligible for a sentence reduction, and if so, whether in the Court's discretion it would grant or deny his motions. (ECF No. 33.) On October 15, 2020, this Court entered an order directing the Federal Public Defender to serve as counsel for White for purposes of the limited remand. (ECF No. 37.) The Court further directed that after White's counsel entered a notice of appearance, the Government and White's counsel each had 14 days to file briefs reflecting their respective positions. (*Id.*) On October 16, 2020, the Government filed its brief. (ECF No. 38.) Thereafter, on October 29, 2020, White's counsel filed his brief.

Discussion

A court can “modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.” 18 U.S.C. § 3582(c)(1)(B). Under the First Step Act, a district judge has “limited authority to consider reducing a sentence previously imposed.” *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019). Section 404(b) of the First Step Act provides that “[a] 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 of 2010 . . . were in effect at the time the covered offense was committed.” *United States v. Batiste*, ___ F.3d ___, 2020 WL 6689823, at *3 (5th Cir. Nov. 13, 2020) (citing Pub. L. No. 115-391, § 404(b), 132 Stat at 5222).

In this case, the Government concludes that White is eligible for a sentence reduction, and in support of this conclusion, it notes that although the Fifth Circuit Court of Appeals has not specifically addressed this issue, the Fourth Circuit Court of Appeals and the Sixth Circuit Court of Appeals have, and they ruled favorably for White’s position. (ECF No. 38 at 1-2.) *See United States v. Woods*, 949 F.3d 934, 937 (6th Cir. 2020) (“Given that Woods’s current 37-month [revocation] sentence relates to his original offense under 21 U.S.C. § 841(a)(1)---a First Step Act ‘covered offense’---Woods is eligible for resentencing (although not necessarily entitled to resentencing).”); *United States v. Venable*, 943 F.3d 187, 194 (4th Cir. 2019) (“[G]iven that [the defendant’s] revocation sentence is part of the penalty for his initial offense, he is still serving his sentence for a ‘covered offense’ for purposes of the First Step Act. Thus, the district court had the authority to consider his motion for a sentence reduction, just as if he was still serving the original custodial sentence.”). However, the Government argues that this Court, in its discretion, should deny White a sentence reduction under Section 404 of the First Step Act. (ECF No. 38 at 1.) For the reasons addressed below, the Court agrees.

Consistent with the argument from White's counsel and the Government, the Court finds that White is eligible for a sentence reduction under Section 404 of the First Step Act. However, the Court, in its discretion, will deny him a reduction. This is so because the Court would impose the same 24-month revocation sentence, even if re-sentenced him under the First Step Act, for at least four reasons. First, the seriousness of the crimes White committed that led to the violation of his supervised release term on September 9, 2019. *See* (ECF No. 3 at 2; ECF No. 20.) Second, a 24-month term of imprisonment falls below his new statutory maximum, which is 36 months. *See* 21 U.S.C. § 841(b)(1)(B); 18 U.S.C. § 3559(a)(2) (offenses with a statutory maximum of 25 years or more but less than life are Class B); 18 U.S.C. § 3583(e)(3) (Class B felonies have a revocation imprisonment maximum term of three years).¹ Third, 24 months is also below White's Chapter 7 policy statement range of 30 to 37 months' imprisonment, which is based on his criminal history and the seriousness of his supervised release violations. (ECF No. 18-1 at 25) *See* U.S.S.G. § 7B1.4 (policy statement). Finally, running White's revocation sentence concurrent with his sentence in Case Number 3:17-cr-638-N (N.D. Tex.), as he proposes, would essentially allow him a pass on some very serious violations.


Conclusion

Considering the foregoing, the Court finds that White is eligible for a sentence reduction under Section 404 of the First Step Act, but in the Court's discretion, a sentence reduction will be **DENIED**.

SO ORDERED

SIGNED this 4th day of December 2020.

¹ At the time of White's sentencing on February 23, 2010 in the Eastern District of Texas, his offense carried a lifetime maximum sentence. It was therefore a Class A felony and had a maximum revocation term of 5 years' imprisonment. *See* 18 U.S.C. §§ 3559(a)(1), 3583(e)(3).



DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
for the Fifth Circuit

No. 20-10557

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LEE DALE WHITE,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CR-33-1

Before JONES, COSTA, and WILSON, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the opposed motion of appellee for a limited remand to the district court to consider whether White is eligible for a reduction and, if so, whether in its discretion it would grant or deny White's First Step Act motion and provide additional findings is GRANTED.

IT IS FURTHER ORDERED that the opposed alternative motion of appellee for an extension of 30 days to file brief from the denial of the motion for remand is DENIED AS MOOT.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

LEE DALE WHITE

§
§
§
§
§

No. 3:18-CR-033-N (BT)


ORDER

The Court has received your motion to reduce a sentence based on Section 404 of the First Step Act of 2018. Based on your motion, it appears that:

- ☐ You were not convicted of an offense involving crack cocaine or cocaine base to which Section 404 of the First Step Act of 2018 applies. *See* 21 U.S.C. §§ 841 and 960.
- ☐ You are currently on supervised release.
- ☒ You are currently in prison because you violated your supervised release.
- ☐ You were convicted of an offense involving crack cocaine or cocaine base, but you were sentenced after June 21, 2012, *see Dorsey v. United States*, 567 U.S. 260 (2012) (holding that the Fair Sentencing Act of 2010 applies to all defendants, whose crimes preceded the effective date of the Act, but who were sentenced on or after the Act's effective date), and you have not demonstrated that the Court failed to apply the Fair Sentencing Act at sentencing.
- ☐ You previously filed a motion requesting a sentence reduction under Section 404 of the First Step Act of 2018 and the Court rejected your motion.
- ☐ Other _____.

For this reason, you are not eligible for re-sentencing, and your motion under Section 404 of the First Step Act of 2018 is hereby **DENIED**.

SIGNED on 15th day of May, 2020.


DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE