

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JACK ERVAN, III,

Defendant.

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ORDER

99-cr-106-bbc

Defendant Jack Ervan, III, has filed a motion under 18 U.S.C. § 3582, contending that he is entitled to a two-level reduction in his base offense level under the amendments relating to crack cocaine offenses. Technically, he is entitled to such a reduction; practically, it makes no sense.

On August 31, 200, defendant was sentenced to 20 years in prison. His guideline range of imprisonment was 360 months to life. (His base offense level was 38; he was given a two-level adjustment for possession of a firearm, plus another two levels for using a juvenile to commit the offense and no downward adjustment for acceptance of responsibility.) The guideline sentence was constrained by the statutory maximum sentence of 20 years to which he was subject. If I were to give him a two-level reduction in his guidelines, it would reduce

his total offense level to 40, which with his criminal history category of I would produce a range of 292-365 months, but that is still higher than the 240-month sentence he is serving.

The author of the motion defendant filed argued that if defendant's base offense level were reduced by two, he would qualify for a sentence between 188-235 months. This would be true only if defendant did not have two enhancements for possession of a gun and use of a child to commit a crime. With those two enhancements, his adjusted offense level is 40, which as I have noted, dictates a range of 292-365 months for someone in criminal history category I.

Not willing to concede his point, defendant argues that the court is free not only to reduce his sentence under § 3582 but to determine an appropriate sentence under 18 U.S.C. § 3553(a). To the contrary, sentencing courts are not free to reconsider a defendant's entire sentence when applying the new crack cocaine guidelines. The Sentencing Commission has said that § 3582 reductions are to be limited in scope and are not intended to allow sentencing judges to re-open sentencing. Although the courts have not ruled definitively on the sentencing court's authority in this regard and defendant's position may turn out to be correct, I am not inclined to reduce his sentence any further than it was reduced by the operation of the statutory maximum to which he was subject. Defendant was the beneficiary of the change in the law that followed the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Without that change, his sentence could have been life.

Defendant says that he has put his prison time to good use, which is commendable. His efforts should stand him in good stead when he is released.

ORDER

IT IS ORDERED that the motion for resentencing under 18 U.S.C. § 3582 filed by defendant Jack Ervan, III, is DENIED because his sentence, as imposed, was lower than his sentence would be if it were reduced under § 3582.

Entered this 6th day of August, 2008.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge