

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

-----  
UNITED STATES OF AMERICA,

Plaintiff,

v.

IVAN FLYNN,

Defendant.

-----

ORDER

07-cr-8-jcs

Defendant Ivan Flynn has filed a motion pursuant to 18 U.S.C. § 3582, seeking a reduction of the amended sentence imposed upon him on June 1, 2007. During Judge Shabaz's medical leave, I am handling the cases assigned to him, including this one.

In addition to his § 3582 motion, defendant has an appeal pending before the Court of Appeals for the Seventh Circuit. Therefore, the first question to be decided is whether this court has authority to correct defendant's sentence while the court of appeals is considering his challenge to that sentence. The general rule is that once the notice of appeal is filed, the district court should not take any further action. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) ("[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a

notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”). However, the general rule has exceptions. A district court may take ministerial acts, such as entering final judgment or resolving the question of attorney fees and dealing with other matters that will not intrude on the court of appeals’ work. Wisconsin Mutual Insurance Co. v. United States, 441 F.3d 502, 504-05 (7th Cir. 2006).

From my review of defendant’s case, I see no reason why acting on his § 3582 motion will affect his appeal or interfere with the court of appeals’ consideration of that appeal. Therefore, I will take up his motion.

Defendant’s original total adjusted offense level was 29; he was sentenced to 96 months, which was slightly below the midpoint of the sentencing guideline range of 87 to 108 months. Under the amended guidelines, his base offense level is 30, reduced by three levels for acceptance of responsibility. With an offense level of 27 and a criminal history category of I, defendant has an advisory guideline range of 70-87 months.

Defendant asks for a sentence of 70 months, at the bottom of the amended sentencing range. The government argues for a proportional decrease to slightly below the midpoint of the amended range, or 77 months.

I am persuaded that in this case a reduction to the bottom of the range is justified as a response to the sentencing discrepancy between crack and powder cocaine offenses. Such

a reduction will also take into account defendant's youth, mental problems and learning disabilities. These would not be reasons to depart from the range but they do argue in favor of a lower sentence within the range.

Defendant has not asked for a sentence below the guideline range and I am not inclined to give him one under whatever authority I have under Kimbrough v. United States, 128 S. Ct. 558 (2007). The reduced sentence will still carry out the statutory purposes of sentencing, which include reflecting the severity of defendant's crime, protecting the community, achieving parity with the sentences of similarly situated defendants and giving defendant an opportunity to participate in educational programs and drug treatment.

#### ORDER

IT IS ORDERED that defendant Ivan Flynn's motion for modification of his sentence is GRANTED. FURTHER, IT IS ORDERED that the amended judgment and commitment order entered on June 1, 2007 is AMENDED to provide that the sentence imposed on defendant is reduced to 70 months. In all other respects, the judgment and commitment

order remains as entered on June 1, 2007.

Entered this 5th day of May, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge