

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 19 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ADOLPH SPEARS, Sr.,

Defendant-Appellant.

No. 17-30082

D.C. No. 3:98-cr-00208-SI
District of Oregon,
Portland

ORDER

Before: WALLACE, SILVERMAN, and BYBEE, Circuit Judges.

A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

Accordingly, we grant appellee's motion for summary affirmance (Docket Entry No. 9). The district court's order denying Spears's motion for a new trial is affirmed.

AFFIRMED.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

UNITED STATES OF AMERICA,

v.

ADOLPH SPEARS, SR.,

Defendant.

Case No. 6:98-cr-0208-SI

ORDER

Michael H. Simon, District Judge.

On December 7, 2000, a jury found Defendant guilty of conspiracy to possess with intent to distribute cocaine base, conspiracy to launder monetary instruments, possession with intent to distribute cocaine, and money laundering. On May 7, 2001, the Court sentenced Defendant to life imprisonment on Count 1 and 240 months' imprisonment on Counts 2, 8, 9, 45, and 47, to be served concurrently, followed by a ten-year term of supervised release. ECF 1789. In so doing, the Court adopted most of the findings of the presentence report, including—over Defendant's objection—the findings regarding the quantity of drugs involved. ECF 1790. Defendant filed a direct appeal of his conviction and sentence and filed two motions under 28 U.S.C. § 2255, all of which were unsuccessful.

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Before the Court is Defendant's *pro se* motion for a new trial. Defendant purports to bring his motion under Federal Rule of Criminal Procedure 33. Motions for a new trial under Rule 33, however, must be brought within three years if based on newly discovered evidence, or 14 days if based on any other grounds. Fed. R. Crim. P. 33. Thus, Defendant's motion is time-barred.

Because Defendant is proceeding *pro se*, the Court liberally construes his filing and considers whether there may be some other legal basis on which he can bring his motion. *See Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (noting that a court must liberally construe the filings of a *pro se* plaintiff and afford the plaintiff the benefit of any reasonable doubt). Defendant argues that he is entitled to a new trial because Congress "repealed" the 1986 law under which he was sentenced when Congress enacted the Fair Sentencing Act of 2010 ("FSA"). As an initial matter, what Defendant appears to be seeking is not a new trial because of a problem with the merits of his case, but a change to his sentence based on a subsequent change in the law.

The government correctly notes that district courts generally may not correct or modify a sentence at any time, but may do so only under limited circumstances, such as in response to a mandate from the court of appeals, after resolving a § 2255 motion in favor of a defendant, or after resolving a motion under 18 U.S.C. § 3582(c) in favor of a defendant. *See* ECF 2521 at 5 (citing cases). Here, there is no mandate requiring Defendant be resentenced, Defendant has already unsuccessfully litigated a motion under § 2255 and may not litigate a second motion without leave from the Ninth Circuit Court of Appeals, and there is no basis for a motion under § 3582(c). Thus, the Court has no jurisdiction to resentence Defendant.

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Moreover, even if the Court were to consider Defendant's argument that he should be resentenced because Congress passed the FSA, this argument fails on the merits. Defendant relies on the Supreme Court's decision in *Dorsey v. United States*, 132 S. Ct. 2321 (2012), which holds that the FSA applies to defendants who were convicted before FSA went into effect, but sentenced afterward. The Ninth Circuit, however, has held that *Dorsey* does not provide relief to defendants who were both convicted *and* sentenced before the FSA went into effect. *United States v. Augustine*, 712 F.3d 1290, 1293 (9th Cir. 2013). In such cases, the General Savings Statute applies. This statute provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide" 1 U.S.C. § 109. The Ninth Circuit noted that because the FSA does not contain an express provision indicating the intent to apply it to pre-enactment conduct, the FSA does not apply retroactively. *Augustine*, 712 F.3d at 1293.

The Ninth Circuit acknowledged that this outcome will create disparities between persons sentenced before the FSA and those sentenced after, but recognized the Supreme Court's comment that "this particular new disparity . . . cannot make a critical difference." *Id.* at 1295 (quoting *Dorsey*, 132 S. Ct. at 2335). Thus, despite this disparity, the Ninth Circuit concluded that the FSA did not apply retroactively. As the Ninth Circuit explained:

We recognize, as did the Supreme Court, that this regime creates a disparity between those sentenced before and after adoption of the FSA. But, as *Dorsey* noted, some disparities "will exist whenever Congress enacts a new law changing sentences." 132 S. Ct. at 2335. Any unfairness of the disparity resulting from the inapplicability of the FSA to *Augustine*, however, is beyond the province of the court to resolve. In light of the General Savings Statute, Congress, through its silence in the FSA on the question of retroactivity, has resolved the issue.

Id. at 1295.

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CONCLUSION

Defendant's motion for a new trial (ECF 2517) is DENIED.

IT IS SO ORDERED.

DATED this 5th day of April, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge