[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16008
Non-Argument Calendar

D.C. Docket No. 2:02-cr-00030-WCO-SSC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CRAIG CESAL,

Defendant-Appellant.

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

(April 6, 2018)

Before ROSENBAUM, JULIE CARNES, and FAY, Circuit Judges.

PER CURIAM:

Defendant Craig Cesal appeals the district court's order granting him a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782 to the Sentencing Guidelines. On appeal, Defendant argues that the district court lacked authority to resentence him under § 3582(c)(2) because he did not authorize the filing of a § 3582(c)(2) motion on his behalf. Based on the agreement of the parties that the district court's order should be vacated and because the record shows that a § 3582(c)(2) motion was filed on Defendant's behalf without his authorization, we vacate the order granting Defendant a sentence reduction and remand to the district court for further proceedings.

I. BACKGROUND

In 2003, a jury convicted Defendant of conspiracy to possess with intent to distribute marijuana. Applying the 2001 Sentencing Guidelines, the Presentence Investigation Report (PSR) assigned Defendant a base offense level of 34 under U.S.S.G. § 2D1.1(c)(3) because he was responsible for at least 3,000 but less than 10,000 kilograms of marijuana. Defendant also received several enhancements, resulting in an adjusted offense level of 44. Based on a total offense level of 44 and a criminal history category of I, Defendant's guideline range was life imprisonment.

At sentencing, the district court determined that the base offense level was 36, based on at least 10,000 but less than 30,000 kilograms of marijuana. The

court also declined to apply an enhancement not relevant to this appeal, which resulted in a total offense level of 44 and yielded a guideline range of life imprisonment. The court sentenced Defendant to life imprisonment. The Supreme Court later granted *certiorari* and vacated the decision in light of *Booker v. United States*, 543 U.S. 220 (2005). *See Cesal v. United States*, 545 U.S. 1101 (2005). On remand, we reinstated our previous opinion and affirmed Defendant's conviction and sentence.

Over a decade later, in August 2016, the Federal Defender Program, Inc. and the Government filed a joint motion informing the district court that Defendant was eligible for a sentence reduction under § 3582(c)(2) and Amendment 782. The parties explained that Amendment 782 lowered Defendant's base offense level by two levels from 36 to 34, resulting in an amended guideline range of 360 months' to life imprisonment. The parties recommended that Defendant receive a 360-month sentence. The district court subsequently granted the motion and reduced Defendant's sentence to 360 months.

Shortly thereafter, Defendant sent a letter informing the district court that he did not authorize the joint motion for a reduction of sentence that was filed on his behalf and that he had been representing himself *pro se* since 2005. The court issued an order, in which it memorialized a conversation it had with the Federal Defender and the Government, in which the Federal Defender represented that she

believed, in error, that she had received Defendant's consent to file the motion for reduction of sentence. The district court indicated that it would not take any further action without Defendant's consent and noted that Defendant had not asked the court to set aside the order reducing his sentence. Defendant did not move to set aside the district court's order and instead filed this appeal.[1]

II. DISCUSSION

We review *de novo* the district court's conclusions regarding the scope of its legal authority under 18 U.S.C. § 3582(c)(2). *United States v. Jones*, 548 F.3d 1366, 1368 (11th Cir. 2008). Under § 3582(c)(2), a district court may modify a term of imprisonment when the original sentencing range has subsequently been lowered as a result of an amendment to the Guidelines by the Sentencing Commission. 18 U.S.C. § 3582(c)(2). To be eligible for a sentence reduction under § 3582(c)(2), a defendant must identify an amendment to the Sentencing Guidelines that is listed in U.S.S.G. § 1B1.10(d). U.S.S.G. § 1B1.10(a)(1).

Here, the district court issued an order reducing Defendant's sentence to 360 months' imprisonment based on Amendment 782, an amendment that reduced the base offense levels under U.S.S.G. § 2D1.1 by two levels for most drug offenses.

[1] In the meantime, apparently believing that the present appeal from the district court's order granting a sentence reduction was not filed, Defendant filed a motion in the district court for an extension of time to file a notice of appeal. After the district court denied the motion, Defendant appealed that denial to this Court, which was docketed as case number 16-16912. We *sua sponte* dismissed that appeal as moot because Defendant sought an order for an extension of time to file a notice of appeal in a case that was already pending on appeal, *i.e.*, the present appeal.

See U.S.S.G. App. C, Amend. 782 (2014). It is undisputed that Defendant was eligible for the sentence reduction under Amendment 782, as it lowered his base offense level from 36 to 34, resulting in an amended guideline range of 360 months' to life imprisonment. *See id.*

Defendant's eligibility for the § 3582(c)(2) reduction, however, is not the issue in this appeal. Instead, Defendant argues that the Government, in an effort to undermine his petition for executive clemency, engaged in prosecutorial misconduct by recruiting the Federal Defender to file a motion for reduction of sentence under § 3582(c)(2) without Defendant's approval. He also asserts that that the district court lacked authority to reduce his sentence because he did not authorize the Federal Defender or the Government to file a § 3582(c)(2) motion on his behalf.

For starters, we are not persuaded by Defendant's argument that the Government engaged in prosecutorial misconduct by filing a joint motion with the Federal Defender for a reduction of Defendant's sentence. To establish prosecutorial misconduct, a defendant must show that the prosecutor's actions "(1) were improper and (2) prejudiced the defendant's substantive rights." *See United States v. Foley*, 508 F.3d 627, 637 (11th Cir. 2007) (quotation omitted). Defendant has not shown that the Government engaged in any improper conduct. The Federal Defender represented to the district court that *she* erroneously believed

that she had Defendant's consent to file the motion. Defendant has not put forth any facts establishing that the Government knew or had any reason to believe that the Federal Defender was mistaken about having Defendant's authorization to file the § 3582(c)(2) motion. To the extent Defendant asserts a pattern of prosecutorial misconduct throughout his entire criminal proceedings, those arguments are outside the narrow scope of a § 3582(c)(2) proceeding. *See Dillon v. United States*, 560 U.S. 817, 825–27 (2010) (explaining that all aspects of a case that are not affected by the applicable Sentencing Guidelines Amendment are outside the scope of a § 3582(c)(2) proceeding).

We now turn to the more difficult issue in this case. That is, Defendant argues that the district court erred by reducing his sentence because the Federal Defender did not represent him and he did not authorize her to file a § 3582(c)(2) motion on his behalf. We acknowledge that a district court is permitted to *sua sponte* reduce a defendant's sentence under § 3582(c)(2). *See* 18 U.S.C. § 3582(c)(2) (explaining that a court may reduce a defendant's sentence of imprisonment "upon motion of the defendant or the Director of the Bureau of Prisons, or *on its own* motion" (emphasis added)). But that is not what happened here. Indeed, the Federal Defender and the Government filed a joint motion, in which they recommended that Defendant's sentence be reduced to 360 months'

imprisonment. The court thereafter reduced Defendant's sentence to 360 months' imprisonment.

Although we have explained that a defendant is not entitled to be present at a § 3582(c)(2) proceeding, or even entitled to respond in a § 3582(c)(2) proceeding if the district court does not intend to rely on any new information, *see United States v. Jules*, 595 F.3d 1239, 1242, 1245 (11th Cir. 2010), we are not aware of any precedent holding that a defendant is prohibited from opposing a sentence reduction under § 3582(c)(2), where the reduction stemmed from a motion filed on the defendant's behalf without his knowledge and against his wishes. Because both parties agree that we should vacate the district court's order reducing Defendant's sentence—and, in fact, the district court indicated an intention to do so if Defendant had moved to set aside the order rather than appealing it to this Court—we vacate the district court's order reducing Defendant's sentence under § 3582(c)(2) and remand for further proceedings.

VACATED AND REMANDED.