

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DEWARD JOHNSON,

Defendant.

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OPINION AND ORDER

11-cr-125-bbc

Defendant Deward Johnson has moved for a reduction in his sentence under the 2014 amendments to the drug sentencing guidelines. The motion must be denied because is not eligible for a reduction.

Defendant was charged in 2011 for conspiracy to distribute 500 or more grams of cocaine. At sentencing, he was held accountable for 840 grams to 2.8 kilograms of cocaine base and was found to be a career offender under U.S.S.G. § 4B1.1. because he had two prior convictions for controlled substance offenses. Ordinarily, as a career offender, he would have had a base offense level of 37, which would have been reduced to 34, after deducting three levels for acceptance of responsibility, and a criminal history category of VI, giving him a guideline range of 262-327 months. However, the amount of drugs for which he was held responsible placed him in a higher offense level under Chapters Two and Three of the guidelines. (Under the guidelines, when an offender qualifies for two different offense levels,

the higher one governs. § 4B1.1(b).) As a result of his drug distribution, defendant's offense level was 34; four levels were added to the base offense level because he was the organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, § 3B1.1; and three levels were deducted because he had accepted responsibility. § 3E1.1. His total offense level was § 4B1.1(b), his criminal history category was VI and his guideline sentencing range was 292-365 months.

At sentencing, I granted defendant a variance under Kimbrough v. United States, 552 U.S. 85 (2007), and Spears v. United States, 555 U.S. 261 (2009), to lessen the sentencing differences between defendant, who was dealing cocaine base, and other defendants who had been dealing powder cocaine. Dkt. #75. This meant that defendant's sentence was reduced to what it would have been had the offense level from the career offender table been applied. I gave defendant another variance under United States v. Corner, 598 F.3d 411 (7th Cir. 2010), which allows sentencing courts to vary from the guidelines for career offenders convicted of distribution of crack cocaine. The resulting sentence was 240 months, which was 52 months less than a sentence at the bottom of the guidelines had defendant been sentenced for drug quantity, and 20 months lower than the bottom of the guidelines had his sentence been based on the career offender guideline in the offense level table. (A year after his sentencing, defendant's sentence was reduced again, this time to 180 months, after the government moved for a reduction based on defendant's substantial assistance.)

Although the second variance reduced defendant's sentence below the guidelines for career offender, he remains a career offender, albeit one with a lower sentence. U.S.S.G. §

4B1.1. As a general rule, “the only applicable guideline range [the court need consider] is the range established before a district court decides to depart or vary downward.” United States v. Guyton, 636 F.3d 316, 320 (7th Cir. 2011). This statement is correct insofar as it relates to conduct-based offense levels but not as to situations in which a defendant’s conduct-based offense level exceeds that of his career offender status. A defendant who is found to be a career offender but sentenced above the career offender range because of his conduct-based offense remains a career offender even if the court gives him variances that take his sentence down to his career offender level or below it. United States v. Stevenson, 749 F.3d 667, 669 (7th Cir. 2014) (“sentencing court’s determination that Stevenson was a career offender was a ‘guidelines decision’ and remains in place despite the subsequent changes to the crack cocaine guidelines”) (citing United States v. Waters, 648 F.3d 1114, 1117 (9th Cir. 2011) (under U.S.S.G. § 1B1.10(b), reduction in defendant’s term of imprisonment is not authorized under § 3582(c)(2) “if . . . an amendment . . . is applicable to the defendant *but the amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline* or statutory provision”)).

The drug sentencing reductions set out in Amendment 782 do not have the effect of lowering defendant’s applicable guideline range because he has been found to be a career offender. Therefore, he is not entitled to any relief under § 3582(c)(2). United States v. Taylor, 778 F.3d 667, 672 (7th Cir. 2015) (“Relief [under § 3582(c)(2)] is not available if a retroactive amendment ‘does not have the effect of lowering the defendant’s applicable guideline range.’ U.S.S.G. § 1B1.10(a)(2)(B).”)

ORDER

IT IS ORDERED that defendant Deward Johnson's motion for resentencing under 18 U.S.C. § 3582(c)(2) is DENIED.

Entered this 1st day of October, 2015.

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