

November 3, 2015

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCOS ANTONIO AVALOS-
CHAVEZ,

Defendant - Appellant.

No. 15-4111
(D.C. No. 2:12-CR-00642-DAK-2)
(D. Utah)

ORDER AND JUDGMENT*

Before **GORSUCH, McKAY, and BACHARACH**, Circuit Judges.

After his conviction for federal drug charges, the district court turned to the question of an appropriate sentence for Mr. Avalos-Chavez. It began by calculating the advisory guidelines range. In doing so, the court took into account — and gave Mr. Avalos-Chavez the benefit of — an anticipated amendment to the guidelines that was not yet technically effective. The resulting advisory

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

guidelines suggested a sentence of between 70 and 87 months. But the district court thought this much too much and ultimately imposed a 48-month sentence. Now the amendment is effective and Mr. Avalos-Chavez seeks to reopen his sentencing hearing. The district court refused this request, emphasizing that it had already given him everything the amendment might. Even so, Mr. Avalos-Chavez appeals.

We see no grounds for reversal. Mr. Avalos-Chavez is of course correct that 18 U.S.C. § 3582(c)(2) empowers a district court to modify a defendant's sentence if it was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." And Mr. Avalos-Chavez is also right that his advisory sentencing range has now been lowered by the Commission. But he fails to account for the fact that § 3582(c)(2) also states that a district court may reduce a defendant's sentence only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." And the relevant policy statement here, U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(A)-(B), expressly provides (with one exception not relevant here) that a court "shall not" reduce a defendant's sentence below the amended advisory guidelines range. Because the district court anticipated the amended advisory guidelines range at his original sentencing hearing, because that range suggested a sentence of at least 70 months, and because Mr. Avalos-Chavez received a

sentence well below that, the district court properly recognized that he was entitled to no further relief.

Affirmed.

ENTERED FOR THE COURT

Neil M. Gorsuch
Circuit Judge