

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-11129
Non-Argument Calendar

D.C. Docket No. 7:05-cr-00020-HL-RLH-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL MITCHELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(August 30, 2013)

Before TJOFLAT, PRYOR, and JORDAN, Circuit Judges.

PER CURIAM:

Daniel Mitchell appeals the district court's denial of his motion for a reduction of sentence, filed pursuant to 18 U.S.C. § 3582(c)(2). After review of the record and the parties' briefs, we affirm.

On March 14, 2006, Mr. Mitchell pled guilty to distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). The pre-sentence investigation report indicated that Mr. Mitchell's total offense level was 24 based upon the quantity of cocaine base (8.3 grams) as well an adjustment for being a minor participant.¹ Mr. Mitchell, however, qualified as a career offender under U.S.S.G. § 4B1.1, which subjected him to an enhanced total offense level of 31 and a sentencing guideline range of 188 to 235 months' imprisonment. The district court found Mr. Mitchell was a career offender, but sentenced him to 120 months' imprisonment after granting the government's motion for a downward departure under U.S.S.G. § 5K1.1.

On December 27, 2011, Mr. Mitchell filed a § 3582(c)(2) motion for a sentence reduction based on Amendment 750 to the Sentencing Guidelines and the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2374 (2010). The district court denied Mr. Mitchell's motion because (1) "a defendant whose original sentence was based on the Career Offender Guidelines . . . cannot receive a sentence reduction pursuant to a Guideline amendment like Amendment 750," and (2) the Fair Sentencing Act does not apply to defendants sentenced before its enactment. *See* D.E. 124 at 2-4. This appeal followed.

¹ If Mr. Mitchell had been sentenced according the offense level for his crack cocaine offense, his sentencing guideline range would have been 77-96 months' imprisonment. *See* U.S.S.G. Ch. 5, Pt. A (2004).

“In a § 3582(c)(2) proceeding, ‘we review *de novo* the district court's legal conclusions regarding the scope of its authority under the Sentencing Guidelines.’” *United States v. Moore*, 541 F.3d 1323, 1326 (11th Cir. 2008). Under § 3528(c)(2), a district court may reduce the terms of a defendant’s imprisonment if the sentence was based on a sentencing range that has subsequently been lowered by the Sentencing Commission. If, however, “a retroactively applicable guideline amendment reduces a defendant's base offense level, but does not alter the sentencing range upon which his or her sentence was based, § 3582(c)(2) does not authorize a reduction in sentence.” *Moore*, 541 F.3d at 1330.

In this case, Mr. Mitchell was not eligible for a reduced sentence because he was sentenced as a career offender under § 4B1.1. His sentencing guideline range remained unchanged because § 4B1.1 was not affected by Amendment 750. *See id.* at 1327 (holding that defendants sentenced as career offenders under § 4B1.1, even those who receive a downward departures for substantial assistance, are not entitled to sentence reductions based on an amendment to the base offense levels for crack cocaine offenses in § 2D1.1); *United States v. Lawson*, 686 F.3d 1317, 1319 (11th Cir. 2012) (holding that *Moore* remains binding precedent and applies to Amendment 750).

Mr. Mitchell urges us to reconsider this interpretation of § 3582(c)(2) because he believes that the Supreme Court’s decision in *Freeman v. United*

States, ___ U.S. ___, 131 S. Ct. 2685 (2011), has “call[ed] *Moore*’s narrow interpretation of the phrase ‘based on’ into question.” See Initial Brief at 8. We have, however, already rejected that argument in a published decision. See *Lawson*, 686 F.3d at 1321 (interpreting *Freeman* and holding that “*Moore* remains binding precedent because it has not been overruled”). And, under our prior precedent rule, we are bound to follow *Lawson* “unless and until it is overruled by this court *en banc* or by the Supreme Court.” *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003).

Mr. Mitchell’s claim for relief under the Fair Sentencing Act is similarly foreclosed by our precedent. In *United States v. Berry*, 701 F.3d 374, 377 (11th Cir. 2012), we held that the Fair Sentencing Act is not a guidelines amendment by the Sentencing Commission and, therefore, cannot be the basis for a sentence reduction under § 3582(c)(2). In addition, Mr. Mitchell was sentenced before the effective date of the FSA, and it is not retroactively applicable to him. See *id.* (“We agree with every other circuit to address the issue that there is ‘no evidence that Congress intended [the FSA] to apply to defendants who had been sentenced prior to the August 3, 2010 date of the Act’s enactment.’”) (citation omitted).

In sum, the district court correctly denied Mr. Mitchell’s § 3582(c)(2) motion.

AFFIRMED.