
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6075

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALEJANDRO SALINAS GARCIA,

Defendant – Appellant.

Appeal from the United States District Court
for the Western District of North Carolina

The Honorable Kenneth D. Bell, District Judge

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

Alejandro Salinas Garcia appeals the denial of his motion for a sentence reduction under section 404 of the First Step Act of 2018, Pub. L. 115-135, 132 Stat. 5194. The district court's subject-matter jurisdiction derives from 18 U.S.C. § 3231, which affords district courts original jurisdiction of offenses against the laws of the United States. The court entered its order on November 4, 2019. J.A. 317. Garcia successfully sought and obtained an extension to file his notice of appeal from the district court and timely filed his notice of appeal, in accordance with the district court's order, on January 10, 2020. J.A. 17, 318. This Court's jurisdiction is premised on 28 U.S.C. § 1291.

ISSUE PRESENTED

Section 404 of the First Step Act makes retroactive provisions of the Fair Sentencing Act of 2010, which reduced the statutory penalties for crack cocaine offenses. Garcia was sentenced in 2012, after the Supreme Court held that the 2010 Act applies to defendants sentenced after August 3, 2010. And the sentencing court applied the statutory range prescribed by the statute, 21 U.S.C. § 841(b)(1)(A), as amended by

the 2010 Act. Did the district court err when it found that Garcia is not eligible for a sentence reduction under the First Step Act because he was already sentenced under the Fair Sentencing Act?

STATEMENT OF THE CASE

A. Garcia leads a drug-trafficking organization and distributes more than 150 kilograms of cocaine, along with methamphetamine and marijuana.

Between 2006 and 2009, Garcia led a drug-trafficking organization that smuggled cocaine, methamphetamine, and marijuana into North Carolina from Mexico and distributed those controlled substances in middle and western North Carolina. Sealed J.A. 6–16. Garcia’s organization involved numerous individuals, including customers, couriers, runners, drivers, stash-house managers, and at least one enforcer who conducted home-invasion robberies at Garcia’s direction. Sealed J.A. 7–11, 14–16. Garcia bought and had modified several cars for the purpose of transporting narcotics and money. Sealed J.A. 8. Garcia also operated at least three stash houses in the Hickory, North Carolina, area. Sealed J.A. 10–11. Garcia rented several trailers within the mobile-home park where one of the stash

houses was located and had “look-outs” living in the park, who alerted Garcia to the presence of law enforcement or other suspicious activity in the park. Sealed J.A. 10. Garcia was aware that powder cocaine he sold was to be converted into crack cocaine for further distribution. Sealed J.A. 8.

In addition to trafficking in kilogram quantities of cocaine and marijuana, Garcia possessed firearms, instructing one of his drug runners, after learning that Garcia’s marijuana supplier was “being followed by the police,” to “go to Garcia’s house and get the drugs and guns.” Sealed J.A. 9. By 2008, Garcia was employing a series of drivers who transported between one and three kilograms of cocaine and 200 pounds of marijuana at least every other day from Atlanta, Georgia, to Hickory, North Carolina. Sealed J.A. 11. In September of 2008, after Garcia learned the identity of one of the confidential informants working with police, the informant was threatened repeatedly, including on one occasion when he was threatened at gun point in front of his family. Sealed J.A. 13. On another occasion, Garcia and two associates beat up another drug-trafficking associate

Garcia believed had stolen some marijuana from him. Sealed J.A. 15.

When police arrested one of Garcia's subordinates in March of 2009, she had a .25 caliber automatic handgun that Garcia had given her.

Sealed J.A. 14.

B. Garcia pleads guilty to a drug-trafficking offense, admits that more than five kilograms of cocaine were reasonably foreseeable to him, and receives a sentence of life in prison.

A federal grand jury indicted Garcia in May of 2009 and ultimately charged him with conspiracy to distribute and possess with intent to distribute at least 5 kilograms of powder cocaine, at least 50 grams of crack cocaine, and at least 1,000 kilograms of marijuana, 21 U.S.C. §§ 841(b)(1)(A), 846. J.A. 5, 20–21. In February of 2010, Garcia entered into a plea agreement with the United States and agreed to plead guilty to the drug-trafficking-conspiracy offense. Supp. J.A. 1.¹ Garcia admitted in the parties' plea agreement that "[t]he

¹ Garcia's plea agreement was not included in the parties' joint appendix but is critical to an understanding of the facts relevant to the issue Garcia presents on appeal. The United States has included the plea agreement in a supplemental joint appendix ("Supp. J.A.") and is filing a motion for leave to file the supplemental appendix.

amount of cocaine that was known to or reasonably foreseeable by [him] was in excess of five (5) kilograms.” Supp. J.A. 2. Above that quantity, the parties “agree[d] to disagree about the specific amount” and would “advocate for their respective positions at sentencing.” Supp. J.A. 2–3. The district court accepted Garcia’s guilty plea as knowing and voluntary. J.A. 23–27.

The probation office prepared a presentence report and calculated a base offense level of 38 based on Garcia’s responsibility for at least 150 kilograms of powder cocaine. Sealed J.A. 17. After a two-offense-level increase because Garcia possessed a firearm, a four-offense-level increase because Garcia was an organizer or leader of the drug-trafficking conspiracy, and a three-offense-level reduction for acceptance of responsibility, Garcia’s total offense level was 41. Sealed J.A. 17–18. Combined with a criminal-history category of III, the Sentencing Guidelines advised a sentence of between 360 months and life in prison. Sealed J.A. 29. The probation officer noted that Garcia faced a mandatory-minimum sentence of at least 10 years and not more than life in prison under 21 U.S.C. § 841(b)(1)(A). Sealed J.A. 29.

At Garcia's request, the district court continued his sentencing hearing six times, and he repeatedly sought and obtained new counsel. J.A. 7–15. In May of 2012, Garcia moved to withdraw his guilty plea. J.A. 12. The district court conducted Garcia's sentencing hearing in December of 2012 and denied Garcia's motion to withdraw his guilty plea. J.A. 76, 86, 100. The United States moved the district court to withdraw Garcia's offense-level adjustment for acceptance of responsibility, and the district court granted the United States' motion, finding that Garcia had not accepted "any responsibility" for his offense. J.A. 85, 131–32. Based on a total offense level of 43 (reduced from a level 44) and a criminal-history category of III, the Sentencing Guidelines advised a sentence of life in prison, which the district court imposed. Sealed J.A. 35; J.A. 77, 82, 85, 141. In February of 2016, the district court reduced Garcia's sentence to 360 months in prison under Amendment 782 to the Sentencing Guidelines. J.A. 147.

C. The district court denies Garcia’s motion for a reduced sentence under the First Step Act.

In April of 2019, Garcia moved the district court to reduce his sentence under section 404 of the First Step Act. J.A. 307–15. That section “makes retroactive certain provisions of the Fair Sentencing Act of 2010,” which “reduced the statutory penalties for cocaine base offenses.” *United States v. Jackson*, 952 F.3d 492, 495 (4th Cir. 2020). Garcia asserted that when he was sentenced, “his statutory sentencing range of 10 years to life imprisonment was triggered by the 5 kilograms or more of cocaine base charged in his indictment” — a statutory range that was modified by the Fair Sentencing Act of 2010. J.A. 308.

The district court denied Garcia’s First Step Act motion. J.A. 316–17. The court explained that Garcia had been sentenced on December 5, 2012, “well after the effective date of the Fair Sentencing Act.” J.A. 316. The court concluded that Garcia is not eligible for a sentence reduction under the First Step Act. J.A. 316.

SUMMARY OF THE ARGUMENT

The district court properly denied Garcia's motion for a reduced sentence under the First Step Act. By the time the district court sentenced Garcia in December of 2012, the Supreme Court had made clear that any defendant sentenced after the effective date of the Fair Sentencing Act of 2010 — August 3, 2010 — should receive its benefits. And the district court sentenced Garcia more than two years after the Act's effective date. Garcia admitted that he was responsible for the distribution of at least 5 kilograms of powder cocaine, and both the presentence report and the district court correctly applied the statutory range prescribed by 21 U.S.C. § 841(b)(1)(A). The district court did not clearly err in finding that Garcia's sentence was imposed in accordance with the Fair Sentencing Act and correctly determined that Garcia is not eligible for a sentence reduction under the First Step Act.

ARGUMENT

The district court properly denied Garcia’s motion for a reduced sentence.

A. Standard of Review

This Court reviews the scope of a district court’s authority under the First Step Act de novo. *United States v. Chambers*, 956 F.3d 667, 670 (4th Cir. 2020). This Court reviews a court’s decision whether to reduce an eligible defendant’s sentence for abuse of discretion. *United States v. Batiste*, 980 F.3d 466, 469 (5th Cir. 2020); *United States v. Ware*, 964 F.3d 482, 487 (6th Cir. 2020); *United States v. Denson*, 963 F.3d 1080, 1086 n.4 (11th Cir. 2020); *see also United States v. Jackson*, 952 F.3d 492, 497 (4th Cir. 2020). A district court abuses its discretion “if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding.” *United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010).

B. Discussion

The district court properly denied Garcia’s motion for a reduced sentence under the First Step Act. Section 404 of that Act gives retroactive effect to the changes made by Sections 2 and 3 of the Fair

Sentencing Act of 2010. *See* 132 Stat. at 5222; *Jackson*, 952 F.3d at 495. Section 404(b) of the Act provides that “[a] court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if Section 2 or 3 of the Fair Sentencing Act of 2010, (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.” *Id.* Section 404(c) makes clear that the First Step Act does not authorize a court to reduce the sentence of a defendant who has already been sentenced under the terms of the Fair Sentencing Act: “No court shall entertain a motion made under [section 404] to reduce a sentence if the sentence was previously imposed . . . in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010.” *Id.* This Court explained in *United States v. Wirsing* that under section 404 of the First Step Act, “[a]ll defendants who are serving sentences for violations of 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii) . . . are eligible” for a sentence reduction under section 404 of the First Step Act, unless they have already moved for relief under section 404 or they received the benefit of the Fair Sentencing Act when they were sentenced. 943 F.3d 175, 186 (4th Cir. 2019).

The district court properly denied Garcia's motion for a reduced sentence because he had already received any possible benefit from the Fair Sentencing Act. The district court sentenced Garcia in December of 2012, more than two years after the August 3, 2010, effective date of the Fair Sentencing Act and six months after the Supreme Court made clear that any defendant sentenced after August 3, 2010, should receive its benefits. *See* Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (Aug. 3, 2010); *Dorsey v. United States*, 567 U.S. 260, 273 (June 21, 2012). The probation office completed Garcia's presentence report on November 2, 2010, two months after the Fair Sentencing Act became effective. Sealed J.A. 2. The probation officer correctly calculated that under the 2010 Act, Garcia's guilty plea to a drug-trafficking conspiracy involving at least 5 kilograms of powder cocaine and Garcia's admission that more than 5 kilograms of powder cocaine were reasonably foreseeable to him placed Garcia's offense within the sentencing parameters defined in 21 U.S.C. § 841(b)(1)(A). Both before and after the effective date of the Fair Sentencing Act, section 841(b)(1)(A) required a sentence of at least 10 years and up to life in

prison for an offense involving at least 5 kilograms of powder cocaine. *Compare* 21 U.S.C. § 841(b)(1)(A) (2009) *with* 21 U.S.C. § 841(b)(1)(A) (2011).

Garcia's indictment charged him with participating in a drug-trafficking conspiracy that trafficked in multiple drugs. J.A. 19. It charged him with responsibility for at least 50 grams of crack cocaine. J.A. 19. And had Garcia pleaded guilty only to trafficking at least 50 grams of crack cocaine, the Fair Sentencing Act would have reduced his statutory sentencing range. But Garcia was also charged with trafficking at least 5 kilograms of *powder* cocaine. And he admitted as part of his plea agreement that he was responsible for more than 5 kilograms of powder cocaine. Under the Fair Sentencing Act, he was subject to a statutory range of at least 10 years in prison and a maximum sentence of life in prison. The district court properly applied that range when sentencing Garcia to life in prison.

This Court should reject Garcia's suggestion that the record establishes that he was not sentenced based on the Fair Sentencing Act because the probation office did not submit a supplemental presentence

report after the Supreme Court decided *Dorsey*, holding that the 2010 Act applied to persons sentenced after August 3, 2010, 567 U.S. at 263–64. *See* Appellant’s Br. at 3. The probation officer prepared Garcia’s final presentence report in November of 2010, two months after the Fair Sentencing Act became effective. No objection from Garcia or anything else in the record suggests that the probation office ignored the Fair Sentencing Act. More importantly, the probation office correctly applied the statutory range called for by the Controlled Substances Act as amended by the Fair Sentencing Act of 2010. J.A. 29; 21 U.S.C. § 841(b)(1)(A) (2011).

Garcia’s reliance on the lack of any reference to the Fair Sentencing Act in the presentence report, statement of reasons, or the sentencing transcript, *see* Appellant’s Br. at 20, is also misplaced. Because Garcia admitted responsibility for a quantity of powder cocaine triggering the Controlled Substances Act’s most severe penalty provisions, *see* 21 U.S.C. § 841(b)(1)(A), application of the Fair Sentencing Act made *no difference* to either the statutory range that applied to Garcia’s offense or to the applicable Sentencing Guidelines

range of imprisonment. Neither the court nor the parties had reason to affirmatively discuss the Fair Sentencing Act in the presentence report, statement of reasons, and sentencing transcript.

Garcia is correct that under this Court's decision in *United States v. Gravatt*, he was convicted of a "covered offense" under the First Step Act because *Gravatt* made clear that a defendant who pleaded guilty to a conspiracy involving both powder and crack cocaine has been convicted of a covered offense. *See* 953 F.3d 258, 263–64 (4th Cir. 2020). Section 404(c) of the First Step Act makes clear, however, that Garcia is not eligible for a sentence reduction under that Act if he already received the benefit of the amendments to 21 U.S.C. § 841(b) made by the Fair Sentencing Act. Garcia was sentenced well after both the effective date of the Fair Sentencing Act and the Supreme Court's decision in *Dorsey*, and nothing in the record suggests that he did not receive at that time all of the benefits that Congress intended the Fair Sentencing Act of 2010 to confer on him.

Garcia is also correct that the date a defendant was sentenced may not be determinative of whether he received the benefit of the Fair

Sentencing Act. Some defendants who committed their offenses before the effective date of the Fair Sentencing Act and were sentenced after that date but before *Dorsey* did not receive the benefit of the Fair Sentencing Act. See, e.g., *United States v. Rivers*, 576 F. App'x 282, 283 (4th Cir. 2014) (unpublished decision) (remanding for resentencing and application of *Dorsey*); *United States v. Allen*, 716 F.3d 98, 107 (4th Cir. 2013) (same). But the decisions Garcia relies upon involve defendants sentenced long before *Dorsey*. Two of the three decisions, moreover, involve a record reflecting that the court likely had not applied the Fair Sentencing Act. See *United States v. Grey*, No. DKC 08-0462, 2020 WL 1890537, at * (D. Md. April 16, 2020) (defendant was sentenced in January of 2011 and sentencing judge stated it was unclear whether Fair Sentencing Act should apply); *United States v. Ferguson*, No. 5:01-CR-13, 2019 WL 3557888, at *2–*3 (W.D. Va. Aug. 5, 2019) (granting First Step Act reduction where defendant was sentenced in January of 2011 and received pre-Fair Sentencing Act mandatory minimum); *United States v. Welch*, No. 7:10-CR-54-8, 2019 WL 2092580, at * (W.D. Va. May 13, 2019) (granting reduction where

defendant was sentenced in January 2011 and pleaded guilty to crack-cocaine offense).

Unlike the defendants in the decisions on which he relies, Garcia was sentenced well after not only the effective date of the Fair Sentencing Act of 2010, but also the Supreme Court's June 21, 2012, decision in *Dorsey* holding that the Act applied to persons sentenced after the effective date. Garcia raised no objection suggesting the Court had failed to apply *Dorsey* or the 2010 Act. And the Court applied and sentenced Garcia within the statutory range prescribed by the statute as amended by the 2010 Act.

The district court did not clearly err when it found that the Fair Sentencing Act applied when Garcia was sentenced in December of 2012. Garcia's argument to the contrary assumes that his offense did not involve a quantity of powder cocaine that required application of the penalty range prescribed in 21 U.S.C. § 841(b)(1)(A). That assumption is incorrect, and the district court properly denied Garcia's motion for a reduced sentence under section 404(c) of the First Step Act.

CONCLUSION

The district court did not clearly err when it found that Garcia has already been sentenced in accordance with the Fair Sentencing Act. The district court, therefore, properly denied Garcia's motion for a reduced sentence under the First Step Act, and the United States respectfully requests that this Court affirm the district court's November 4, 2019, order.

REQUEST FOR DECISION ON THE BRIEFS WITHOUT ORAL ARGUMENT

The United States does not believe that oral argument will assist the Court in any material way and requests that this appeal be decided on the briefs.

Respectfully submitted, this 6th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using Microsoft Word 2010, Century Schoolbook, 14 point typeface.
2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations, and the certificate of service, the brief contains 3,051 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the above upon Defendant herein by serving his attorney of record, Daniel S. Harawa, through electronic case filing.

This 6th day of January, 2021.

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