

FEB 21 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>CHARLES KING,</p> <p style="text-align: center;">Defendant - Appellant.</p>
--

No. 09-10306

D.C. No. 2:08-cr-00322-RLH-GWF-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Submitted February 15, 2012**
San Francisco, California

Before: THOMAS, FISHER and IKUTA, Circuit Judges.

Defendant Charles King appeals his sentence on the bases that (1) the Fair Sentencing Act of 2010 (FSA) and subsequent sentencing guideline amendments retroactively apply to him and (2) his sentence was substantively unreasonable.

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1. The FSA does not retroactively apply to King because he was sentenced before the law was passed. *See United States v. Baptist*, 646 F.3d 1225, 1229 (9th Cir. 2011) (per curiam). Thus, King remains subject to the 60-month mandatory minimum sentence imposed by 21 U.S.C. § 841(b)(1)(B)(iii) at the time he was sentenced. Although the post-FSA sentencing guideline amendments are retroactive, they do not help King because he was sentenced based on a statutory mandatory minimum, not the sentencing guidelines. *See U.S. Sentencing Guidelines Manual* app. C, at 394 (offenders “sentenced at the statutory mandatory minimum . . . cannot have their sentences lowered by an amendment to the guidelines”).

2. The district court did not abuse its discretion by imposing a substantively unreasonable sentence when it sentenced King to the statutory mandatory minimum. The court had no authority to depart below that sentence. *See United States v. Wipf*, 620 F.3d 1168, 1170-71 (9th Cir. 2010). Although Congress later enacted the FSA and the Commission amended the sentencing guidelines, that does not make King’s sentence substantively unreasonable.

AFFIRMED.