IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

02-cr-27-bbc

v.

ERNEST BROOKS III,

Defendant.

- -

Defendant Ernest Brooks has moved for reconsideration of the November 28, 2012 order denying his third motion for a reduction in his sentence. He is proceeding under 18 U.S.C. § 3582, which allows a court to modify a sentence after it has been imposed when the sentence was based upon "a sentencing range that has since been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(*o*)." His third motion was directed to the most recent changes in the guidelines made to comply with the Fair Sentencing Act of 2010, Pub. L. 111-210.

Defendant filed his first motion in 2008, seeking a reduction under the 2008 guidelines amendments for crack cocaine offenses; that motion was denied in an order entered on February 17, 2009, dkt. #249, on the ground that the change in the guidelines did not change his guideline range. The range remained 360 months to life.

Defendant filed a second motion on October 16, 2009, dkt. #253, seeking

reconsideration of the order denying his first motion. That motion was denied; the order could not be reconsidered because it had been upheld by the court of appeals. Dkt. #254. On November 19, 2012, he filed a third motion under the second round of amendments for crack cocaine offenses, Amendments 748 and 750. Dkt. #255. This motion was denied for the same reason as his first motion: the changes in the guidelines did not affect the guidelines that applied to defendant. His guidelines are still 360 months to life.

In his new motion for reconsideration, dkt. #259, defendant argues a revised theory that he did not develop in his previous motion for reduction of his sentence. He contends that a closer look at the drug amounts for which he was held responsible at his sentencing shows that his guidelines should be revised downward. He bases his argument on what appears to be a page from a transcript of the sentencing in this court. Dkt. #259-1. (The origin of this page of transcript is obscure; the docket sheet does not show that a sentencing transcript was ever filed with the court.) The excerpt from the purported transcript shows the court as saying

> All of your [defendant's] relevant conduct is embodied in Count 1 of the Superceding [sic] Indictment to which you pleaded guilty. You're responsible for conspiring with others to distribute in excess of five kilograms of cocaine, over 30 grams of cocaine base, approximately 24 pounds of marijuana and 2.8 grams of heroin. Your relevant conduct approximates 237.13 [sic] kilograms of marijuana equivalent. According to 2D1.1(c)(1), an offense involving in excess of 30,000 kilograms of marijuana has a base offense level of 38.

In addition to his motion for reconsideration, dkt. #259, defendant is moving under Fed. R. Crim. P. 36 for correction of the record to reflect what he says is the drug amount that should be attributable to him. That motion will be denied. Not only do I have some

question about what was actually said at sentencing, but Rule 36 is intended for errors made by the clerk in recording information, not for errors made by the court in an oral ruling from the bench. United States v. Daddino, 5 F.3d 262, 264 (7th Cir. 1993) (errors made by court in oral order not subject to Rule 36).

At the outset I note that defendant did not file his motion for reconsideration within the 14 days allowed under Fed. R. App. 4(a) for filing an appeal from the denial of motion. United States v. Redd, 630 F.3d 649, 650 (7th Cir. 2011) (citing United States v. Healy, 376 U.S. 75, 77-78 (1964)). However, defendant is a prisoner without direct access to the mail and is therefore entitled to extra time under the "mailbox rule." Houston v. Lack, 487 U.S. 266 (1988). This rule takes into account the possibility of a delay between the time the prisoner deposits his motion for mailing into the prison mail system and the time it enters the United States mails. The order that defendant is contesting was entered on November 28, 2012; defendant's motion for reconsideration arrived at the court 15 days later. The likelihood is that it is timely under the mailbox rule so I will consider it.

Defendant's argument is that the court is bound by its oral statement of the drug amounts, even if the presentence report showed more precise amounts, as it did in his case. (The report held defendant responsible for 28.4 kilograms of powder cocaine, 11.85 kilograms of crack cocaine, 28.4 kilograms of powder cocaine and 2.8 grams of heroin, for a total amount of 237,013 kilograms of marijuana equivalent). This smaller amount announced by the court governs, he argues, and the court must grant his motion for a reduction of his sentence.

The general rule in this circuit is that the oral statement of the sentence prevails over the written statement, unless the oral statement is ambiguous. United States v. Bonnano, 146 F.3d 502, 511 (7th Cir. 1998) (when oral and later written sentences are discrepant, "the sentence pronounced from the bench controls," but "when an orally pronounced sentence is ambiguous the judgment and commitment order is evidence which may be used to determine the intended sentence") (internal citations omitted). This requirement is grounded in the defendant's constitutional right to be physically present when sentenced. United States v. Cephus, 684 F.3d 703, 709-10 (7th Cir. 2012) (rule giving precedence to oral pronouncement of sentence on theory that defendant has right to be present at sentencing is well settled); United States v. Agostino, 132 F.3d 1183, 1200 (7th Cir. 1997). It applies to all aspects of the sentence, including restitution obligations, consecutive versus concurrent terms and post confinement drug testing. United States v. Eskridge, 445 F.3d 930, 934 (7th Cir. 2006) (concurrent terms of supervised release); Bonanno, 146 F.3d at 511 (drug testing); United States v. Boula, 997 F.2d 263, 269 (7th Cir. 1993) (restitution obligations).

In this case, however, defendant is not challenging the pronouncement of the sentence but a fact supporting the sentence. The "237.13 kilogram" quantity was either a misstatement by the court or an error in transcription. The words that follow make it plain that the amount attributable to defendant exceeded 30,000 kilograms of marijuana. The written judgment and commitment order shows in two different places that the amount at issue was at least 237,000 kilograms of marijuana equivalent.

If the rule giving priority to the spoken words of a sentence rests on the defendant's right to know his sentence when he leaves the courtroom, it would not apply to matters set out in the presentence report, which defendant has had a chance to read and discuss with his counsel well before sentencing. Defendant knew the drug amount attributed to him by the probation office before he came into court. If he believed that the court had erred in stating the amount, he or his counsel could have objected before the sentence was announced. In this situation, there is no good reason to treat the misstatement in the same way as a misstatement of the specific terms of the sentence.

Even if the same rule of the oral statement having precedence over the written statement applied to facts used to support a particular sentence, defendant could not prevail. Because the 237.13 figure is definitely ambiguous—237.13 kilograms is not greater than 30,000 kilograms—it is appropriate to look at the written statement. Bonnano, 146 F.3d at 511. Doing so dispels any ambiguity about whether the figure is more than 237,000 kilograms or the lesser amount of 237.13 kilograms. The written statement of reasons attached to the judgment and commitment order contains the figure 237,013 in one place and the 237,000 figure in a second place; it does not contain the 237.13 figure in any place.

Amendment 748 amended the guidelines to provide lower sentences for drug offenders in many categories. It did nothing for persons in defendant's situation. This was not an oversight. As explained in Amendment 750,

> not all crack offenders sentenced after November 1, 2011 will receive a lower sentence as a result of the change to the Drug Quantity Table . . . the amendment does not lower the base offense levels, and therefore does not lower the sentences, for [certain] offenses . . . .

U.S.S.G. Guidelines Manual, App. C, Vol. III, at 394. One of the offense levels that is not changed is the one that applies to offenders responsible for marijuana equivalent of 30,000 kilograms or more, which is the one in which defendant falls. Accordingly, defendant is not eligible for a reduction in his sentence; his base offense level remains as it was at the time of his sentencing.

Defendant has argued that the court may take into account his efforts at rehabilitation when resentencing him. Defendant will not be resentenced, so that point is moot. In any event, the cases he cites are ones in which the persons being resentenced were before the court after remand following a direct appeal. The Supreme Court held in Dillon v. United States, 130 S. Ct. 2683 (2010), that a person eligible for a sentence reduction under § 3582(c) is not entitled to reconsideration of any other part of his sentence. The Court relied on the text of § 3582(c)(2), which it read as showing that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not to require the sentencing court to hold a full resentencing hearing.

ORDER

IT IS ORDERED that defendant Ernest Brooks III's motion for reconsideration of the November 28, 2012 order denying a reduction of his sentence under 18 U.S.C. § 3582 is DENIED. FURTHER, IT IS ORDERED that his motion to correct the record under Fed.

R. Crim. P. 36 is DENIED as well.

Entered this 10th day of January, 2013.

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