

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)
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Plaintiff,)
)
v.)
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ROGER JOSEPH BREEDEN,)
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)
Defendant.)

Case No. 04-CR-0206-001-TCK
USM Number: 09633-062

ORDER REDUCING SENTENCE

Before the Court is the motion of Defendant for reduction of sentence pursuant to 18 U.S.C. § 3582(c) and request for a downward variance from the revised guideline range (Doc. 35), and the Government’s response thereto (Doc. 37). At the original sentencing the Court imposed a sentence of 30 months on Count One, based on application of USSG §2D1.1, which resulted in a total offense level 17 and a sentencing range of 27 to 33 months. The Court also imposed a statutory minimum sentence of 60 months as to Count Two, to run consecutive to Count One. The Court thus imposed a total sentence of 90 months.

Retroactive Amendment 706, which revises §2D1.1, reduces the base offense level two levels for Count One, for a total offense level of 15, resulting in an amended guideline range of 21 to 27 months. Because Amendment 706 results in a reduced guideline range, Defendant is eligible for sentence modification pursuant to § 3582(c). The Government urges this Court to exercise its discretion to deny the motion based on Defendant’s long history of drug addiction and treatment failures, facts related to his instant criminal conduct, and Defendant’s failure to complete the Bureau of Prisons’ 500-hour residential drug treatment program. (See Doc. 37 at 12-14.) Defendant’s conduct prior to sentencing, including his history and characteristics, was considered by and influenced this Court’s decision to impose a sentence at the middle of the guideline range. A

district court may consider post-sentencing conduct in determining whether to grant a § 3582(c) motion. However, the post-sentencing conduct at issue in this case is merely a passive failure to complete institutional treatment, rather than more serious post-sentencing conduct such as receiving repeated misconduct reports, committing law violations, or engaging in other behavior that places others or institution property at risk. In the Court's view, Defendant's failure to complete institutional treatment is not a sufficient basis for denying his motion. After review of the facts of this case, consideration of the effect of Amendment 706 and all § 3553(a) factors, the Court finds that good cause exists for reduction of Defendant's sentence within the revised guideline range. Accordingly, Defendant's motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c) (Doc. 35) is **granted**. In granting Defendant's motion, the Court will again consider Defendant's history and characteristics, to include those factors cited by the Government as its bases for denial of Defendant's motion, and impose a sentence at the middle of the Amendment 706-revised range.

In addition to Defendant's motion for reduction of sentence based on Amendment 706, Defendant requests that the Court vary downward. In support of his request for a variance, Defendant cites Kimbrough v. United States, 128 S.Ct. 558, 564 (2007), and the sentencing factors found in 18 U.S.C. § 3553(a), as authority for a non-guideline sentence. Defendant urges the Court to vary from the revised guideline range and impose a sentence of less than 21 months for Count One, making use of the guideline range for cocaine powder to reach a proposed degree of variance. Defendant argues for further reduction of sentence based on the "interim" nature of the Sentencing Commission's solution to the crack to powder cocaine ratio problem and continued unfair disparity in this ratio following Amendment 706. The only fact presented by Defendant in support of a variance is the incongruous treatment of crack cocaine offenses in the sentencing guidelines and

underlying statutory scheme. The Court may not simply rest on the authority of the Sentencing Guidelines but must weigh all the relevant § 3553(a) factors. In addition, following Kimbrough, the Court could vary from the calculated guideline range based solely on the cocaine powder to crack ratio disparity. However, the Court finds this argument unconvincing because a district court must consider the facts and circumstances of the individual case and in so doing, weigh factors other than just the nature and characteristics of the offense. A district court must also consider the history and characteristics of the defendant and the applicable offense category of the defendant as set forth in the guidelines. In addition, the sentencing court must take into account the purposes of sentencing, such as the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, afford adequate deterrence, provide for just punishment, and finally, the need for the sentence to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. See 18 U.S.C. § 3553(a). Upon consideration of all these factors taken as a whole, this Court finds that a sentence within the Amendment 706-revised guideline range is sufficient, but not greater than necessary, to comply with the purposes of sentencing as set forth in § 3553(a). Accordingly, this Court does not find any unwarranted disparity in this case that is sufficient to justify a variance from the revised guideline range.

Accordingly, Defendant's motion for reduction of sentence (Doc. 35) is GRANTED IN PART and DENIED IN PART. Defendant's request for reduction of sentence is GRANTED, and Defendant's request for a downward variance is DENIED.

IT IS THEREFORE ORDERED that the term of imprisonment originally imposed in Count One is reduced to a term of 24 months. The 60-month term in Count Two shall remain the

same as originally imposed, said term to run consecutive to the reduced term in Count One, for a total sentence of 84 months.

IT IS FURTHER ORDERED that all other terms and provisions of the judgment are unchanged and shall remain the same as originally entered.

DATED this 2nd day of December, 2008.



TERENCE KERN
United States District Judge