

11-66

To Be Argued By:
ANTHONY E. KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-66

UNITED STATES OF AMERICA,
Appellant,

-vs-

ANTHONY SWINT, aka KB,
Defendant-Appellee,

TYRICE WHITE, aka Ears,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**REPLY BRIEF FOR
THE UNITED STATES OF AMERICA**

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PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Freeman v. United States</i> , 131 S. Ct. 2685 (2011).	3, 4
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18 U.S.C. § 3553. 2, 5
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United States Sentencing Commission,
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COURT FOR THE DISTRICT OF CONNECTICUT

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Preliminary Statement

In August 2006, the district court found, without objection, that Swint's guidelines should be calculated pursuant to the Career Offender Guideline contained in U.S.S.G § 4B1.1. As such, Swint faced an advisory

sentencing range of 262-327 months. According to the contemporaneous sentencing record, the district court's sentencing comments and the written statement of reasons, the court sentenced Swint to 132 months (approximately one-half of the bottom of the guideline range) solely because of the Government's motion pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1.

Over four years later, the district court, *sua sponte*, reduced the defendant's sentence pursuant to 18 U.S.C. § 3582. The court explained, for the first time, that it had, in fact, selected the defendant's original sentence by reference to the crack guidelines then in effect even though it "did not say so on the record."

There was no legal authority for the district court to amend the judgment and reduce the defendant's sentence. The contemporaneous sentencing record unambiguously reflects that the defendant was sentenced as a career offender, that the departure from those guidelines was premised solely on the government's § 5K1.1 motion, and that the extent of the departure was not related to the crack guidelines. Accordingly, the amended judgment should be vacated, and the original judgment should be reinstated.

Argument

I. The district court lacked the legal authority to reduce the defendant's sentence pursuant to 18 U.S.C. § 3582

In response to the Government's opening brief, Swint, in essence, relies on two cases, neither of which are relevant to the question of whether the district court had the legal authority to modify Swint's term of incarceration.

First, he cites to *Freeman v. United States*, 131 S. Ct. 2685 (2011), for the proposition that “§ 3582(c)(2) modification proceedings should be available to permit the district judge to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement.” *Id.* at 2692-2693. In *Freeman*, the Court held that, under 18 U.S.C. § 3582(c), a district court could modify a sentence imposed pursuant to Fed. R. Crim. P. 11(c)(1)(C) where “the transcript of petitioner's sentencing hearing reveals that his original sentence was based on the [crack] Guidelines” then in effect and the district court's independent judgment that the original sentence was appropriate in light of those crack guidelines. *See id.*, 131 S. Ct. at 2693. The fact that the defendant in *Freeman* pleaded guilty pursuant to a binding plea agreement under Rule 11(c)(1)(C) did not prevent or undermine a subsequent modification under 18 U.S.C. § 3582(c) because the district court had made clear at the original sentencing that, regardless of the binding agreement, its

sentence was based on the crack guidelines then in effect. *See id.* at 2695.

Unlike in *Freeman*, here, nothing in the transcript of Swint’s sentencing hearing reveals or reflects that the district court’s sentence was in any way based on the crack guidelines then in effect. Rather, according to the transcript, the district court determined that the defendant was a career offender, calculated his guideline range under U.S.S.G. § 4B1.1, and reduced the recommended sentence range by half of the bottom of the recommended range based on the Government’s § 5K1.1 motion.

Second, Swint cites to *United States v. McPherson*, No. 09-0042-cr, 2011 WL 2417827 (2d Cir. June 17, 2011) (unpublished summary order). In *McPherson*, the district court denied a defendant’s § 3582(c) motion based on its erroneous belief that the defendant’s eligibility for a reduction turned on “the amendments’ effect on his pre-departure Guidelines range rather than on the range that ultimately served as the basis for his sentence” *Id.* at *1. This Court vacated the district court’s order and remanded the matter to provide the court with an opportunity to reconsider its ruling in light of *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam) and *United States v. Martinez*, 572 F.3d 82 (2d Cir. 2009) (per curiam), both of which were decided after the court’s order.

Here, of course, the district court’s § 3582(c) order post-dated this Court’s decision in *McGee*, and the district court relied (erroneously) on *McGee* in granting a sentence

reduction. Thus, the decision in *McPherson* has no application here. Moreover, unlike in *McPherson*, the sentencing record is not ambiguous or unclear. Here, the unambiguous contemporaneous sentencing record in no way reflects or suggests that the crack guidelines played any part in the original sentencing decision. The defendant's original guideline range was based on his status as a career offender, and the extent of his departure was governed and controlled by the Government's § 5K1.1 motion. See *United States v. Williams*, 551 F.3d 182, 186 (2d Cir. 2009) (holding that "the original crack cocaine Guidelines should not have and did not play a role in determining the maximum extent of a substantial assistance departure under § 3553(e)."). Indeed, where "the Guidelines sentence ends up as the statutory minimum, both the decision to depart and the maximum permissible extent of this departure below the statutory minimum may be based only on substantial assistance to the government and on no other mitigating considerations." *United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008).

In an unpublished decision, this Court recently considered a defendant's claim that, even though his pre-departure guideline range was based on his status as a career offender, he was entitled to § 3582(c) relief because, according to the defendant, "the district court 'factored in the crack cocaine issue as part of its analysis' at sentencing." *United States v. Mitchell*, No. 09-3491-cr(L), 2011 WL 1682000, at *3 (2d Cir. May 5, 2011) (unpublished summary order). This Court rejected that claim, holding:

That the district court made general references to the length of drug sentences during its discussion of the 18 U.S.C. §3553(a) factors, or that [the defendant] was convicted of a crack cocaine offense, does not alter the fact that the court calculated [the defendant's sentence based on U.S.S.G. § 4B1.1, not § 2D1.1. . . . Moreover, [the defendant's] attempt to analogize his case to *United States v. McGee* . . . is unavailing. There, the district court calculated the Guidelines range based on § 4B1.1, but then granted a downward departure and recalculated the applicable range using § 2D1.1, as the base offense level. . . . Here, by contrast, the district court relied exclusively on § 4B1.1, and made no mention of § 2D1.1.

Id. at *3 (citations omitted).

Similar to the facts underlying *Mitchell* and unlike those in *McPherson*, when the district court sentenced Swint in 2006, it relied on § 4B1.1 in calculating the defendant's guideline range and on the Government's § 5K1.1 motion in imposing a sentence below that range. The court made no mention of § 2D1.1 or the corresponding crack cocaine guideline ranges. Accordingly, a sentencing modification pursuant to 18 U.S.C. § 3582(c) and this Court's decision in *McGee* is not appropriate.

Finally, it bears note that the issue presented in this case, in *Mitchell* and in *McPherson* will likely not be repeated for future retroactive changes to the Sentencing

Guidelines. On July 13, 2011, the United States Sentencing Commission approved several amendments to § 1B1.10 which will become effective on November 1, 2011 provided that Congress does not disapprove of them. Among those amendments, the Sentencing Commission proposed a change to Application Note 1(A) to clarify that the “applicable guideline range” is “the guideline range that corresponds to the offense level and criminal history category determined pursuant to 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.” U.S.S.G. § 1B1.10, comment (n. 1(A)) (Nov. 1, 2011). In doing so, the Sentencing Commission recognized that Circuit Courts have adopted different positions as to the definition of the “applicable guideline range” and followed those courts which have held that “the only applicable guideline range is the one established before any departures.” United States Sentencing Commission, 76 Fed. Reg. 41332, 41334 (July 13, 2011). Thus, going forward, § 3582(c) reductions will only be permitted for retroactive guideline changes which impact a pre-departure or pre-variance guideline range.

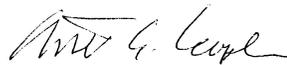
Conclusion

For the reasons set forth above and those set forth in the Government's initial brief, the district court's § 3582(c) order and amended judgment should be vacated, and the original August 29, 2006 judgment should be reinstated.

Dated: August 8, 2011

Respectfully submitted,

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