

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

October 5, 2009

Charles R. Fulbruge III
Clerk

No. 08-61089
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALVIN MAGEE,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:92-CR-67-2

Before DeMOSS, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:*

Alvin Magee, federal prisoner # 03067-043, pleaded guilty to conspiracy to possess with intent to distribute cocaine base and use of a firearm during the commission of a drug trafficking crime. The firearm conviction was vacated, and Magee was sentenced to 235 months in prison. Magee now appeals the district court's denial of his 18 U.S.C. § 3582(c)(2) motion for a reduction of sentence, which was based on the United States Sentencing Commission's amendments

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

to the Sentencing Guidelines's base offense levels for crack cocaine. We review the district court's determination on a § 3582(c)(2) motion for abuse of discretion. *United States v. Dublin*, 572 F.3d 235, 236–37 (5th Cir. 2009).

Section 3582(c)(2) permits the discretionary modification of a defendant's sentence where the sentencing range is later lowered by the Sentencing Commission. *See* § 3582(c)(2). On appeal, Magee makes the same argument that was rejected by the district court, that "approximately 4.7 kilograms" of cocaine base was likely to have been less than 4.5 kilograms of cocaine base, which would have entitled him to two level reduction in his base offense level under the amended guidelines. This argument is refuted absolutely by the record. The presentence report stated unambiguously that Magee's base offense level of 38 was based on "approximately 4,776.3 grams or 4.7 kilograms of crack cocaine." Given the specific amount of 4,776.3 grams, Magee has not shown that the district court abused its discretion in denying his motion. *See Dublin*, 572 F.3d at 237.

AFFIRMED.