

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

UNITED STATES OF AMERICA,

v.

PHILLIP L. EUBANKS,

Defendant.

CASE No. 6:03-cr-30082

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

This matter comes before the Court on Defendant's *pro se* motion to appoint counsel and motion to reduce sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 750 to the United States Sentencing Guidelines (docket no. 44).¹ For the following reasons, I will deny Defendant's motions.

On June 10, 2004, Defendant pled guilty to possession with intent to distribute five grams or more of cocaine base ("crack") as well as possession of a firearm by a felon. At a sentencing hearing on August 25, 2004, I found that Defendant qualified as a career offender under § 4B1.1 of the Sentencing Guidelines. Subsequently, I sentenced Defendant to 188 months of incarceration on the crack offense and 120 months on the firearm offense, with both counts to run concurrently.

¹ The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (the "Act") reduced the disparity between sentences related to cocaine and sentences related to cocaine base ("crack"). 124 Stat. at 2372. The Act, *inter alia*, reduced the statutory penalties for crack offenses and contained directives requiring the Sentencing Commission to amend the guidelines. *Id.* at 2372–75. Amendment 748 to the Sentencing Guidelines, which was made effective on November 1, 2010, was enacted as a means of implementing those directives. *See* U.S. Sentencing Guidelines Manual app. C, vol. III at 381. More specifically, Amendment 748 amended the Drug Quantity Table in § 2D1.1 of the Sentencing Guidelines. *Id.* at 374–81. On June 30, 2011, the Sentencing Commission voted to give Amendment 748 retroactive effect, to be designated Amendment 750 in Appendix C of the Sentencing Guidelines. *See* 76 Fed. Reg. 41332–35 (July 13, 2011). Amendment 750 went into effect on November 1, 2011. *Id.* at 41332.

In the motion presently before the Court, Defendant seeks a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 750 to the Sentencing Guidelines. Significantly, under § 3582(c)(2), a court may modify a defendant's term of imprisonment if it was "based on a sentencing guideline range that has subsequently been lowered by the Sentencing Commission." Amendment 750 retroactively lowers the base offense levels applicable to crack offenses under § 2D1.1 of the Sentencing Guidelines; however, it does not apply in every case.

In the case at hand, Defendant's sentence was not based on the offense level set forth in § 2D1.1, but rather on the offense level provided under § 4B1.1 for career offenders. Consequently, Amendment 750 has no effect on Defendant's sentence because the offense levels set forth in § 2D1.1 were not considered when I imposed his sentence. Thus, I have no authority to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). *See United States v. Bronson*, 267 F. App'x 272, 275 (4th Cir. 2008) ("[A]lthough the base offense level corresponding to the determined drug quantity would be lower as a result of [a predecessor amendment to the Sentencing Guidelines], the amendment is ultimately of no consequence because calculation of [the defendant's] base offense level was driven by the career offender designation."). Accordingly, Defendant's motion for a sentence reduction must be denied.

With respect to Defendant's motion to appoint counsel, it is well-established 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)(2) is not one of them. *See United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) ("A motion pursuant to § 3582(c) 'is not a do-over of an original sentencing

proceeding where a defendant is cloaked in rights mandated by statutory law and the Constitution.”) (quoting *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999)). In the instant case, I find no reason to appoint counsel for Defendant, who, as previously mentioned, is ineligible for a sentence reduction pursuant to § 3582(c)(2). Therefore, Defendant’s motion to appoint counsel is also denied.

For the reasons stated herein, Defendant’s motion to appoint counsel and motion to reduce sentence shall be denied.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion and the accompanying Order to the Defendant and all counsel of record.

Entered this 9th day of January, 2012.

/s/ Norman K. Moon
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE