

Not for Publication in West's Federal Reporter
Citation Limited Pursuant to 1st Cir. Loc. R. 32.3

United States Court of Appeals For the First Circuit

No. 03-1214

UNITED STATES,

Appellee,

v.

CARLOS TOBAR,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, II, U.S. District Judge]

Before

Boudin, Chief Judge,
Lynch and Howard, Circuit Judges.

Carlos Tobar on brief pro se.

H.S. Garcia, United States Attorney, Sonia I. Torres-Pabón,
Assistant United States Attorney, and Nelson Pérez-Sosa, Assistant
United States Attorney on brief for appellee.

September 4, 2003

=====

Per Curiam. Pro se appellant Carlos Tobar appeals a district court order that denied his motion for sentence modification pursuant to 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 3B1.2, as amended by U.S. Sentencing Guidelines Manual, supp. to app. C, Amendment 635 (2001). Assuming that the ten-day appeal period in Fed. R. App. P. 4(b)(1)(A) controls, see, e.g., United States v. Fair, 326 F.3d 1317, 1318 (11th Cir. 2003) (collecting cases), this appeal is timely. See Fed. R. App. P. 4(c)(1) (mailbox rule applies to inmate's notice of appeal), Fed. R. App. P. 26(a)(2) (weekends and holidays are excluded from filing periods of less than 11 days, unless stated in calendar days). Nevertheless, the appeal fails on another ground.

Contrary to appellant's suggestion, Amendment 635 is not retroactive. See U.S.S.G. § 1B1.10(c) (2002). Consequently, the district court lacked the authority to reduce appellant's sentence in light of this amendment. See id. § 1B1.10(a) ("If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) ... is not authorized."); see also, United States v. Jordan, 162 F.3d 1, 3 (1st Cir. 1998) (noting that, under 18 U.S.C. § 3582(c)(2), district court "could reduce the sentence if and only if doing so was 'consistent with applicable policy statements issued by the Sentencing Commission'"); United States v. Lopez-Pineda, 55 F.3d 693, 697 n.3 (1st Cir. 1995) (guideline amendment not listed in

U.S.S.G. § 1B1.10(c) may not be applied retroactively); DeSouza v. United States, 995 F.2d 323, 324 & n. 1 (1st Cir. 1993) (per curiam) (similar).

In view of the foregoing, the order denying appellant's 18 U.S.C. § 3582(c)(2) motion is summarily affirmed. See Loc. R. 27(c).