United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3075 **September Term, 2017**

1:03-cr-00491-ESH-1

Filed On: February 15, 2018

United States of America,

Appellee

v.

Carlos Alberto Ojeda-Herrera, also known as El Ingeniero, also known as Carlos,

Appellant

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

BEFORE: Srinivasan, Pillard, and Wilkins, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by the appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order, filed October 3, 2017, be affirmed. A prisoner is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) only if his sentence was "based on a sentencing range that has subsequently been lowered," and the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); see also United States v. Berry, 618 F.3d 13, 16 (D.C. Cir. 2010). Because of the large quantity of drugs involved, see Plea Agreement ¶ 3 (incorporating Statement of Facts); Statement of Facts ¶ 2 (700-800 kilograms of cocaine), Amendment 782 to the U.S. Sentencing Guidelines did not lower appellant's sentencing range by two levels. His total offense level under the current guidelines still remains at level 40. Even if Amendment 782 did lower by two levels appellant's base offense level, appellant would still be ineligible for a sentence reduction because appellant's 204-month sentence is less than the minimum of the amended guideline range (235 months). See U.S.S.G. § 1B1.10(b)(2)(A) ("[T]he court shall not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range . . . ."); see also United States v. Taylor, 743 F.3d 876, 879-80 (D.C. Cir. 2014) (per curiam).

Despite appellant's assertion to the contrary, appellant does not qualify for the exception to § 1B1.10(b)(2)(A), because the government did not file a motion "to reflect the defendant's substantial assistance to authorities." U.S.S.G. § 1B1.10(b)(2)(B). Finally, to the extent appellant challenges the constitutionality of § 1B1.10(b)(2)(B), that policy statement does not violate equal protection, see United States v. Broxton, 926 F.2d 1180, 1184 (D.C. Cir. 1991). And this court declines to address appellant's "asserted but unanalyzed" ex post facto argument. SEC v. Banner Fund Int'l, 211 F.3d 602, 613 (D.C. Cir. 2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam