United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3069 **September Term, 2018**

FILED ON: MAY 20, 2019

UNITED STATES OF AMERICA,
APPELLEE

v.

MARK SMITH, ALSO KNOWN AS JOHN DOE, ALSO KNOWN AS MELVIN SMITH,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cr-00237-1)

Before: TATEL, SRINIVASAN, and RAO, *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 briefs and oral arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is hereby

ORDERED and **ADJUDGED** that the decision of the district court be affirmed.

Appellant Mark Smith pled guilty to conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base, in violation of 21 U.S.C. section 846. Pursuant to this plea, he was sentenced to 156 months in prison, a sentence within the then-operative Sentencing Guidelines range. Smith now argues that the district court abused its discretion by declining to reduce his sentence following a post-sentencing reduction in the Guidelines range for the crime to which he pled guilty. *See United States v. Lafayette*, 585 F.3d 435, 439 (D.C. Cir. 2009) (in reviewing a sentencing decision, "we first ensure that the district court committed no significant procedural error" and "then consider the substantive reasonableness of the court's decision under an abuse-of-discretion standard" (alteration omitted) (internal quotation marks omitted)).

The relevant statute provides that the district court, in such a situation, "may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); *see id.* § 3553(a) (listing "[f]actors to be considered in imposing a sentence"). Smith first claims that the district court erred by applying a "presumption of reasonableness" to his original sentence. That is incorrect: the district court applied no such presumption. Instead, as required by section 3582(c)(2), the district court considered the section 3553(a) factors when deciding whether to grant Smith a sentence reduction, and it committed no procedural error in declining to reduce his sentence. Smith also argues that, because his sentence falls above the now-operative Guidelines range, the district court abused its discretion in declining to reduce the sentence. But so long as it considers the relevant factors, the district court retains discretion over whether to grant a sentence reduction in such a case, and it did not abuse its discretion by allowing Smith's now-above Guidelines sentence to stand. *See United States v. Jones*, 846 F.3d 366, 370–71 (D.C. Cir. 2017) (concluding the district court did not abuse its discretion in declining to grant sentence reductions where the sentences fell above the revised Guidelines recommendation).

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. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk