IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA)	
)	
V.)	1:08-CR-388-1
)	
JOHN CALVIN BROWN, III,)	
)	
Defendant.)	

ORDER

Defendant John Calvin Brown, III, has filed a Motion for Sentence Reduction pursuant to 18 U.S.C. § 3582(c)(2). The Court appointed counsel for Mr. Brown, (Doc. 66), and both Mr. Brown and the Government filed supplemental briefs, as requested by this Court. (Docs. 72, 73.) Because Mr. Brown's sentence was not based on a sentencing guideline range that has been subsequently reduced, but was instead based upon a statutory mandatory minimum and a statutorily-authorized downward departure due to substantial assistance, both of which remain unchanged by recent amendments to the Sentencing Guidelines, § 3582 does not apply. The Court will deny the motion. ¹

BACKGROUND

In 2008, Mr. Brown was indicted on drug and firearms charges. (Doc. 1.) He thereafter pleaded guilty to Count 1, possession with intent to distribute 79 grams of a

¹ The Court has not sealed this Order because the facts concerning substantial assistance already appear on the public record. *E.g.*, Docs. 42, 67. The Court further questions whether it is appropriate to seal this Order given the traditional public nature of sentencing decisions and the significant public interest in transparency when sentences are reduced, as well as the need for the Government and the criminal defense bar to be aware of decisions such as this in order to competently represent clients. The Court notes that the decision in *Hood* was not redacted or sealed and that many appellate decisions discuss issues related to § 3553(e) in public opinions.

cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), and Count 3, possession of firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). (*See* Doc. 11; Minute Entry February 3, 2009; Doc. 41.) Both crimes carried statutory minimum penalties established by Congress.

The presentence report shows that in the absence of the 120-month statutory minimum, Mr. Brown's guideline calculation on Count 1 would have been 70-87 months based on an offense level of 27 and a Criminal History Category of I. (*See* Doc. 62-1 at ¶ 51.) Because the statutory mandatory minimum was greater, 120 months became the guideline sentence recommendation for Count 1. (*Id.*; *see* U.S.S.G. § 5G1.1(b).) The guideline on Count 3 was 60 months consecutive, the minimum required by statute. (Doc. 62-1 at ¶¶ 50, 51.)

The sentencing court departed downward as a result of substantial assistance pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. (Doc. 21; see Doc. 42 at 16.)

The court sentenced Mr. Brown to 72 months on Count 1 and 36 months on Count 3, to run consecutively. (Doc. 35; see Doc. 42 at 16-17; Minute Entry March 4, 2010.) The Fourth Circuit affirmed his conviction on appeal, (Docs. 43-44), and a § 2255 motion was unsuccessful. (Doc. 59.) Mr. Brown filed the pending motion for a sentence reduction on November 6, 2014. (Doc. 60.)

ANALYSIS

The present motion asks this Court to reduce Mr. Brown's sentence pursuant to 18 U.S.C. § 3582(c)(2) on the basis of Amendments 750, 780, 782, and 788 to the United States Sentencing Guidelines applicable to cocaine base offenses. Section 3582(c)(2)

provides that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," the sentencing court may reduce the term of imprisonment "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). This Court agrees with both parties that these amendments have the effect of lowering Mr. Brown's guideline calculations absent the statutory mandatory minimum. However, the issue here is whether Mr. Brown's original sentence was "based on" on a subsequently lowered sentencing range as required by 18 U.S.C. § 3582(c)(2).

The Fourth Circuit addressed a similar sentence reduction request in *United States* v. *Hood*, 556 F.3d 226 (4th Cir. 2009). In *Hood*, the court held that § 3582(c)(2) does not authorize a reduction in sentence where the defendant was initially subject to a statutory minimum term of imprisonment that trumped an otherwise applicable Guidelines range. *Hood*, 556 F.3d at 232-33. This is so because the sentence was "based on" the statutory minimum, not the Guidelines, and it remains the rule even when the sentencing court was authorized by statute to go below the minimum sentence due to the defendants' substantial assistance to the government. *Id.* at 233-34; *see also* 18 U.S.C. § 3553(e).

Hood has been repeatedly applied in this circuit. E.g., United States v. Spinks, 770 F.3d 285, 287-88 (4th Cir. 2014) (holding that the only appropriate factor to consider in connection with a § 3553(e) departure from a mandatory minimum is substantial assistance); United States v. Black, 737 F.3d 280, 286-87 (4th Cir. 2013) (holding that a defendant subject to a statutory minimum is not eligible for a reduced sentence under §

3582(c)(2) because his sentence was not based on a sentencing range that the Sentencing Commission subsequently lowered).

In light of the language of the statute and the holdings in *Hood*, *Black*, and *Spinks*, this Court concludes that Mr. Brown was not "sentenced to a term of imprisonment *based* on a sentencing range that has subsequently been lowered by the Sentencing Commission" 18 U.S.C. 3582(c)(2) (emphasis added). Mr. Brown's sentence was "based on" the mandatory minimum sentence in place at the time of sentencing and "based on" a departure from that mandatory minimum pursuant to 18 U.S.C. § 3553(e). Therefore, the Court finds that it need not consider the application of the Sentencing Guideline Amendments because the statutory prerequisites have not been met. *E.g.*, *Dorsey v. United States*, 132 S. Ct. 2321, 2327 (2012) (recognizing that no guideline provision can trump applicable statutory sentencing requirements). This Court has no authority to reduce Mr. Brown's sentence. *See United States v. Williams*, 1:07cr429-6 (M.D.N.C. July 10, 2015) (Doc. 372).

It is **ORDERED** that the motion for sentence reduction, (Doc. 60), is **DENIED**. Because the Government and the defendant agree that the Court does have statutory authority to reduce the sentence, the Court issues a certificate of appealability.

This the 17th day of August, 2015.

UNITED STATES DISTRICT JUDGE