

APR 04 2008

CATHY A. CATTERSON, 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NOT FOR PUBLICATION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.

JAMES STEPHON JOHNSON,

Defendant-Appellant.

No. 05-50830

D.C. No. CR 05-452-R-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted October 24, 2006
Pasadena, California

Before: SILER,** TASHIMA, and BEA, Circuit Judges.

Defendant James Stephon Johnson appeals his 120-month sentence for possessing cocaine base (crack cocaine) with intent to distribute, claiming that his sentence was unreasonable under *United States v. Booker*, 543 U.S. 220 (2005). We affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Relying on *United States v. Medina Casteneda*, 511 F.3d 1246, 1248-49 (9th Cir. 2008), Johnson argues that the district court did not recognize its discretion to consider the disparity between crack and powder cocaine under the Sentencing Guidelines. However, the facts of this case distinguish it from *Medina Casteneda*, in which the district court stated: “I don’t believe it’s appropriate for the Court to specifically reduce a sentence under 18 U.S.C. [§] 3553(a) on the basis that the Congress and the U.S. Sentencing Commission are wrong in establishing different penalties for different types of controlled substances.” *Id.*

In this case, the government conceded at sentencing that the district court had discretion to consider the disparity between crack and powder cocaine under the Sentencing Guidelines. Nowhere did the court indicate that it lacked discretion to consider the disparity. The court’s comment about Congress concerned minimum sentences, not the disparity between crack and powder cocaine. Further, the court properly considered evidence of Johnson’s involvement with greater quantities of drugs and specifically referenced the § 3553(a) factors. During sentencing, the court stated: “The Court has considered the provisions of Title 18 United States Code Section 3553(a), that while [Johnson] was dealing narcotics it was at least shown to me based upon questions that they determined from phone taps that he was involved in much greater quantities than that which he was found.” The court reasonably found

that Johnson did not deserve a downward departure from the Sentencing Guidelines, and the court correctly recognized the advisory nature of the Sentencing Guidelines and that it had sentencing discretion. *See United States v. Kimbrew*, 406 F.3d 1149, 1152 (9th Cir. 2005).

Although we find no error in the district court's actions, Johnson may still move the district court to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2) based on the retroactive amendment to the Sentencing Guidelines that reduces penalties for crack cocaine offenses. *See* USSG § 1B1.10 (2008).

AFFIRMED.