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

UNITED STATES OF AMERICA,

ORDER

Plaintiff,

12-cr-41-wmc

v.

12-cr-136-wmc-1

GIOVANNI COLLAZO-SANTIAGO,

Defendant.

On February 9, 2015, the court granted a joint motion by Assistant United States Attorney Laura Przybylinski Finn and Associate Federal Public Defender Kelly A. Welsh to reduce the term of imprisonment imposed on the defendant, Giovanni Collazo-Santiago, in Case No. 12-cr-136-wmc-1. The order was entered pursuant to 18 U.S.C. § 3582(c)(2) as the result of 2014 amendments to the guidelines. Unfortunately, that order also violated the requirement of USSG § 3D1.1(a) for determining a combined offense level when a defendant has been convicted of more than one count, which includes separate indictments for which sentences are imposed at the same time or in a consolidated proceeding, as occurred in Case Nos. 12-cr-136 and 12-cr-41-wmc-1. *See* §3D1.1, Application Note 1. The reduced calculation ignored the fact that both cases resulted in one combined offense level under the rules set forth in § 3D1.4 for determining a total punishment in accordance with Chapter 5 of the advisory guidelines. Therefore, the 2014 amendments to the guidelines affected both cases and warranted reductions as contemplated at § 1B1.10(a)(1).

In recognition of this error, attorneys Przybylinski Finn and Welsh filed a joint motion on March 6, 2015, to vacate the court's earlier order in Case No. 12-cr-136 and enter orders reducing the sentences in both of the defendant's federal cases. (Dkt. ## 41:49; 136:21.) The court granted that motion on March 11, 2015. (Dkt. ## 41:50; 136:22.)

On March 30, 2015, the defendant filed a *pro se* motion to reinstate the February 9th order, apparently based on the erroneous understanding that it had applied to both of his federal sentences. The defendant's motion must be denied for the reasons set forth below.

BACKGROUND

The defendant was convicted on one count in Case No. 12-cr-136 for possession with intent to distribute cocaine and one count in Case No. 12-cr-41 for being a felon in possession of a firearm. At the time of the defendant's initial sentencing hearing for both cases on January 4, 2013, application of the provisions at USSG § 3D resulted in a *combined* offense level of 28. *See* § 3D1.4. With a criminal history category of II, his advisory guideline range of imprisonment was 87 to 108 months and the defendant received a sentence of 90 months in both cases, with the sentences to run concurrently.

Although the Cross Reference at § 2K2.1(c)(1)(A) applied to the felon in possession count in Case No. 12-cr-41, the adjusted offense level remained higher under § 2K2.1. As a result, § 2K2.1(c)(1)(A) directs that the cross reference is only to be applied if the resulting offense level is greater. Therefore, the offense level as determined under § 2K2.1 determined the adjusted offense level.

Those guidelines have not changed under the current edition of the guidelines manual. The base offense level remains 20 under § 2K2.1(a)(4), because the defendant committed the offense after sustaining a felony conviction for possession with intent to distribute psilocin. Pursuant to § 2K2.1(b)(4), a two-level increase applies because the FEG .45 pistol had previously been reported stolen. A four-level increase applies pursuant to § 2K2.1(b)(6), because the firearm was used to shoot at, or dangerously near, another human being during a car chase. Therefore, the adjusted offense level in Case No. 12-cr-41 is 26.

As to Case No. 12-cr-136, the guideline for possession with intent to distribute cocaine is found at § 2D1.1. At the time of sentencing, the court found the defendant to be responsible for a total of 8.981 kilograms of marijuana and 1.982 kilograms of cocaine. The combined substances are equivalent to 405 kilograms of marijuana. Previously, pursuant to § 2D1.1(c)(6), the base offense level was 28. Under the current guidelines manual, the base offense level is 26 pursuant to § 2D1.1(c)(7). A two level increase applies pursuant to § 2D1.1(b)(12), because the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance. Under the current manual, therefore, the adjusted offense level is 28.

As found at the time of the defendant's initial sentencing, the multiple count adjustment under § 3D1.4 produces a combined offense level. The combined offense level is determined by assigning one unit to the offense with the highest offense level (Case No. 12-cr-136) and assigning one unit to the additional offense that is equal to or from one to four levels less serious (Case No. 12-cr-41). The two units (one assigned to each case) result in a

two-level increase to the offense with the highest offense level (Case No. 12-cr-136) to provide a combined adjusted offense level of 30 under the current guidelines manual before the adjustment for acceptance of responsibility. With a three-level downward adjustment under § 3E1.1(a) and (b) for acceptance of responsibility, the defendant's amended offense level is 27 as stipulated by the government and defense counsel and reflected in the orders dated March 11, 2015, in Case Nos. 12-cr-41 and 12-cr-136.

A total offense level of 27 and a criminal history category II results in an advisory guideline imprisonment range of 78 to 97 months. Since there is no statutory authority under 18 U.S.C. § 3582(c)(2) to impose a sentence below the applicable guideline imprisonment range, the lowest sentence available to the defendant is the 78 months stipulated to by counsel.

OPINION

As an initial matter, the defendant is simply mistaken in his belief that the February 9th order applied to his sentence in Case No. 12-cr-41. While the order provided that the sentence was to run concurrently with the sentence imposed in 12-cr-41, the order only reduced the term of imprisonment in Case No. 12-cr-136. Therefore, the 98-month term of imprisonment that was imposed in Case No. 12-cr-41 on January 4, 2013, remained in effect after the February 9th order. Defendant's confusion is understandable given the "Sentence Monitoring Good Time Data" that he was apparently provided by the Bureau of Prisons and attaches to his pending motion, states quite erroneously that the court had reduced his sentence in Case No. 12-cr-41-wmc, However, that document has no legal force.

In contrast, the orders entered by the court on March 11, 2015, in Case Nos. 12-cr-136 and 12-cr-41, properly reduce the sentences in *both* cases, resulting in the court's February 9th order being vacated. In accordance with USSG § 1B1.10(a)(3), a reduction under 18 U.S.C. § 3582(c)(2) is not a full resentencing. Subsection (b)(2) at § 1B1.10 limits the extent of the reduction to within the amended guideline range, except under limited circumstances which are not present in the defendant's cases.

As a result, this court had, and has, no legal authority to reduce the defendant's sentence in either case below the concurrent sentences of 78 months entered on March 11, 2015. Accordingly, the defendant's motion to reinstate the court's February 9, 2015, order is DENIED.

Entered this 14th day of May, 2015.

BY THE COURT:

/s/

Honorable William M. Conley
U.S. District Judge