

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

LARRY McGEE,

Defendant.

ORDER

05-cr-136-bbc

Defendant Larry McGee has moved under 18 U.S.C. § 3582(c)(2) for modification of his sentence, seeking a reduction based on the opinion in United States v. Wren, 706 F.3d 861 (7th Cir. 2013), which interpreted the 2011 amendments to the crack cocaine sentencing guidelines. His motion must be denied because it is an impermissible successive petition.

Defendant was convicted in 2006 of possessing more than five grams of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and sentenced to a term of 200 months. He met the criteria for a career offender but his sentence was determined by the quantity of crack cocaine for which he was found responsible (902.7 grams).

Defendant's sentence was amended to 160 months in May 2007 on the government's Fed. R. Crim. P. 35(b) motion and reduced again in December 2008 to 132 months on defendant's motion, dkt. #47, because of changes in the guidelines applying to crack cocaine

offenses. His offense level was reduced to 28, five levels below his offense level as a career offender. On October 30, 2009, defendant asked for another reduction, dkt. #53; that request was denied because he had received the full benefit of the 2008 changes. Dkt. #56.

On November 9, 2010, plaintiff moved for another reduction in his sentence, this time under the Fair Sentencing Act. Dkt. #59. That motion was denied because the Act had not been held to apply to sentences imposed before the Act took effect. Dkt. #60. Defendant filed more motions for a reduction under the Act in July, November and December, 7, 2011. Dkts. ##62, 63 & 64. Although by that time, the Act had been made retroactive under Amendment 750, the subsequent changes in the guidelines had no effect on defendant's sentence because the total offense level was the same for defendant's career offender status as it was for his drug quantity, that is, 28, after deducting three levels for acceptance of responsibility and three levels for substantial assistance, his sentence could not be reduced further. This was the same total offense level applicable to his drug quantity (base level for drug quantity of 902.7 grams is 34, less the same six-level reduction for acceptance of responsibility and substantial assistance). United States v. Taylor, 627 F.3d 674 (7th Cir. 2010) (relief under § 3582(c)(2) is not available when a retroactive amendment “does not have the effect of lowering the defendant's applicable guideline range.” (quoting 18 U.S.C. § 3582(c)(2)). Accordingly, I denied his motion on December 15, 2011. Dkt. #66.

Defendant appealed the December 15 order; his appeal was dismissed on March 22, 2012 for his failure to file the docketing fee. On February 28, 2013, he filed a request under

§ 3582(c)(2) for a lowered sentence in light of United States v. Wren, 706 F.3d 861 (7th Cir. 2013).

OPINION

The initial question is whether defendant can file another motion for a reduction in his sentence under 18 U.S.C. § 3582(c)(2). That question can be answered quickly. The Court of Appeals for the Seventh Circuit made it clear in United States v. Redd, 630 F.3d 649 (7th Cir. 2011), that he cannot. Just as district courts have no continuing power to revise sentences once they have been imposed, they have no power to consider repeated requests for revision of a reduced sentence, id. at 651, unless, of course, the Sentencing Commission adopts a new amendment of the guidelines lowering the sentencing ranges. In this instance, there has been no new amendment that affects defendant's sentencing range. He rests his motion upon Wren.

The decision in Wren cannot help defendant. It dealt with mandatory minimums, not with career offender guidelines. But even if it were applicable to defendant's case, he could not take advantage of it because the issuance of a new decision does not revive a prior motion or authorize this court to reconsider the reduced sentence. As explained above, defendant is barred from filing a new motion, so this case must be dismissed.

ORDER

IT IS ORDERED that defendant Larry McGee's motion for a reduction in his

sentence, dkt. #80, is DENIED.

Entered this 15th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge