

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

UNITED STATES OF AMERICA

-vs-

Case No. 6:01-cr-27-Orl-31DAB

RANDALL L. ATWELL

ORDER

On May 12, 2008, this Court, *sua sponte*, entered an Order (Doc. 113) directing the parties to respond regarding Defendant's eligibility for a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2). The parties filed timely responses thereto (Docs. 116 and 117), as well as supplemental briefs and authorities (Docs. 119, 121 and 122), and oral argument was held before this Court on August 1, 2008.

I. Background

On May 3, 2001, following a jury trial, Defendant Randall Atwell ("Atwell") was found guilty of one count of possession with the intent to distribute and distribution of more than 50 grams of cocaine base ("crack"), in violation of 21 U.S.C. § 841 ("§ 841"). (Doc. 44). On July 25, 2001, this Court sentenced Atwell to life imprisonment (Doc. 51). However, that sentence was later vacated (Doc. 77) and Atwell was re-sentenced to 210 months incarceration, followed by 60 months of supervised release (Doc. 100).

On March 3, 2008, the United States Sentencing Commission retroactively adopted Amendments 706 and 711 to the United States Sentencing Guidelines ("the Guidelines"). Therefore,

some Defendants are entitled to a sentence reduction under 18 U.S.C. § 3582(c)(2) (“§ 3582”) which states:

[I]n 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 pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2) (2007).

The Government concedes that, pursuant to § 3582 and Amendments 706 and 711, this Court has jurisdiction to reduce Atwell’s term of imprisonment from 210 months to 168 months. However, Defendant argues that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), this Court has the authority to reduce his sentence even further, to 120 months, which is the statutory minimum under § 841.

II. Legal Analysis

In *Booker*, the Supreme Court considered the constitutionality the Sentencing Reform Act of 1984 (“the SRA”). Specifically, the Court considered “[w]hether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.” *Booker*, 543 U.S. at 229, n1. The Court answered this question in the affirmative, and went on to fashion a remedy by excising the two provisions of the SRA that made application of the Guidelines mandatory: 18 U.S.C. §§ 3553(b)(1) and 3742(e). However, *Booker* was not made retroactive and did not address resentencings under § 3582. Thus, the question presented here becomes whether the rationale of *Booker* should be extended to include a § 3582 resentencing.

This proceeding is a resentencing, occasioned by the retroactive application of an amended guideline which lowers Defendant's guideline score. But the statute which provides the Court with jurisdiction to re-sentence the Defendant specifically limits the Court's authority to a reduction "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).¹ And, the Sentencing Commission's policy in regard to crack resentencings is clear – any reduction in sentence is limited to two guideline levels and a "full resentencing of the Defendant" is prohibited. U.S.S.G. § 1B1.10.

The only Circuit Court opinion that is arguably on point is *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007). Since the *Hicks* decision, and perhaps in response to it, the Sentencing Commission has amended its policy statement to make it clear that it intended to impose a two-level limitation on § 3582 resentencings. *See United States v. Strothers*, 2008 U.S. Dist. LEXIS 47630, *12 (W.D.Pa. June 19, 2008) (Bloch, J.). However, the Defendant argues that the reasoning in *Hicks* still applies, and suggests that the amended policy statement is unconstitutional.

There are district court decisions on both sides of this issue across the country. *See, e.g., United States v. Ragland*, Criminal Case No. 98-0196-01 (D.D.C. July 31, 2008) (Friedman, J.) and *United States v. Strothers, supra*. Here in the Middle District of Florida, Judge Merryday has upheld the policy statement as not violative of *Booker*. *United States v. Clarke*, 2008 U.S. Dist. LEXIS 34577 (M.D.Fla. April 28, 2008). However, *Clarke* relies on *United States v. Crawford*, 243 Fed. Appx. 476 (11th Cir. 2007) and *United States v. Moreno*, 421 F.3d 1217 (11th Cir. 2005), which are inapposite.

¹There has been no argument that this is an unconstitutional delegation.

See United States v. Stokes, 2008 U.S. Dist. LEXIS 27938, *9-10 (M.D.Fla. April 7, 2008) (Conway, J.). Thus, this is an open question in the Eleventh Circuit.

However, having considered all available persuasive authority on the subject, this Court finds Judge Steele's Opinion in *United States v. Speights*, 2008 U.S. Dist. LEXIS 10356 (S.D.Ala. June 23, 2008), to be a sound and accurate statement of the reasons why *Booker* does not apply to § 3582 resentencings. Therefore, this Court incorporates that Opinion by reference herein and finds that it is without jurisdiction to reduce Atwell's sentence below 168 months.

Accordingly, it is

ORDERED that Randall Atwell is hereby re-sentenced to a term of 168 months incarceration or time served, whichever is greater. Upon his release by the Bureau of Prisons, Defendant will be subject to the conditions and term of supervised release imposed by this Court in its judgment, dated December 18, 2002 (Doc. 103).

DONE and ORDERED in Chambers in Orlando, Florida on August 4, 2008.


GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Marshal
United States Attorney
United States Probation Office
United States Pretrial Services Office
Counsel for Defendant
Randall L. Atwell