

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

UNITED STATES OF AMERICA,

ORDER

Plaintiff,

v.

08-cr-53-bbc

WALTER L. McCOY,

Defendant.

On January 31, 2012, defendant Walter McCoy filed a motion under 18 U.S.C. § 3582, seeking a modification of the sentence imposed upon him on November 26, 2008. He contended that because he was sentenced for possession with intent to distribute cocaine base (crack cocaine) and the guidelines for crimes involving distribution of crack cocaine have been lowered and given retroactive effect, he was entitled to a reduction in his sentence. His motion was denied on February 23, 2012, because defendant had been determined to be a career offender at sentencing and therefore the amendment to the guidelines did not apply to him.

Now defendant has filed a document entitled “Motion to Correct a Wrongfully Noted

U.S.S.G. Assessment and Judgment.” Technically, defendant’s motion is an untimely motion for reconsideration of the February 23, 2012 order denying his § 3582 motion. Defendants filing motions for reconsideration of the denial of a motion under § 3582 must file within the time allowed under Fed. R. Crim. P. 35(a) for filing an appeal for denial of motion, that is, within 14 days. United States v. Redd, 630 F.3d 649, 650 (2011) (time for adjusting sentence is limited; prisoner is not entitled to more than one opportunity to request lower sentence for any given change in guidelines range). Motions filed after the 14-day deadline are treated as new motions for a lower sentence under § 3582(c)(2) because nothing in the text of § 3582(c) or the language of the applicable amendment, Amendment 712, “suggests that prisoners are given more than one opportunity to request a lower sentence for any given change in the Guideline range.” Redd, 630 F. 3d at 651.

Even if defendant’s motion were timely, it would have to be denied on the merits. In his motion defendant provides excerpts from his sentencing transcript which demonstrate that I granted him a one level downward variance under 4A1.3(b)(1), because I determined that a Criminal History Category of VI substantially overrepresented his criminal history.

Defendant seems to think that the grant of the variance means that he is no longer considered to be a career offender and is eligible for reduction in his sentence under § 3582, but he is mistaken. A “variance” is a discretionary modification of the otherwise applicable guidelines sentence. It does not change the initial calculation of the guidelines or the

determination of career offender status. Despite the variance defendant received at sentencing, he was still considered to be a career offender, which is why the amendment does not apply to him.

ORDER

IT IS ORDERED that defendant Walter McCoy's motion "To Correct a Wrongly Noted U.S.S.G. Assessment and Judgment" is DENIED.

Entered this 11th day of September, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge