IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

06-cr-56-bbc

v.

ANDRE FISHER,

Defendant.

- -

Defendant has filed yet another motion to reduce his sentence under 18 U.S.C. § 2582(c)(2). Dkt. #82. I denied an earlier motion for reduction of sentence, dkt. #68, in an order entered on July 31, 2012. Dkt. #70. He did not appeal the order but filed a "motion to correct fundamental errors," dkt. #71, and, when that motion was denied, he appealed the denial. Dkt. #73. Sometime later, he moved for dismissal of the appeal; the Court of Appeals for the Seventh Circuit granted the motion on October 31, 2012. Dkt. #79. On October 9, 2012, I certified that his appeal was not taken in good faith, dkt. #76; he appealed that finding, dkt. #77, but later moved to dismiss the appeal. The court of appeals granted that motion on February 5, 2013. Dkt. #81.

Defendant's new motion for reduction of sentence reiterates his request for a reduction in his sentence without making any reference to this court's July 2012 order denying his earlier request. For reasons explained in that order, he is not eligible for a

further reduction in his sentence. (I have attached a copy of that order to this one, in the event that defendant has misplaced the copy sent to him in July.)

ORDER

IT IS ORDERED that defendant Andre Fisher's motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) is DENIED. If he files any further motions for reduction of sentence, the clerk of court is directed not to file them but to send them to chambers for review. If they raise any issues that have not been addressed and that the court is authorized to address, they will be filed. Otherwise, they will be placed in a file and not acted upon.

Entered this 26th day of February, 2013.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDRE FISHER,

Defendant.

OPINION AND ORDER

06-cr-56-bbc

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Because of a mistake by the court and an oversight by both defendant Andre Fisher and his counsel, defendant has been denied a reduction in his sentence to which he would otherwise have been entitled. Defendant has filed a motion for relief from a final judgment pursuant to Fed. R. Civ. P. 60(b)(1), dkt. #68, but he cannot obtain relief under that rule from an order entered in a criminal case. The question is whether there is any other way to correct that mistake.

BACKGROUND

Defendant was convicted in 2006 of possession with intent to distribute five grams or more of crack cocaine. The probation office prepared a presentence report, recommending that the court find that defendant was in criminal history category V and that he was responsible for 311 grams of crack cocaine. The office noted in ¶ 12 of the report

that the amount determined by the Wisconsin State Crime Laboratory was actually 229.68 grams of crack cocaine, but did not carry this finding over into its calculation of the offense level. In ¶ 19 of the report, the probation office stated that defendant's relevant conduct involved "about 311" grams of crack cocaine.

None of the persons involved in the sentencing—the court, the probation office, the Assistant United States Attorney or defendant's counsel—noticed the discrepancy in the drug amounts reported in ¶ 12 and ¶ 19. This is not surprising, because the discrepancy had no effect on defendant's sentence at the time. Under the 2006 version of U.S.S.G. § 2D1.1(c)(3), offenses involving 150 to 500 grams of crack cocaine had a base offense level of 34, so the same base offense applied whether the amounts were 311 grams or 229.68. On July 20, 2006, defendant was sentenced to a term of 210 months, which was at the bottom of his guideline range of 210-262 months, based on offense level 33 (base offense level of 34, plus two levels for possessing a firearm in connection with the offense, less three levels for acceptance of responsibility), and criminal history category V. Defendant took an appeal of the sentence, dkt. #21, but did not challenge the amount of crack cocaine attributed to him. After that appeal was denied in an order entered on April 25, 2007, defendant petitioned the Supreme Court for a writ of certiorari. The petition was granted on January 7, 2008, and defendant's case was remanded to the Court of Appeals for the Seventh Circuit for further consideration in light of Kimbrough v. United States, 128 S. Ct. 558 (2007).

On February 21, 2008, defendant filed a motion under 18 U.S.C. § 3582, asking for a reduction in his sentence in light of a recent amendment to the sentencing guidelines

(Amendment 706) that became effective on November 1, 2007. Dkt. #32. On June 16, 2008, the court of appeals remanded the case to this court for reconsideration in light of Kimbrough. Dkt. #33. At a new sentencing hearing held on October 28, 2008, I reduced defendant's sentence to 150 months, which was 18 months below the bottom of the guideline range of 168-210 months for an offense level of 31 and a criminal history category of V. I found it appropriate to give defendant a variance to reflect the fact that a discrepancy still existed between the sentences for crack and powder cocaine. The court of appeals denied defendant's appeal of the new sentence. Dkt. #50-1.

After the resentencing, I denied defendant's § 3582 motion as moot, dkt. #40, because the resentencing proceeding had achieved the same result. In fact, it was a better result. Had I been sentencing under § 3582, I would have been constrained to keep the reduced sentence within the guideline range of 168-210 months.

About a year and a half later, in the fall of 2010, the Sentencing Commission promulgated Amendment 748 in response to the Fair Sentencing Act of 2010, Pub. L. 111-220, further reducing the crack cocaine guidelines. On November 17, 2011, defendant moved for another reduction in his sentence under 18 U.S.C. § 3582, citing the new guidelines range applicable to his offense that were promulgated in connection with the Fair Sentencing Act. Dkt. #51. The United States Attorney filed a response to defendant's motion, Position of the United States Regarding Resentencing, dkt. #52, arguing that defendant was not eligible for a reduction because he had been sentenced for possessing 311 grams of crack cocaine and the Sentencing Commission had not reduced the guidelines for

possession of amounts greater than 280 grams. Relying on the facts that 311 grams is the amount shown in the offense level calculation in the presentence report and the amount accepted as accurate by all those involved in the original sentencing in 2006, I denied defendant's § 3582 motion on December 30, 2011, on the ground that his base offense level would not change under the new guidelines. Order, dkt. #53. I did not take into account the 229.68 grams shown in ¶ 19 of the presentence report. Using that amount to calculate defendant's sentence would have reduced his adjusted offense level to 29 because it was less than 280 grams. The base offense level would have been 30; with the addition of two levels for possession of a firearm and the subtraction of three levels for acceptance of responsibility, and the criminal history category of V, the guideline range would have been 140-175 months.

On January 17, 2012, defendant filed a notice of appeal of the December 30, 2011 order denying his motion. Dkt. #54. The court of appeals entered an order giving defendant an opportunity to explain why his appeal should not be dismissed as untimely because it was not filed within 14 days of this court's order. Defendant responded to the court of appeals' order but on June 6, 2012, he moved to withdraw his appeal. The court granted his motion the same day. Order, dkt. #67.

On May 29, 2012, defendant filed a motion under Fed. R. Civ. P. 60(b)(1), requesting relief from a final judgment (the December 30, 2011 order of this court). Dkt. #64. (On June 4, 2012, he filed the same motion again; the second one can be ignored.) For the first time, he identified the discrepancy in the crack cocaine quantities shown in the

presentence report and argued that he was entitled to relief because the court relied mistakenly on his having been held accountable for a drug amount of more than 300 grams. Unfortunately, he is right about the mistake but wrong about his entitlement to relief, for a number of reasons.

First, defendant's time for filing a motion to reconsider the December 30, 2011 order expired on January 12, 2012. A defendant filing a motion for reconsideration of the denial of a § 3582 motion must file such a motion within the time allowed for filing an appeal of the denial of motion, which is 14 days. United States v. Redd, 630 F.3d 649, 650 (7th Cir. 2011). A § 3582 motion is a motion brought in a criminal case, so it is governed by the rules applicable to criminal cases, not the rules of civil procedure. Id.

Second, defendant took an appeal from the order but failed to complete it and asked to have it withdrawn, so he cannot take another appeal. Third, I am not aware of any other route that defendant could take to obtain relief. Had he recognized the error sooner, he might have filed a motion for post conviction relief under 28 U.S.C. § 2255, but he did not. It is not clear whether his time for doing so expired one year after the Supreme Court ruled on his petition (January 7, 2008) or one year and 90 days after the Court of Appeals for the Seventh Circuit denied his appeal from the sentence imposed on him upon remand (February 12, 2009). In either event, he waited too long. And it might have been useless for him to have filed such a motion because he never objected to the drug amount at the time of sentencing and he did not raise the issue on appeal. In those circumstances, it is probable that he would have been barred from raising the issue in a post conviction motion.

Prewitt v. United States, 83 F.3d 932, 935 (7th Cir. 1996) ("An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for the failure to raise the claims on direct appeal and actual prejudice from the failure to raise those claims, or if a refusal to consider the issue would lead to a fundamental miscarriage of justice.")

28 U.S.C. § 2255(f)(4) gives a defendant a year from the date on which new information "supporting the claim could have been discovered through the exercise of due diligence," but this provision does not help defendant. He has no new information that was not available to him earlier. The discrepancy appeared in the presentence report filed before his original sentencing and both he and his counsel told the court at sentencing that they had read the report.

It is unfortunate that no one focused on the difference in the drug amounts at the time of defendant's original sentencing, when the problem could have been addressed. It is probably of little consolation to defendant to know that the sentence imposed on him after his case was remanded from the court of appeals in 2008 (150 months) was near the bottom of the guidelines to which he is now subject (140 to 175 months).

ORDER

IT IS ORDERED that defendant Andre Fisher's motion, dkt. #68, for relief from a final judgment under Fed. R. Civ. P. 60(b)(1) is DENIED.

Entered this 31st day of July, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge