

15-0670-cr

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

BENITO DEL ROSARIO, AKA Sealed Defendant 1,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

Appellant Benito Del Rosario appeals from the district court's partial denial of his motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) entered by the United States District Court for the Southern District of New York on February 18, 2015. *United States v. Del Rosario*, 12-CR-81 (KBF). A-34. Appellant filed a timely notice of appeal on March 4, 2015. A-35. The district court had jurisdiction pursuant to 18 U.S.C. §§ 3231 and 3238. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court's partial denial of Appellant's motion for re-sentencing was erroneous insofar as it set a date certain before which Mr. Del Rosario is precluded from applying for relief when no corresponding time limitation appears in the applicable statute?

STATEMENT OF THE CASE

On August 25, 2011, Mr. Del Rosario was arrested and charged with a conspiracy to distribute cocaine. A-2. Mr. Del Rosario pled not guilty. On January 27, 2012, he was indicted on one count of conspiracy to distribute and possess with the intent to distribute one kilogram or more of heroin in violation of 21 U.S.C. §§ 846, 812, 841(a)(1), and 841(b)(1)(A). A-3 at Dkt. # 10. Mr. Del Rosario was convicted of that offense after a jury trial on June 26, 2012. A-12 at Dkt. # 73.

At sentencing, the district court determined that Mr. Del Rosario was responsible for conspiring to distribute between 10 and 30 kilograms of heroin, a base offense level of 36 under the 2011 Guidelines Manual in effect at the time of sentencing. *See* U.S.S.G. §2D1.1(c)(2) (November 1, 2011 edition). With applicable adjustments, the district court found that Mr. Del Rosario's applicable Guidelines range was 292 to 365 months (level 40, Criminal History Category I). As a prior felony offender, Mr. Del Rosario faced a mandatory minimum sentence of 20 years. *See* 21 U.S.C. § 841(b)(1)(A). On September 28, 2012, the district court sentenced Mr. Del Rosario principally to 292 months of imprisonment, the low end of the applicable guideline range. A-13 at Dkt. # 78.

Effective November 1, 2014, the Sentencing Commission adopted and made retroactive Amendment 782 to the United States Sentencing Guidelines, which reduces the base offense level for most drug offense by two levels. Under the Amendment, Mr. Del Rosario would face a reduction in his base offense level from 36 to 34 for 10 to 30 kilograms of heroin. *See* U.S.S.G. §2D1.1(c)(3) (November 1, 2014 edition), which would reduce his total offense level to 38. At offense level 38 and in Criminal History Category I, the amended range is 235 to 293 months' imprisonment, which is limited in Mr. Del Rosario's case by the statutory mandatory minimum sentence of 240 months.

Mr. Del Rosario has been imprisoned since his arrest on August 25, 2011. His current release date is November 5, 2032.

On January 5, 2015, Mr. Del Rosario, through counsel, petitioned the district court to reduce his sentence to 240 months, the mandatory minimum sentence under the statute of conviction (21 U.S.C. § 841(b)(1)(A)), which is five months above the low end of the revised applicable Guidelines range of 235 to 293 months. A-14 at Dkt. # 86; A-17-25.

In support of Mr. Del Rosario's application, counsel noted that he was a responsible son and father who had supported his family and dependents, both in the United States and in the Dominican Republic, to the best of his ability through construction work before he made the poor decision that this case represents. In addition, Mr. Del Rosario has maintained an excellent record while in Bureau of Prisons custody, learning English, studying for his GED and completing courses in Parenting, Drug Abuse Education, and Save Our Youth Save Our Future. *See generally* A-17-25.

Counsel argued that public safety concerns were not implicated in Mr. Del Rosario's application for a sentence reduction. Although the instant case represents Mr. Del Rosario's second arrest, the first offense (in 1996) resulted in a sentence of time served for which no criminal history points were assessed. A-17 at n.3. His offense, although serious, was non-violent. At sentencing in 2011, Mr.

Del Rosario was 39 years old. By 2032, he will be 60 years old. Moreover, he is not a United States citizen and will be deported after completing his sentence. He will not be at liberty in the United States in the foreseeable future. A-20.

On January 8, 2015, the district court dismissed the motion as premature, granting leave to renew the motion “not earlier than 24 months prior to the Defendant’s projected release date.” A-31-32.

On January 22, 2015, Appellant moved for reconsideration, asking the district court to reconsider its earlier dismissal because the district court’s dismissal effectively denied Mr. Del Rosario the benefit of the sentencing reduction for which he was eligible. A-26-28. Counsel calculated that Mr. Del Rosario would be eligible for release in or around February or March 2029 if the district court granted the motion for sentence reduction and imposed a sentence of 240 months. Accordingly, counsel argued that, “[a]llowing Mr. Del Rosario to apply for sentencing reduction only after November 5, 2030, therefore effectively denies him the benefit of the full sentencing reduction for which he is eligible.” A-27.

On January 26, 2015, the district court ordered the government to respond to counsel’s request for reconsideration. A-33. The government responded on February 13, 2015, and advised that it suggested that leave be granted to reapply for resentencing as soon as the Probation Office’s supplemental report was received. A-29-30. The government’s letter implied that this date would be

January 26, 2027. A-29. In the alternative, the government asked the district court to order that a supplemental report be provided sooner than the otherwise anticipated date of January 26, 2027, for the parties' consideration. A-30.

On February 18, 2015, the district court issued an order granting in part and denying in part Appellant's motion for reconsideration. The district court granted Appellant leave to renew his motion "not earlier [than] January 26, 2020." A-34.

SUMMARY OF THE ARGUMENT

In setting a firm date before which Mr. Del Rosario is not permitted to apply for re-sentencing, the district court erred by imposing a timeframe limitation that is not supported by the relevant statutory or Guidelines provisions. This limitation prejudices Mr. Del Rosario because it effectively treats him differently than any other inmate who might be eligible for resentencing, creating a date before which he cannot reapply for the requested relief, regardless of when the supplemental Presentence Report is received.

In addition to unconstitutionally treating him differently from other similarly situated inmates who are awaiting a supplemental Presentence Report, the continued uncertainty as to whether Mr. Del Rosario's sentence will be reduced, combined with Mr. Del Rosario's unchanged 2032 release date, may affect his eligibility for different programs while incarcerated or for reclassification to a

lower security level. Because the district court's Order is not supported by the text of the relevant provisions, the district court's ruling was erroneous.

ARGUMENT

1. Applicable Law

As this appeal concerns a question of law, *de novo* review is appropriate. See *United States v. Josephberg*, 562 F.3d 478, 488 (2d Cir. 2009).

Under 18 U.S.C. § 3582(c)(2), when a defendant has been sentenced to a term of imprisonment based on a sentencing range that is subsequently lowered by the Sentencing Commission, the Court may act upon motion of the defendant or the Director of the Bureaus of Prisons, or upon its own motion, to reduce the defendant's term of imprisonment. There is no statutory requirement that a sentence may not be reduced without review of a supplemental report from the Probation Department, or that such a report must be produced.

In *Dillon*, the Supreme Court set forth a two-step procedure for a district court to follow in determining whether to grant a sentencing reduction under 18 U.S.C. § 3582(c)(2). See *Dillon v. United States*, 560 U.S. 817, 825 (2010); *United States v. Christie*, 736 F.3d 191, 194–95 (2d Cir. 2013):

First, the district court must determine whether a defendant is “*eligible* for a reduction in sentence.” *Christie*, 736 F.3d at 194 (emphasis in original) (quoting *United States v. Mock*, 612 F.3d 133, 137 (2d Cir. 2010)). Second, if a defendant is eligible for resentencing, the court will then consider whether a reduction is warranted in the defendant's particular case. *Dillon*, 560 U.S. at 817.

United States v. Bonefont, No. 12-CR-581-1 NGG, 2015 WL 1966425, at *1 (E.D.N.Y. Apr. 30, 2015).

The first consideration, whether a defendant is eligible for a sentence reduction, requires that the district court “determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines . . . had been in effect at the time the defendant was sentenced.” U.S.S.G. § 1B1.10(b). “[T]he amended Sentencing Guidelines range must be lower than the range that was applied at sentencing in order for a defendant to be eligible for a reduction.” *United States v. Vargas*, No. 05-CR-1327 VM, 2015 WL 708540, at *1 (S.D.N.Y. Feb. 10, 2015). If a defendant is eligible for a reduction, that reduction, with exceptions not applicable here, “shall not” be less than the minimum of the amended Guidelines range. U.S.S.G. § 1B1.10(b)(2)(A).

If a district court determines that a defendant is eligible for a sentence reduction, “[a] court may grant a sentence reduction only after considering the factors set forth in Section 3553(a) of Title 18 (“Section 3553(a)”) and upon a finding that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *Vargas*, No. 05-CR-1327 VM, 2015 WL 708540, at *1 (reducing applicant’s sentence from 151 to 121 months). *See also* U.S.S.G. §1B1.1, comment (n.1(B)) (To determine the extent of a sentencing reduction under § 3582(c)(2) for an eligible defendant, a court “shall consider the

factors set forth in 18 U.S.C. § 3553(a)” as well as “public safety consideration[s]” including “the nature and seriousness of the danger to any person or the community that may be posed by a reduction” and the defendant’s “post-sentencing conduct.”); *Dillon*, 560 U.S. at 827 (district court shall consider the 3553(a) factors including “the nature and circumstances of the offense and the history and characteristics of the defendant” and the need to “protect the public from further crimes of the defendant.”).

Although Amendment 782 provides that no person re-sentenced thereunder may be released from custody before November 1, 2015, *see* U.S.S.G §1B1.10(e)(1), the Guidelines explicitly authorize the district court to enter such an Order at any time after November 1, 2014. *See* U.S.S.G. §1B1.10, comment (n.6). There are no limitations on the timing to make a motion for sentence reduction. 18 U.S.C. § 3582(c)(2).

2. Discussion

The district court’s second Order, barring Mr. Del Rosario from applying for a sentence reduction before January 26, 2020, appears to alleviate any disadvantage to him that arose from the district court’s original Order, based on the government’s assertion that the Probation Department is not projected to review Mr. Del Rosario’s case before January 26, 2027. However, Appellant respectfully notes that there is no requirement that the Probation Department *not* complete its

review of his case sooner. Nor does the district court's Order allow for such a possibility. Therefore, in the event that the Probation Office completes its review of Mr. Del Rosario's case before January 26, 2027, the district court's partial denial of his motion, which sets a date certain before which he cannot apply for re-sentencing, will prejudice Mr. Del Rosario and will unconstitutionally treat him differently from other, similarly situated inmates with long sentences, who are not barred from applying for a reduction at any time. Under these circumstances, despite the district court's broad statutory authority to grant a sentence reduction, the district court erred in setting a date certain before which Mr. Del Rosario may not apply for resentencing.

In addition, Mr. Del Rosario's unchanged 2032 release date and the continued uncertainty as to whether his sentence will be reduced may affect his eligibility to participate in programs while incarcerated for which he would be eligible with a lower sentence, or for reclassification to a lower security level, or for other benefits unknown to counsel at this time.

Appellant acknowledges that the district court has not yet ruled on the merits of his application. He notes, however, that his case meets all of the statutory requirements discussed above. He was sentenced within a Guidelines range that has now been lowered. The mandatory minimum sentence of 240 months is within

the new Guidelines range (235-293 months). Mr. Del Rosario satisfies the criteria in 18 U.S.C. § 3553(a) for a sentence reduction. The offense, although serious, was non-violent. Mr. Del Rosario has taken steps to improve his education while incarcerated, including learning English, studying for his GED, and completing several programs. As a citizen of the Dominican Republic, he will be deported on his release from the custody of the Bureau of Prisons, and will not pose a danger—under any possible scenario—to any person or the community in the United States. Finally, even acknowledging the need for a sentence to provide specific and general deterrence and just punishment for the offense, Appellant respectfully notes that a sentence of 20 years, which would be the lowest sentence Mr. Del Rosario could receive, is certainly sufficient to meet these goals.

CONCLUSION

Wherefore, this case should be remanded to the district court with an instruction to grant leave to reapply for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) without any time limitation or, in the alternative, as soon as the supplemental report from the Probation Office is received.

Dated: June 3, 2015
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,283 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

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