

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

United States of America,

Plaintiff,

v.

Kevin D. Allen,

Defendant.

CRIMINAL ACTION No. 3:05cr00041-2

ORDER

JUDGE NORMAN K. MOON

This matter is before the Court on the Court's Notice to the parties requiring a response to a possible reduction in Defendant's sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706,¹ as amended by 711, to the United States Sentencing Guidelines. (docket entry no. 203). Having reviewed the record, the Court finds that it has no authority to reduce Defendant's sentence because he was sentenced to the statutory mandatory minimum term of incarceration. Therefore, Defendant's sentence will not be reduced as he is not eligible for a reduction under 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10.²

The Court sentenced Defendant on September 19, 2006, to a 120-month term of incarceration for conspiracy to distribute and to possess with intent to distribute 50 grams or more of cocaine base

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.

²The Court regrets any confusion this Notice may have caused, but on initial examination it had appeared that Defendant was eligible for a reduction in sentence. It was not until further examination of the record that the Court discovered that it could not reduce Defendant's sentence.

and 500 grams or more of cocaine hydrochloride in violation of 21 U.S.C. §§ 841(a)(1) and 846. The Court found under the advisory guidelines that Defendant's Total Offense Level was 35 and his Criminal History Category was V, which resulted in an advisory guidelines range of 262 to 327 months of imprisonment. The United States filed a motion for substantial consideration on September 19, 2006, pursuant to U.S.S.G. § 5K1.1 and asked that the Court depart from the advisory guidelines range. The United States specifically directed, however, that the motion for substantial assistance was not made pursuant to 18 U.S.C. § 3553(e). As a result, the Court could depart below the advisory guidelines range, but could not depart below the statutory mandatory minimum of incarceration of 120 months required by 21 U.S.C. § 841(b)(1)(A). See United States v. Johnson, 393 F.3d 466, 470 n.4 (4th Cir. 2004) (explaining that a § 3553(e) motion allows the district court to depart below both the statutory minimum and the bottom of the applicable guidelines range, but that a § 5K1.1 motion does not permit the court to depart below the statutory minimum sentence). Thus, the Court sentenced Defendant to 108 months—the statutory mandatory minimum term after taking into consideration Defendant's state term of incarceration of 24 months in a related case. See U.S.S.G. § 5G1.3(b)(1) (allowing the court to adjust the sentence for any period of imprisonment on an undischarged term (i.e., a state term of imprisonment) where the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons).

The Court is permitted to modify an imposed term of imprisonment in only limited circumstances. 18 U.S.C. § 3582(c). One of these circumstances arises when the term of imprisonment was based on a guidelines range that has subsequently been lowered by the Sentencing Commission. § 3582(c)(2). The Court may only reduce the sentence, however, if the reduction is consistent with applicable policy statements issued by the Sentencing Commission. Id.

The applicable policy statement, U.S.S.G. § 1B1.10, provides that the Court shall determine

the amended guideline range that would have been applicable if the amendment had been in effect at the time the defendant was sentenced. U.S.S.G. § 1B1.10(b)(1). In this case, Amendment 706 reduces Defendant's advisory guideline range to 235 to 293 months, but this range exceeds the sentence imposed. Ordinarily, the Court is authorized under 18 U.S.C. § 3582(c)(2) to reduce a defendant's sentence that previously has been reduced for providing substantial assistance in proportion to the reduction in the advisory guidelines range, which would result in a 22 month reduction in this case. The Court has no authority to reduce Defendant's sentence in this case, however, because of the United States' decision to limit its motion for substantial assistance to U.S.S.G. § 5K1.1 and to not invoke 18 U.S.S.G. § 3553(e). Therefore, Defendant's sentence cannot be reduced under Amendment 706, as amended by 711. See Melendez v. United States, 518 U.S. 120, 129–31 (holding that a § 5K1.1 motion permits a departure from the applicable guidelines range, but the departure cannot be below the statutory minimum sentence absent a § 3553(e) motion for substantial assistance).

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