

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA**
CHARLOTTESVILLE DIVISION

United States of America,

Plaintiff,

v.

Melvin Tyrone Tindall,

Defendant.

CRIMINAL ACTION No. 3:04cr00031-2

ORDER

JUDGE NORMAN K. MOON

This matter is before the Court on Defendant's motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706,¹ as amended by 711, to the United States Sentencing Guidelines and his motion to appoint counsel to assist him in receiving a reduction [Docket #230]. For the following reasons, Defendant's motion is denied.

Defendant was charged with three counts in a seven count Superseding Indictment that charged him with, among other things, conspiracy to distribute and to possess with intent to distribute 50 grams or more of cocaine base, mixtures or substances containing a detectable amount of cocaine powder, and mixtures or substances containing a detectable amount of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. Defendant entered a plea of guilty on November 28, 2005, pursuant to a written plea agreement, to a lesser included offense² of conspiracy to distribute

¹The United States Sentencing Commission has amended the federal sentencing guidelines applicable to crack cocaine offenses. The Sentencing Commission has also decided, pursuant to its authority under 28 U.S.C. § 994(u), that effective March 3, 2008, the amendment will apply retroactively to offenders who were sentenced under prior versions of the Guidelines Manual and who are still incarcerated.

²Defendant avoided the statutory mandatory minimum term of 10 years of imprisonment by pleading to the lesser included offense, which had a lower 5-year minimum term of incarceration.

and possess with intent to distribute 5 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. The parties agreed that Defendant should be sentenced to an 84-month term of incarceration pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C),³ and the Court sentenced Defendant that same day to the agreed upon 84-month term. The Court concluded that no presentence investigation report was required under Federal Rule of Criminal Procedure 32 because it had accepted the plea agreement negotiated by the parties and, therefore, was bound by the agreed upon 84-month term of incarceration under Rule 11(c)(1)(C).⁴ Thus, the Court did not make any findings under the advisory guidelines in sentencing Defendant because of the parties' plea agreement.

Defendant asks the Court in his motion to modify his term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706, as amended by 711, to the United States Sentencing Guidelines. Section 3582(c) of Title 18 permits the Court to modify an imposed term of imprisonment in limited circumstances, such as when the term of imprisonment was based on a guidelines range that has subsequently been lowered by the Sentencing Commission. 18 U.S.C. § 3582(c)(2). Amendment 706 lowers the base offense levels applicable to crack cocaine offenses, but it does not apply in every case. In this case, Defendant's sentence was not based on a guidelines range, but rather on the 84-month sentence agreed upon pursuant to Rule 11(c)(1)(C). As a result, Amendment 706 has no effect on Defendant's sentence because the advisory guidelines range was

³Federal Rule of Criminal Procedure 11(c)(1)(C) permits the parties to agree to a specific sentence during plea negotiations and, if the plea agreement is accepted by the Court, the Court is bound to impose the agreed upon sentence.

⁴Although the Court did not require a presentence investigation report, the U.S. Probation Officer did prepare a post-sentence investigation report on December 2, 2005, and determined that Defendant's Total Offense Level was 27 and his Criminal History Category was II, which would have resulted in an advisory guideline range of 78 to 97 months of incarceration.

not considered in imposing his sentence. Thus, the Court cannot reduce his sentence pursuant to 18 U.S.C. § 3582 and Amendment 706. See United States v. Trujeque, 100 F.3d 869, 871 (10th Cir. 1996) (holding that a sentence imposed under Rule 11(c)(1)(C) is not subject to a reduction under 18 U.S.C. § 3582(c)(2) because it was not based on a sentencing range subsequently lowered by the Sentencing Commission); see also United States v. Clayborn, No. 1:CR-05-51-01, 2008 WL 2229531, at *1 (M.D. Pa. May 28, 2008).

As for Defendant's request to appoint counsel in this matter, it is well settled that "a criminal defendant has no right to counsel beyond his first appeal." Coleman v. Thompson, 501 U.S. 722, 756 (1991). While in some limited circumstances, due process mandates the appointment of counsel for certain post-conviction proceedings, a motion to reduce sentence pursuant to § 3582(c) does not fit into this category. See United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000). The Court finds no reason to appoint counsel in this case because it has no authority to reduce Defendant's sentence.

Accordingly, it is hereby

ORDERED and ADJUDGED

that Defendant's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706, as amended by Amendment 711, shall be and hereby is DENIED and that Defendant's motion for appointment of counsel shall also be and hereby is DENIED. [Docket #230]

The Clerk of the Court is hereby directed to send a copy of this Order to Defendant and counsel of record for the United States.

It is so ORDERED.

Entered this ____ day of June, 2008



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE