

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50675  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN THOMAS McCUSKER

Defendant-Appellant.

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Appeal from United States District Court  
for the Western District of Texas  
(A-89-CR-173)

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(May 17, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

John T. McCusker appeals the district court judgment denying his request for resentencing based on a retroactive change in the United States Sentencing Guidelines. For the following reasons, the judgment of the district court is AFFIRMED.

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\* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## BACKGROUND

John Thomas McCusker, a/k/a "Comic Book John," was found guilty by a jury of one count of conspiracy to distribute LSD and four counts of possession with intent to distribute LSD. Three of the possession counts were pre-guideline convictions because the illegal activities occurred prior to November 1, 1987. See United States v. Robles-Pantoja, 887 F.2d 1250, 1261 n.13 (5th Cir. 1989). McCusker received three concurrent 360-month terms of incarceration on the pre-guideline convictions, a concurrent 360-month term of incarceration on the conspiracy conviction, and a concurrent 240-month term of incarceration on the guidelines possession conviction. McCusker also received two concurrent five-year terms of supervised release on the guidelines convictions and a \$100 special assessment.

McCusker's convictions and sentences were affirmed on direct appeal. United States v. McCusker, 936 F.2d 781, 782 (5th Cir. 1991). McCusker then filed a motion pursuant to § 3582(c)(2) to reduce his sentences based on an amendment to the guidelines, which permitted the calculation of the weight of LSD without the inclusion of the weight of the carrier medium. The district court provided McCusker with court-appointed counsel. The court ordered the Probation Office to prepare an addendum to the original presentence investigation report (PSR) taking into account the amended retroactive guideline provision, U.S.S.G. 2D1.1(c).

The PSR had originally calculated McCusker's base offense level by determining that the weight of the LSD involved was between 100 to 300 grams. The Addendum recalculated McCusker's

base offense level by determining that the weight of the LSD was 9.95 grams. The Addendum specifically stated that resentencing should not apply to the pre-guideline convictions.

McCusker objected to the Addendum, asserting that all five convictions should be subject to resentencing, and also reasserted various objections raised at his original sentencing hearing. A resentencing hearing was conducted after which the district court adopted the Addendum, resentenced McCusker to two concurrent 210-month terms of incarceration and two concurrent three-year terms of supervised release on the guidelines convictions, and stated that it did not believe it had "the authority to re-sentence on non-Guideline counts." McCusker appeals his resentencing.

#### DISCUSSION

McCusker contends that the district court should have resentenced him on all five convictions pursuant to § 3582(c)(2) instead of the guideline convictions only. The crux of his argument is that the language of § 3582(c)(2), which states that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has been subsequently lowered [emphasis added] by the Sentencing Commission . . . the court may reduce the term of imprisonment," permits a district court to resentence a defendant on pre-guideline convictions.

McCusker alleges that the original sentencing court "in effect grouped" the guideline and pre-guideline counts when it imposed concurrent 360-month terms for each count except Count 5, which carried a maximum sentence of 240 months. He also points to the

original sentencing court's expression of disagreement with the severity of the range established by the guideline for the guideline offenses. The Government contends that McCusker has shown "no actual, effective, or hypothetical grouping of the guideline and non-guideline counts."

Section 3582(c)(2) permits a sentencing reduction in accordance with guideline amendments which take effect after sentencing and are given retroactive application. United States v. Pardue, 36 F.3d 429, 430 (5th Cir. 1994), petition for cert. filed, (Feb. 10, 1995) (No. 94-8025). Amendment 488, U.S.S.G. App. C (Nov. 1993) is one of the guideline amendments which operates retroactively. § 1B1.10(d), p.s. (Nov. 1993). Under Amendment 488, the weight of the carrier medium is not to be used for sentencing determinations.

However, "§ 3582(c), enacted as part of the federal sentencing guidelines, applies only to offenses committed on or after their effective date, November 1, 1987." United States v. Watson, 868 F.2d 157, 158 (5th Cir. 1989). It does not appear that § 3582 permits resentencing for pre-guideline sentences whose duration parallels that of concurrent guideline sentences. McCusker argues that failure to apply § 3582 to his pre-guideline sentences would frustrate the intent of the Sentencing Commission and Congress. Such a contention appears too attenuated in light of Watson; the language of § 3582 relied upon by McCusker, "sentenced to a term of imprisonment based on a [subsequently-lowered] sentencing range," logically pertains to defendants sentenced under

the guideline, as the statute was enacted in conjunction with adjustments to the guidelines. Thus, § 3582(c) does not provide an avenue for the reduction of McCusker's pre-guideline sentences.

McCusker's proper avenue for a reduction of his pre-guideline sentences would have been a motion under former Fed. R. Crim. P. 35(b). See United States v. Chagra, 957 F.2d 192, 194 n.1 (5th Cir. 1992). A Rule 35 motion must be brought within 120 days after the sentence was imposed "or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment," and the time limit imposed by Rule 35 is jurisdictional. Id. (citation omitted); see In re United States, 900 F.2d 800, 803 (5th Cir.), cert. denied, 498 U.S. 905. Having failed to timely file a Rule 35 motion, McCusker is not entitled to any relief.

#### CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.