[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-12863
Non-Argument Calendar

D.C. Docket No. 1:00-cr-00485-UU-4

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

JOSEPH SAMPSON AUGUSTE,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(March 9, 2016)

Before TJOFLAT, JULIE CARNES, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Joseph Sampson Auguste, proceeding with counsel, appeals the district court's denial of his motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782 to the Sentencing Guidelines. After careful review, we affirm.

I. BACKGROUND

In 2001, a jury found Defendant guilty of conspiring to possess with intent to distribute 5 kilograms or more of cocaine ("Count One"), and conspiring to use and carry a firearm during a drug trafficking offense ("Count Two"), in violation 21 U.S.C. § 846 and 18 U.S.C. § 924(o).

In anticipation of sentencing, the probation officer prepared a Presentence Investigation Report ("PSR"). The PSR assigned Defendant a base offense level of 38 pursuant to U.S.S.G. § 2D1.1(a)(3), (c)(1) because the offense involved more than 150 kilograms of cocaine. Because a firearm was possessed during the drug trafficking offense, Defendant also received a two-level increase under § 2D1.1(b)(1), which resulted in an adjusted offense level of 40. The PSR indicated that Defendant was a career offender under U.S.S.G. § 4B1.1 because he had two prior convictions for crimes of violence. Because the statutory maximum for Defendant's present offense was life imprisonment, the PSR stated that Defendant's guideline offense level would be a minimum of 37 under the career offender provision. However, Defendant's total offense level remained at 40, as

his otherwise applicable offense level exceeded the offense level provided under the career offender provision. *See* U.S.S.G. § 4B1.1(b). Due to his status as a career offender, the PSR assigned Defendant a criminal history category of VI. Based on a total offense level of 40 and a criminal history category of VI, Defendant's guideline range was 360 months to life.

At sentencing, the district court held Defendant accountable for 5 kilograms of cocaine, and consequently assigned Defendant a base offense level of 32. The district court adopted all other guidelines calculations from the PSR and applied the career offender provision, which increased Defendant's total offense level to 37. Based on a total offense level of 37 and a criminal history category of VI, the resulting guideline range was 360 months to life. The district court sentenced Defendant to 360 months' imprisonment as to Count One, and 240 months' imprisonment as to Count Two, to be served concurrently. We affirmed Defendant's convictions and sentences on appeal. *United States v. Charles*, 313 F.3d 1278, 1280 (11th Cir. 2002).

In February 2015, Defendant filed a *pro se* motion for a reduction of sentence based on § 3582(c)(2) and Amendment 782. The district court denied Defendant's motion, concluding that, because Defendant was sentenced as a career offender, he was not eligible for a sentence reduction.

Through counsel, Defendant now appeals from that decision, arguing that his classification as a career offender should not bar him from relief under § 3582(c)(2) because his base offense level, if not his total offense level, was based on the Drug Quantity Table located at U.S.S.G. § 2D1.1. He also argues for the first time on appeal that the policy statement set forth in U.S.S.G. § 1B1.10 violates the Separation of Powers Clause.

II. DISCUSSION

We review *de novo* a district court's legal conclusions on the scope of its authority under § 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 sentencing 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). A defendant is not eligible for a sentence reduction if a guideline amendment "does not have the effect of lowering the defendant's applicable guideline range." *Id.* § 1B1.10(a)(2)(B); *id.* § 1B1.10, comment. (n.1(A)).

Amendment 782 reduced the base offense level for most drug offenses by two levels. *See id.* § 1B1.10(d); U.S.S.G. App. C., Amend. 782 (2014).

Amendment 782 did not make any changes to U.S.S.G. § 4B1.1, the career offender guideline. *See* U.S.S.G. App. C., Amend. 782.

When a defendant is sentenced as a career offender, his base offense level is determined under § 4B1.1, not under the Drug Quantity Table set forth in § 2D1.1(c). U.S.S.G. § 4B1.1; *United States v. Moore*, 541 F.3d 1323, 1327 (11th Cir. 2008). In *Moore*, we considered whether defendants who were sentenced as career offenders under § 4B1.1 were eligible for § 3582(c)(2) relief in light of Amendment 706, which lowered the 2D1.1(c) base offense levels for certain quantities of crack cocaine. 541 F.3d at 1325. We held that the defendants did not qualify for § 3582(c)(2) relief because Amendment 706 had no effect on their applicable guideline ranges, which had been calculated under § 4B1.1. *Id.* at 1327–30; *see also United States v. Lawson*, 686 F.3d 1317, 1321 (11th Cir. 2012) (concluding that *Moore* remained binding precedent and that Amendment 750 did not lower the guideline range for career offenders).

Here, the district court did not err when it concluded that Defendant was not eligible for a sentence reduction. Defendant's total offense level and applicable guideline range were not based on the drug quantity offense levels in § 2D1.1, but instead were based on the career offender level in § 4B1.1. Because Defendant's guideline range was not based on the drug quantity guidelines, Amendment 782

did not lower the sentencing range upon which Defendant's sentence was based. *See Lawson*, 686 F.3d at 1321; *Moore*, 541 F.3d at 1327–30.

We turn next to Defendant's argument that our decision in *Moore* has been called into doubt by the Supreme Court's decision in *Freeman v. United States*, 131 S. Ct. 2685 (2011). In *Freeman*, a four-justice plurality concluded that § 3582(c)(2) relief is available to a defendant sentenced pursuant to a Fed. R. Crim. P. 11(c)(1)(C) plea agreement that includes an agreed-upon sentence that is expressly based on a guideline range that was subsequently lowered by the Sentencing Commission. *Freeman*, 131 S. Ct. at 2690. In her concurring opinion, Justice Sotomayor explained that sentences imposed pursuant to a Rule 11(c)(1)(C) plea agreement are based on the plea agreement itself, and not the applicable guideline range. *Id.* at 2696. However, as Defendant properly concedes, his argument is foreclosed by binding precedent because we have expressly determined that *Freeman* did not overrule our decision in *Moore*. *See Lawson*, 686 F.3d at 1321. Nor is *Freeman* applicable to the issue we addressed in *Moore*—whether defendants sentenced as career offenders were eligible for a § 3582(c)(2) sentence reduction. *Id.*

Finally, Defendant argues for the first time on appeal that the policy statement in U.S.S.G. § 1B1.10 violates the Separation of Powers doctrine. We

review sentencing challenges raised for the first time on appeal for plain error.[1] *United States v. Moreno*, 421 F.3d 1217, 1220 (11th Cir. 2005). Defendant cannot demonstrate plain error because he has not cited to, nor have we found, any published decision holding that § 1B1.10 violates the Separation of Powers Clause. *See United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003) ("[T]here can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving [an issue]."). In fact, we have previously rejected similar separation-of-powers arguments that have challenged § 1B1.10. *See United States v. Maiello*, 805 F.3d 992, 1000–01 (11th Cir. 2015) (concluding that § 1B1.10(e), which imposes a limitation on the effective date of an order granting § 3582(c)(2) relief, did not violate the Separation of Powers Clause); *United States v. Colon*, 707 F.3d 1255, 1260–61 (11th Cir. 2013) (rejecting an argument that a post-Amendment 759 version of § 1B1.10(b) violated the Separation of Powers doctrine by limiting the district court's ability to reduce a defendant's sentence below the amended guideline range, except in cases where the defendant received a reduction for substantial assistance). Accordingly, the district court committed no error in concluding that Defendant was ineligible for a sentence reduction under § 3582(c)(2) and Amendment 782.

[1] Under plain error review, we will reverse where there is "(1) an error (2) that is plain and (3) that has affected the defendant's substantial rights; and . . . (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Madden*, 733 F.3d 1314, 1322 (11th Cir. 2013).

AFFIRMED.