

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA,

v.

CRIMINAL NO. 4:20cr27

JOSEPH M. CHERRY, II,

Defendant.

MEMORANDUM ORDER

This matter comes before the court on Defendant Joseph M. Cherry, II's Letter Motion to Correct Sentencing ("Letter Motion"). He challenges the calculation of his criminal history category in his Presentence Report ("PSR") and asks the court to correct his sentence pursuant to Federal Rule of Criminal Procedure 36. See ECF No. 39.

This postconviction case pits the principle of judicial finality against the need for justice. Under these circumstances, finality must yield to justice. For the reasons discussed below, the court **GRANTS** Defendant's pro se Letter Motion, unless there is a timely objection to this sentencing change and procedure, as set forth below.

Procedural History

On October 23, 2020, Defendant pleaded guilty to Counts 1 and 5 of the Indictment. ECF No. 18. In his Plea Agreement, Defendant waived his right to appeal. Id. ¶ 5. Count One charged Defendant with Wire Fraud, in violation of 18 U.S.C. § 1343.

Id. ¶ 1. Count Five charged Defendant with Theft of Government Property, in violation of 18 U.S.C. § 641. Id. On January 7, 2021, the Probation Office prepared a PSR. ECF No. 22. The parties did not object to the PSR. ECF Nos. 25, 26. The PSR calculated a Total Offense Level of 16. ECF No. 28 ¶ 95. After compiling Defendant's prior convictions and sentences, the PSR determined that, based on ten (10) criminal history points, Defendant fell into Criminal History Category V. Id. ¶¶ 48, 96. With a Total Offense Level of 16 and Criminal History Category V, Defendant faced a Sentencing Guidelines range of forty-one (41) months to fifty-one (51) months' imprisonment. Id. ¶ 96.

On March 11, 2021, the court sentenced Defendant to fifty-one (51) months of imprisonment, the high end of the Guidelines range, and three years of supervised release. ECF No. 31.¹

On September 7, 2021, the court received a letter motion subject to defect. ECF Nos. 37, 38. On October 4, 2021, the court received the instant Letter Motion with the defect corrected. ECF No. 39.

¹ The court sentenced Defendant to identical punishments for Counts 1 and 5, which would run concurrently. ECF No. 31.

PSR Analysis

Before discussing Rule 36, the court first addresses whether an error exists. In this case, the court agrees with Defendant that the PSR miscalculated his criminal history category of V.

Defendant challenges the two points added for his 2018 state conviction. See ECF No. 39 at 1; PSR at 20. Defendant argues that the total imprisonment for the conviction was only fifty-five (55) days, thus falling under the sixty (60) days required for two criminal history points. See U.S.S.G. § 4A1.1(b). That fifty-five (55) days comes from the underlying non-suspended forty-five (45) days' imprisonment plus ten (10) extra days for a probation violation. See ECF No. 39 at 1; PSR at 20. Under the July 6, 2018, amended sentence the term of imprisonment summed to fifty-five (55) days. Under § 4A1.1(c) that would add a single point to the criminal history score rather than two (2) points as listed.

The Defendant has correctly identified a calculation error in the PSR. His term of imprisonment under the 2018 state conviction was misapplied to the Guidelines. See PSR at 20. Under the Guidelines, a reduction from ten (10) points to nine (9) points drops Defendant's criminal history category from V to IV, reducing the sentencing range from 41-51 months down to

33-41 months.² Since the court sentenced Defendant to fifty-one (51) months' imprisonment for the offense conduct, this PSR error had a substantial impact on his sentencing. The court must now determine whether the error is a clerical error and thus can be addressed through Rule 36.

Rule 36 Background

Rule 36 of the Federal Rules of Criminal Procedure provides that "[a]fter giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." Fed. R. Crim. P. 36. "There is no dispute that a PSR . . . constitutes an 'other part of the record' amenable to correction under Rule 36." United States v. Vanderhorst, 927 F.3d 824, 826 (4th Cir. 2019).

In Vanderhorst, the Fourth Circuit explained that Rule 36 allows "a defendant to obtain resentencing when a clerical error likely resulted in the imposition of a longer sentence than would have been imposed absent the error." Id. at 827 (citing United States v. Powell, 266 Fed. App'x 263, 265 (4th Cir. 2008)). While finality in judicial proceedings requires that judicial and substantive errors become final after a period, this principle does not limit the correction of a purely

² The probation officer agrees that an error occurred and with the court's recalculation. See October 7, 2021, Memo to the Honorable Rebecca Beach Smith. ECF No. 40.

clerical error. Id. (citing Powell, 266 Fed. App'x at 266). "Forcing a defendant . . . to spend years longer in prison solely due to a data entry error for which he had no responsibility serves no legal, judicial, or public interest, is manifestly unjust, and is why Rule 36 exists." Id.

The Federal Rules of Criminal Procedure do not define "clerical error," but courts have held that a clerical error "must not be one of judgment or even misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." Connor v. United States, 2011 WL 1322402, *3 (D. Md. Apr. 1, 2011) (quoting United States v. Robinson, 368 F.3d 653, 656 (6th Cir. 2004)). These errors typically occur when "the written sentence differs from the oral pronouncement of the sentence, not judicial mistakes." United States v. Johnson, 571 F.3d 716, 718 (7th Cir. 2009).³

In Vanderhorst, for example, the PSR misclassified a prior conviction as "conspiracy to sell and deliver cocaine," instead

³ For other applications of Rule 36 see United States v. Mackay, 757 F.3d 195, 196 (5th Cir. 2014) (requiring the correction of a clerical error where the PSR listed the offense of conviction as involving cocaine, when it had in fact involved marijuana); see also United States v. McLean, 2012 WL 259322, *2 n.8 (D. Md. Jan. 25, 2012) (collecting cases and citing examples of clerical errors including written judgment stating defendant had been convicted under statute different from that orally imposed by the court; statement in judgment that defendant was sentenced to 77 months in prison when court had orally imposed 83-month sentence; and statement in written judgment that sentences would run concurrently when court had pronounced that they would run consecutively).

of "conspiracy to traffick cocaine by transportation." 927 F.3d at 826. As a result, this conviction incorrectly served as a predicate offense for the career offender enhancement at the time of sentencing. Id. at 825-26. The Fourth Circuit held that the district court had the power under Rule 36 to correct this "scrivener's or recording error" and that the district court could order resentencing based on such error. Id. at 827.⁴

In contrast to errors that are "mechanical in nature," courts reject the application of Rule 36 to alleged errors of the court's judgment. United States v. Taylor, No. 3:13CR87, 2021 WL 43994, at *6 (E.D. Va. Jan. 5, 2021) (Lauck, J.) (quoting United States v. Robinson, 368 F.3d 653, 656 (6th Cir. 2004)). A common unsuccessful Rule 36 claim involves questioning whether a predicate offense counts toward a career offender sentence enhancement. See, e.g., United States v. Dillman, No. 5:11cr44, 2019 WL 7169786, at *3 (W.D. Va. Dec. 24, 2019) (denying Rule 36 motion where defendant argues that the convictions do not meet the definition of "prior felony conviction"). These claims fail because such arguments address

⁴ Since the defendant in Vanderhorst had other convictions that qualified him for career offender status, the Fourth Circuit affirmed the denial of postconviction relief. Vanderhorst, 927 F.3d at 828 (affirming "the district court's judgment because Defendant's three remaining convictions were sufficient to sustain his classification and sentencing as a career offender under U.S.S.G. § 4B1.1").

substantive legal issues. Courts have also rejected the use of Rule 36 to challenge drug quantities in the PSR when the court made the drug quantity findings itself. Black v. United States, No. 2:94cv15, No. 2:14cv35, 2015 WL 12916995, *1 (E.D.N.C. Oct. 20, 2015), aff'd 645 F. App'x 284 (4th Cir. 2016). In United States v. Johnson, the Seventh Circuit rejected the use of Rule 36 because the court found nothing in the record indicating that the pronounced drug quantities were "added to the overall sentencing calculation without the district court's knowledge or approval." 571 F.3d 716, 718 (7th Cir. 2009). These challenges fail because the petitioner sought to amend the court's judgment or findings as to the weight of the drugs. These kinds of questions involve specific legal analysis and factual findings by the court, and thus fall outside the purview of Rule 36.

Once a district court finds a clerical error, Rule 36 does not require a full resentencing to alter a sentence. See Taylor, No. 3:13CR87, 2021 WL 43994, at *9 (correcting a PSR error with a simple adjustment of the sentence to the low end of the corrected Guidelines range rather than with a de novo resentencing as the United States suggested). Like with other postconviction challenges, under Rule 36, a district court can recalculate a movant's Guidelines range without a de novo resentencing. See United States v. Black, 388 F. Supp. 3d 682,

690, 692 (E.D. Va. 2019) (reducing defendant's sentence pursuant to the First Step Act without a resentencing hearing). The need for a resentencing hearing falls within the discretion of the district court.

Rule 36 Application

The court finds that Defendant identified a clerical error in his PSR that the court may correct "at any time." Fed. R. Crim. P. 36. The miscalculation does not involve the court's judgment of law or fact. This mistake involves the mechanical summing of the days of imprisonment to see if they total at least sixty (60) days. While not a pure copying error, the miscalculation bears a strong resemblance to the errors found by courts to trigger Rule 36.⁵

Like in Taylor, Defendant has not raised a substantive legal argument. Instead, he seeks only the proper calculation of his term of imprisonment and the proper application of the Sentencing Guidelines. Unlike in Johnson, here the record indicates that the error in calculation was not knowingly approved by the court and involved no findings by the court. The court accepted as fact that the 2018 state conviction involved at least sixty (60) days of imprisonment, as there was never an issue or an objection to it at sentencing. All parties accepted the Probation Officer's calculation.

⁵ See supra at 4-7 ("Rule 36 Background").

Since the error falls within the purview of Rule 36, the court must determine the nature of the remedy. Under its discretion, the court finds that a full resentencing hearing is not necessary. Instead, a mechanical modification of the sentence will suffice. Using the corrected thirty-three (33) months to forty-one (41) months Guidelines range, the court will simply shift Defendant's sentence to the high end of that range, for all the same reasons stated by the court at sentencing. ECF Nos. 31, 35. This results in a sentence reduction of ten (10) months, from fifty-one (51) months to forty-one (41) months' imprisonment.

This decision does not open the door widely for postconviction Rule 36 relief. In the court's experience, miscalculations that impact the Sentencing Guideline range rarely slip past the probation officer, the parties, and the court itself. This exceptional case shows that Rule 36 offers a remedy for a limited set of purely clerical errors. The court's finding is a narrow one, serving the needs of our judicial system for both finality and justice.


Conclusion

The Defendant's Letter Motion to Correct Sentencing is **GRANTED**. ECF No. 39. The court hereby **RESENTENCES** Defendant to forty-one (41) months' imprisonment on Counts 1 and 5 to run concurrently. All other aspects of the Judgment entered

March 12, 2021, ECF No. 34, including his three (3) years of supervised release, remain in full force and effect. Additionally, the Probation Officer is **DIRECTED** to amend the PSR with the proper Guideline calculations. The court advises the parties that this sentencing change will go into effect unless they timely object within fourteen (14) days of the filing of this Memorandum Order.

The Clerk is **DIRECTED** to send a copy of this Memorandum Order to the Defendant; the Defendant’s former trial counsel, Lawrence Hunter Woodward, Jr.; the United States Attorney at Newport News; the Bureau of Prisons; and the Probation Officer.

IT IS SO ORDERED.

/s/ 

Rebecca Beach Smith
Senior United States District Judge

REBECCA BEACH SMITH
SENIOR UNITED STATES DISTRICT JUDGE

October 8, 2021