

MAY 21 2013

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCUS GALLIEN, a.k.a. Baby
Scrooge, a.k.a. Scrooge,

Defendant - Appellant.

No. 12-50141

D.C. No. 2:08-cr-00381-VBF

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Submitted May 14, 2013**

Before: LEAVY, THOMAS, and MURGUIA, Circuit Judges.

Marcus Gallien appeals pro se from the district court's order denying his 18 U.S.C. § 3582(c)(2) motion for reduction of sentence. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* 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).

Gallien contends that he is eligible for a sentence reduction because his sentence was based on a sentencing range calculated under U.S.S.G. § 2D1.1, and that range was subsequently lowered by the Sentencing Commission through Amendment 750 to the Guidelines. Gallien acknowledges that the court initially calculated his sentencing range under U.S.S.G. § 4B1.1, the career offender Guideline, but contends that it varied downward to the section 2D1.1 sentencing range, thus entitling him to relief under section 3582(c)(2). We review de novo whether the district court had jurisdiction to modify a sentence under section 3582(c)(2). *See United States v. Leniear*, 574 F.3d 668, 672 (9th Cir. 2009).

The record does not support Gallien's assertion that the district court calculated a new sentencing range under section 2D1.1 when it varied below the career offender Guideline range. Moreover, even if Gallien were correct, a reduction in his sentence would not be consistent with U.S.S.G. § 1B1.10, which establishes that the applicable Guidelines range is the pre-variance Guidelines range. *See* U.S.S.G. § 1B1.10 cmt. n.1(A) (2011); *United States v. Pleasant*, 704 F.3d 808, 812 (9th Cir. 2013). Accordingly, the district court lacked jurisdiction to lower Gallien's sentence. *See* 18 U.S.C. § 3582(c)(2); *Pleasant*, 704 F.3d at 812.

AFFIRMED.