

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3869
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NORMAN CRAIN and JOSEPH
CRAIN,

Defendants-Appellants.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-91-593-A
- - - - -

June 22, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:*

The defendants argue that the district court erred in not departing downward in light of an impending amendment to U.S.S.G. § 3E1.1. In general, this Court will not disturb a sentencing court's discretionary decision not to depart downward from the guidelines unless the court acted under the mistaken assumption that departure was not permitted. United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). "[T]he sentencing court may impose a sentence outside the range established by the applicable

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

guideline, if the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S.S.G. § 5K2.0, p.s. (internal quotations and citations omitted).

Generally, the guideline provision in effect on the date of sentencing is the version to be employed in determining the defendant's sentence. United States v. Ainsworth, 932 F.2d 358, 362 (5th Cir.), cert. denied, 112 S.Ct. 346 (1991). However, if a defendant received a sentence based on a guideline range which has been subsequently lowered by the Sentencing Commission, the district court may reduce the term of imprisonment, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

The policy statement regarding the retroactive application of amended guideline ranges is contained in U.S.S.G. § 1B1.10, p.s. (Nov. 1992). Section 1B1.10(d) lists the amendments which may be retroactively applied to reduce a defendant's term of imprisonment. If an amendment is not listed in subsection (d), a reduction in the defendant's term of imprisonment is not consistent with the policy statement. § 1B1.10(a). The amendment to § 3E1.1, which is amendment 459, is not one of the amendments listed in the applicable version of subsection (d). U.S.S.G. §1B1.10(d). Therefore, the amendment was not subject to retroactive application.

The Sentencing Commission considered the effect of guideline

range amendments in formulating the above policy and determined that certain specific amendments warranted retroactive application. Because the effect of such amendments was adequately taken into consideration in formulating the guidelines, the district court did not err in refusing to depart from the guideline range.

AFFIRMED.