

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 11a0647n.06

No. 09-2212

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.)

JOHN TYLER McKINNEY, SR.,)

Defendant-Appellant.)

**ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF MICHIGAN**

OPINION

FILED

Aug 31, 2011

LEONARD GREEN, Clerk

BEFORE: NORRIS, GIBBONS, and GRIFFIN, Circuit Judges.

PER CURIAM. Defendant John McKinney, Sr., pleaded guilty to one count of distributing five or more grams of cocaine base in violation of 21 U.S.C. § 841(a). His plea agreement preserved his right to appeal a penalty enhancement that he received for a prior felony drug offense. He also contends that the Fair Sentencing Act of 2010 (“FSA”), Pub. L. No. 111-220, 124 Stat. 2372 (Aug. 3, 2010), should be applied retroactively to his sentence.

The panel has had the opportunity to consider the arguments advanced by the parties and to conduct our own independent review of the record on appeal. In this case, the district court entered an Order on April 29, 2009, which explains in detail why defendant’s prior conviction in Michigan state court for possession of dihydrocodeinone qualifies as a prior “felony drug offense” under 21 U.S.C. § 841(b)(1)(B). We agree with the reasoning of the district court and affirm on that basis.

With respect to the second issue raised by defendant, a prior panel of this court has decided that the FSA does not apply retroactively to cases on direct appeal. *United States v. Carradine*, 621

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F.3d 575 (6th Cir. 2010). A panel of this court cannot overrule a published decision of another panel. *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). Defendant recognizes that *Carradine* is controlling authority but raises the issue to preserve it for possible en banc review, which he is entitled to pursue.

The judgment of the district court is **affirmed**.