

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL D. STARK,

Defendant.

ORDER

09-cr-114-bbc

Michael D. Stark has moved for a modification of his sentence under 18 U.S.C. § 3582, as well as reconsideration of the denial of his request for a three-level reduction in his sentence for his acceptance of responsibility, dkt. #73. Both motions will be denied. Defendant does not qualify for a two-level reduction in his sentence under the recent guideline amendment and this court cannot hear his request for a sentencing reduction based on an alleged error at the time of his sentencing, because this is a claim that can be brought only in a post conviction motion, not in a motion under § 3582.

When defendant was sentenced, he had a total offense level of 36 and a criminal history category of III. His guidelines range was 235-293 months. However, he received a variance, which resulted in a sentence of only 168 months. Under the new amendment, his sentencing range can be reduced only two levels, which would drop his range to 188-235 months, well above his present sentence. Because his sentence involved a variance and was

not based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), defendant's motion for a modification of his sentence must be denied.

As for defendant's request for a reconsideration of his request for a reduction of his sentence to recognize his acceptance of responsibility, this court has no authority to hear that request. Defendant raised that issue in his direct appeal of his sentence and he raised it again in the post conviction motion he filed on November 14, 2011, which was denied by this court in an order entered on January 4, 2012. The court of appeals declined to hear the case, finding that defendant had not shown the denial of a constitutional right.

A defendant cannot bring a second motion for post conviction relief in the district court unless he obtains permission to do so from the court of appeals. 28 U.S.C. § 2255(h). Defendant has not shown that he has such permission, which means that this court cannot hear the claim that he was improperly denied a reduction in his sentence for his failure to accept responsibility for his criminal conduct.

ORDER

IT IS ORDERED that defendant Michael D. Stark's motion for a reduction in his sentence under 18 U.S. C. § 3852(c)(2), dkt. #73, is DENIED and his motion for reconsideration of his claim for a three-level downward adjustment in his sentence for

acceptance of responsibility is DENIED as outside the authority of this court to adjudicate.

Entered this 26th day of October, 2015.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge