UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:15-cr-00025-JMS-MJD
	)	
ROBERT E. FOX,	) -01	
	)	
Defendant.	)	

ORDER DENYING MOTION FOR SENTENCE REDUCTION

This matter is before the Court on Robert E. Fox's motion seeking a sentence reduction, dkt. [203], filed pursuant to § 603 of the First Step Act, which is codified at 18 U.S.C. § 3582(c)(1)(A). For the reasons explained below, Mr. Fox's motion is **denied.**

I. Background

In 2016, Mr. Fox was convicted of two counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and two counts of using, carrying, or possessing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(C)(i). Dkts. 111, 113. He was initially sentenced to a total term of 435 months' imprisonment, consisting of concurrent 51-month sentences for each of the robbery counts and consecutive sentences of 84 months and 300 months, respectively, for the two firearm counts. Dkt. 113. On appeal, the Seventh Circuit Court of Appeals affirmed his convictions but vacated his sentences and remanded for resentencing. Dkt. 148. In August 2018, Mr. Fox was resentenced to a total term of imprisonment of 396 months and 1 day, consisting of concurrent sentences of 12 months and 1 day on each of the robbery counts and consecutive sentences of 84 months and 300 months, respectively, for the two firearm counts.

Dkts. 163, 164. At the time, the consecutive 84-month and 300-month sentences for the two firearm counts represented the mandatory minimum sentence under the so-called "stacking" provisions of § 924(c)(1). *See* 18 U.S.C. § 924(c)(1) (eff. Oct. 6, 2006 to Dec. 20, 2018). As explained below, the stacking provisions of § 924(c)(1) have since changed.

Mr. Fox is 39 years old. He represents that he has been incarcerated for just over 6 years, *see* dkt. 203 at 3, and the Bureau of Prisons ("BOP") lists his anticipated release date as November 2, 2044.

On August 31, 2020, Mr. Fox filed a motion seeking a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). Dkt. 201. He argued that the Court should reduce his sentence of imprisonment to a total of 5 years. *Id.* at 11. He argued that the change to the stacking provisions of § 924(c)(1)(C) constituted an extraordinary and compelling reason for a sentence reduction under § 3582(c)(1)(A)(i). *See generally* dkt. 201. The Court denied the motion without prejudice because it did not show that Defendant was entitled to compassionate release. Dkt. 202. In so doing, the Court noted that the Court had held that the change to the stacking provisions of § 924(c)(1)(C) is not an extraordinary and compelling reason warranting a sentence reduction and, even if it could be in some case, it was not an extraordinary and compelling reason when the defendant had only served a portion of what he claimed his sentence would be under current law. *Id.* (citing *United States v. Fisher*, 1:15-cr-157-JMS-MJD-01, dkt. 140 (S.D. Ind. Aug. 25, 2020)). The Court informed Mr. Fox that he could pursue a motion for compassionate release by completing and returning the Court's form compassionate release motion. *Id*. On October 20, 2020, Mr. Fox

completed and returned the Court's form compassionate release motion. Dkt. 203. That motion is currently pending before the Court.[1]

II. Discussion

In 2018, Congress passed the First Step Act, which allows the Court to consider a federal inmate's motion to reduce sentence pursuant to 18 U.S.C. § 3582(c)(1)(A). First Step Act of 2018, § 603(b)(1), 132 Stat. 5194, 5239. The First Step Act was enacted on December 21, 2018—after Mr. Fox was sentenced. Section 403(a) of the First Step Act also modified § 924(c)'s stacking provision, eliminating mandatory stacking except for "a violation of [§ 924(c)] that occurs after a prior conviction under [§ 924(c)] has become final." *Id.*, § 403(a), 132 Stat. at 5222; *see* 28 U.S.C. § 924(c)(1)(C). This change effectively eliminated mandatory stacking for cases—like Mr. Fox's—where multiple firearms offenses were charge in a single indictment. Thus, if Mr. Fox were sentenced today, he would not be subject to a mandatory 300-month sentence for his second firearm charge. But the First Step Act's amendment to § 924(c)(1)(C) applies only to "any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." First Step Act of 2018, § 403(b), 132 Stat. at 5222. That is, the amendment to the stacking provisions was not retroactive.

In his renewed motion, Mr. Fox again argues that the Court should grant him a sentence reduction based on the change to the stacking provisions of § 924(c)(1)(C). Dkt. 203 at 4. Although not explicitly stated in his current motion, the Court understands Mr. Fox to again be arguing that the change to the stacking provisions of § 924(c)(1)(C) represents an extraordinary and compelling reason warranting a sentence reduction. Dkt. 203 at 2; *see also* dkt. 201 at 2, 4, 9–11;

[1]The Court concludes that it does not require a response brief from the United States to decide the issues presented by Mr. Fox's motion.

18 U.S.C. § 3582(c)(1)(A)(i).[2] In his renewed motion, Mr. Fox does not request any particular sentence reduction, but his original motion asked the Court to reduce his total term of incarceration to 5 years. *See* dkt. 201 at 11.

Mr. Fox's motion must be denied. Congress expressly declined to make § 403(a)'s amendment retroactive to defendants, like Mr. Fox, who were sentenced before the First Step Act was enacted. First Step Act of 2018, § 403(b), 132 Stat. at 5222. And Congress authorized courts to exercise their discretion to apply other sentencing amendments—but not § 403(a)'s stacking amendment—to otherwise ineligible defendants. *See* First Step Act of 2018, § 404(b), 132 Stat. at 5222 (authorizing courts to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed"). If Congress intended to authorize courts to exercise discretion to apply § 403 retroactively to otherwise ineligible defendants, it would have included that amendment in § 404(b). This Court has consistently held that defendants like Mr. Fox may not use 18 U.S.C. § 3582(c)(1)(A)(i)'s "extraordinary and compelling" provision as an end-around to achieve a result that Congress did not intend. *See United States v. Neubert*, 2020 WL 1285624, at *3 (S.D. Ind. Mar. 17, 2020) (rejecting argument similar to Mr. Fox's); *see also United States v. Fulcher*, No. 1:98-cr-00119-SEB-TAB, dkt. 18 (S.D. Ind. Aug. 5, 2020) (same); *United States v. Goetz*, No. 1:98-cr-123-SEB-KPF-01, dkt. 25 (S.D. Ind. Sept. 10, 2020) (same); *Fisher*, 1:15-cr-157-JMS-MJD-01, dkt. 140 (same); *but see United States v. Arey*, --- F. Supp. 3d ----, ----, 2020 WL 2464796, at *4-5 (W.D. Va. May 13, 2020) (collecting cases and holding that "continued incarceration under a sentencing

[2]To the extent Mr. Fox relies directly on § 403 of the First Step Act, as opposed to the "extraordinary and compelling reasons" prong of § 3582(c)(1)(A), his motion also must be denied because, as explained, § 403 explicitly states that it is not retroactive.

scheme that has since been substantially amended is a permissible 'extraordinary and compelling' reason to consider a reduction in [the defendant's] sentence"). Thus, as the Court informed Mr. Fox in its September 2 Order, the change to the stacking provisions is not an extraordinary and compelling reason warranting a sentence reduction.[3]

In his original motion, Mr. Fox argued that courts have broad discretion to decide what constitutes an "extraordinary and compelling reason" for a sentence reduction under § 3582(c)(1)(A)(i). Dkt. 201 at 1. That may be true. But Congress explicitly declined to make the change to § 924(c)'s stacking provisions retroactive. That fact convinces the Court that the difference between the lengthy sentence Mr. Fox received and the sentence he might receive if sentenced today is not an extraordinary and compelling reason warranting a sentence reduction.

Mr. Fox also states that § 403 of the First Step Act "'clarified' the 924(c) statute and it narrowed the class of persons covered by the enhancement provision." Dkt. 203 at 4; *see also* dkt. 201 at 4–7 (making argument that § 403 of the First Step Act "clarified" § 924(c)). To the extent Mr. Fox's "clarification" argument is an argument that § 403 of the First Step Act should be applied retroactively because it merely clarified what § 924(c) has always meant, the Court disagrees. The Court agrees with the detailed analysis in *United States v. Neubert*, No. 1:07-cr-166-SEB-KPF-01, dkt. 93 at 3–5 (S.D. Ind. Mar. 17, 2020) (J. Barker), which rejected a similar argument. In brief, although the section heading of § 403 of the First Step Act is "Clarification of Section 924(c) of

[3]In his original motion, Mr. Fox also relied on his record of rehabilitation as an extraordinary and compelling reason warranting a sentence reduction. *See* dkt. 201 at 2. He does not repeat that argument in his current motion, and the Court deems it abandoned. Regardless, rehabilitation is not—standing alone—an extraordinary and compelling reason warranting a sentence reduction. 28 U.S.C. § 994(t). ("[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason").

Title 18, United States Code," in the text of the statute, Congress explicitly declined to make § 403 retroactive. In such a situation, there is no basis to conclude that § 403 applies retroactively.

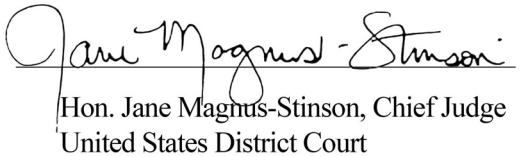
Finally, the Court notes that, even if the change to the stacking provisions of § 924(c)(1)(C) could be an extraordinary and compelling reason warranting a sentence reduction in some case, it would not support the only specific reduction Mr. Fox has requested—a reduction to a total term of imprisonment of 5 years. Mr. Fox was sentenced to 12 months and 1 day for the Hobbs Act counts. And, even if he were sentenced today, Mr. Fox would—at a bare minimum—be subject to an additional consecutive sentence of 7 years for his first firearm count, resulting in a total sentence of 8 years and 1 day. 18 U.S.C. §§ 924(c)(1)(A)(ii), (D)(ii) (eff. Dec. 21, 2018). Moreover, Mr. Fox was convicted of two firearms counts, and § 924(c)(1)(D)(ii) provides that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." Thus, he could also be subject to another mandatory consecutive 7-year sentence for his second firearm count, representing a total sentence of 15 years and 1 day.[4] In either case, a sentence of 5 years would not be appropriate.

III. Conclusion

Mr. Fox's motion for sentence reduction, dkt. [203], is **denied.**

IT IS SO ORDERED.

Date: 10/26/2020



Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

[4] Mr. Fox has only served about 6 years of his sentence. Assuming that he would be sentenced to 15 years and 1 day if sentenced today, his motion is due to be denied for another reason—it is premature. *See Fisher*, No. 1:15-cr-157-JMS-MJD-01, dkt. 140 at 5–6.

Distribution:

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