

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
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 Plaintiff, :
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 v. :
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NATHAN BENJAMIN THOMAS, :
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 :
 Defendant. :

Colm F. Connolly, Esquire, United States Attorney, Robert J. Prettyman, Esquire, Assistant United States Attorney of the UNITED STATES DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for Plaintiff.

Nathan Benjamin Thomas, Pro Se Defendant.

MEMORANDUM OPINION

May 21, 2002

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Motion Pursuant To 18 U.S.C. § 3582(c)(2) And Sentencing Guideline 1B1.10 For Reduction Of Sentence Based On Guideline Amendment Effective November 1, 2000 (D.I. 175) filed by Defendant, Nathan Benjamin Thomas. For the reasons set forth below, Defendant's Motion will be denied.

BACKGROUND

Defendant was charged by a two count Superseding Indictment with (1) conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and (2) attempted possession of cocaine with intent to distribute in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. (D.I. 40). In June 1990, Defendant was tried before a jury. The jury convicted Defendant of attempted possession of cocaine with intent to distribute, but acquitted Defendant of conspiracy to possess cocaine with intent to distribute. (A-94).¹

Thereafter, the Court sentenced Defendant to 293 months imprisonment. (A-95). The Court's sentence was based in part on its decision to grant the Government's motion for an upward departure based upon the use of children in the commission of a crime. Defendant contends that the upward departure raised his offense level from a 36 with a 188-235 month sentencing range, to

¹ References to "A-" are to the Appendix of the Government's Answering Brief (D.I. 176).

a 38 with a 235-293 month sentencing range. (D.I. 175 at 3).

By his Motion, Defendant seeks a reduction of his sentence based upon Amendment 591 to the United States Sentencing Guidelines. The Government has filed a response opposing Defendant's Motion. Accordingly, the instant Motion is ripe for the Court's review.

DISCUSSION

Defendant contends that Amendment 591 amended the Guidelines to delete the increased Guideline penalties for use of a minor in a drug trafficking offense, unless the defendant is actually convicted of the statute outlawing the use of minors in drug trafficking, 21 U.S.C. § 861. Defendant correctly points out that Amendment 591 is to be given retroactive effect. U.S.S.G. § 1B1.10(c). Defendant was not convicted of a Section 861 offense, and thus, Defendant contends that the Court erred in enhancing his sentence based on his use of a minor in a drug crime.

The purpose of Amendment 591 was to resolve a conflict among the Courts of Appeals as to whether the enhanced penalties in Section 2D1.2 (Drug Offenses Occurring Near Protected Locations Or Involving Underage or Pregnant Individuals) of the Guidelines applied only in cases in which the defendant was convicted of an offense corresponding to that Guideline, or whether it applied in any case, regardless of the underlying conviction, if the

defendant's relevant conduct included drug sales occurring in a protected location or involving a protected person. U.S.S.G., Am. 591 (A-105). Effective November 1, 2000, Amendment 591 provided that the Section 2D1.2 penalties only applied if the defendant was convicted of an offense corresponding to that Guideline provision. (A-103-104, 106). Specifically, Amendment 591 revised the Guidelines to require the Court to use the offense of conviction to determine the applicable starting provision for sentencing under the Guidelines. Stated another way, the Court must refer to the Statutory Index in the Appendix to the Guidelines, locate the statutory basis for the offense of conviction and select the Guideline corresponding to that offense of conviction. (A-103).

This point is highlighted in the Amendment's revisions to Section 2D1.2. Revising the commentary to Section 2D1.2, Amendment 591 provides, in pertinent part:

This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking . . . involving an underage . . . individual (including an attempt or conspiracy to commit such a violation) . . .

(A-104).

Defendant was not charged with or convicted of a violation corresponding to Section 2D1.2 of the Guidelines. Thus, Defendant contends that his sentence should not have been enhanced under Section 2D1.2. The fundamental flaw in

Defendant's argument, however, rests in his premise that his sentence was enhanced under Section 2D1.2. It was not. The enhancement of Defendant's sentence by two offense levels for the use of minor children in the commission of his crime was based upon a departure authorized by Section 5K2.0.² Indeed, that Section 5K2.0 was the basis for Defendant's enhanced sentence was stated in the Pre-Sentence report, emphasized by the Court during sentencing and acknowledged by the parties in their respective arguments both in favor of and against the sentence enhancement. (A-21, 25-29, 33-34, 39, 43-45); Pre-Sentence Report ("PSR") at ¶ 24-27, 33.

Amendment 591 did not refer to or otherwise alter the Court's ability to grant an upward departure pursuant to Section 5K2.0. (A-103-106); United States v. Chambers, 178 F. Supp. 2d 789 (E.D. Mich. 2001) ("Nothing in Amendment 591 diminishes the Court's authority to upward depart under § 5K2.0, or limits the circumstances that may be considered in determining whether, and to what extent, such a departure may be warranted."). Further,

² Section 5K2.0 of the Guidelines permits a court to impose a sentence outside the range established by the applicable Guidelines, if the court finds that an aggravating or mitigating circumstance warrants such a departure. U.S.S.G. § 5K2.0. The reason for the departure may be a reason already considered by the court in determining the Guideline range, if the court determines that the weight attached to the factor under the Guidelines is inadequate or excessive. Id. The decision to depart from the Guidelines under Section 5K2.0 rests with the sentencing court and involves a case-by-case determination. Id.

both prior to and subsequent to the enactment of Amendment 591, courts have recognized that Section 5K2.0 provides an adequate basis for an upward departure when minor children are involved in drug crimes. United States v. Salcido-Corrales, 249 F.3d 1151, 1152, 1155-1156 (9th Cir. 2001) (collecting cases) (affirming upward departure under § 5K2.0 for defendant who involved his son in drug crime); United States v. Lesdema, 979 F.2d 816, 822 (11th Cir. 1992). Because the Court's authority to sentence Defendant under an enhancement provided by Section 5K2.0 is not altered by Amendment 591, and because Defendant was not sentenced pursuant to Section 2D1.2 of the Guidelines, the Court concludes that Amendment 591 does not provide a basis to modify Defendant's sentence. Accordingly, Defendant's Motion for a modification of his sentence will be denied.

In the alternative, even if the Court were to conclude that Amendment 591 applied to Defendant's sentence, the Court would deny Defendant's motion. That Amendment 591 was made retroactive under Section 1B1.10(c) of the Guidelines does not mean that the Court is required to modify Defendant's sentence. Pursuant to 18 U.S.C. § 3582(c) and Section 1B1.10 of the Guidelines, the decision to reduce a defendant's sentence based on a sentencing range that was subsequently lowered by a retroactive amendment is within the Court's discretion. In determining whether to exercise its discretion pursuant to Section 3582, the Court

should consider the applicable factors enumerated in 18 U.S.C. 3553(a). 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10, background (first unnumbered paragraph). Such factors include the nature and circumstances of the offense, the history and characteristics of the defendant and "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3552(a)(1), (2)(A). In addition, the Court should consider the sentence that it would have imposed if the retroactive guideline amendment was in place when the defendant was sentenced. U.S.S.G. § 1B1.10(b).

Applying these factors to the instant case, the Court concludes that a reduction of Defendant's sentence is not warranted. The nature and circumstances of Defendant's crime are particularly serious and troubling. Defendant attempted to deliver 29.1 kilograms of cocaine, an offense so grave and involving such a substantial quantity of cocaine that Congress set a mandatory minimum sentence of 10 years imprisonment and a maximum sentence of life imprisonment for the offense. 21 U.S.C. § 841(a)(1) and (b)(1)(A); PSR ¶ 18. In addition, Defendant's criminal actions were taken in the presence of his own minor children, ages ten, eleven and eleven respectively. (A-25-26). Defendant also used at least one of his minor children to assist him in carrying the money and displaying the money to the

anticipated cocaine trafficker. (A-26, 44). As the Court noted during sentencing, Defendant's "commandeering the presence of children during the course of a transaction involving drugs is significant . . ." (A-43). The Court recognized that Defendant's children would have a lasting memory of the "awful experience" of being "placed in a situation to display money to strangers in a strange town and then to be surrounded by police officers and to go through the rigors of an arrest." (A-44).

Further, with regard to Defendant's character, the Court has expressly found Defendant to be a person of poor character. As the Court stated to Defendant at the hearing, "I find that, at least in my view, you're a person who has very, very poor character; specifically that you would undertake to involve your children in a drug transaction, let alone that you would be involved in drug trafficking yourself, is very, very significant." (A-52-53).

As for the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment, the Court's previous observations are equally applicable. Give the seriousness of Defendant's crime and the involvement of his children in the offense, the Court finds that its original sentence was warranted. (A-44). Further, the Court finds that its original sentence promotes respect for the law, furthers the public's interest in safety, punishes Defendant for

his crimes and deters future criminal conduct. (A-53). As the Court stated to Defendant, "When you get out of jail, I hope that you will not ever be involved in the type of activity you have been and that your sentence not only will be punishment for you, but a message to your community that there is a way to observe the law and still be a successful person." (A-53-54).

Further, the Court concludes that its original sentence would not have been different even if Amendment 591 was in effect at the time Defendant was sentenced. U.S.S.G. § 1B1.10(b). Defendant was not sentenced pursuant to Section 2D1.2 of the Guidelines, and therefore, Amendment 591 would not have had an impact on Defendant's sentence. Further, the Court would still have concluded that Defendant's conduct warranted an enhancement under Section 5K2.0 of the Guidelines. Because the Court finds that the applicable factors under Section 3553(a) and Section 1B1.10(b) of the Guidelines weigh in favor of maintaining the Court's original sentence and against a reduction of that sentence based on the retroactive application of Amendment 591, the Court will deny Defendant's Motion.

CONCLUSION

For the reasons discussed, the Motion Pursuant To 18 U.S.C. 3582(c)(2) And Sentencing Guideline 1B1.10 For Reduction Of Sentence Based On Guideline Amendment Effective November 1, 2000 filed by Defendant, Nathan Benjamin Thomas, will be denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
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 Plaintiff, :
 :
 v. : Criminal Action No. 89-99-1 JJF
 :
 :
 NATHAN BENJAMIN THOMAS, :
 :
 Defendant. :

O R D E R

At Wilmington, this 21st day of May 2002, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that:

1. Defendant's Motion Pursuant To 18 U.S.C. 3582(c)(2) And Sentencing Guideline 1B1.10 For Reduction Of Sentence Based On Guideline Amendment Effective November 1, 2000 (D.I. 175) is DENIED.

2. To the extent that a determination regarding a certificate of appealability under 28 U.S.C. § 2253(c)(2) is required, the Court finds that Defendant has failed to make "a substantial showing of the denial of a constitutional right," and therefore, a certificate of appealability is DENIED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE