NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1514

UNITED STATES OF AMERICA,

Appellee,

v.

ERIC KINNARD,

Appellant.

On Appeal from the Sentence of the United States District Court
for the Middle District of Pennsylvania
and Petition to Withdraw from Representation
(D.C. No. 05-cr-0337)
District Judge: Honorable Christopher C. Conner

Submitted Under Third Circuit LAR 34.1(a)
January 8, 2007

Before: SLOVITER, RENDELL, *Circuit Judges*, and IRENAS,[*] *Senior District Judge.*

(Filed: January 18, 2007)

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[*] Honorable Joseph E. Irenas, Senior United States District Judge for the District of New Jersey, sitting by designation.

OPINION

IRENAS, *Senior United States District Judge.*

Eric Kinnard appeals his sentence of 105 months imposed after he pleaded guilty to distribution and possession with intent to distribute heroine in violation of 21 U.S.C. § 841(a)(1). Kinnard's counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), along with a Petition to Withdraw from Representation of the Appellant. Kinnard was notified of his right to submit a *pro se* brief in support of his appeal but has not done so. For the reasons set forth below, we will affirm the sentencing order and grant counsel's request to withdraw.

I.

Pursuant to a written plea agreement with the United States, Kinnard pleaded guilty to one count of distribution and possession with intent to distribute heroine on October 28, 2005. At the sentencing hearing, Kinnard moved for a downward departure, asserting that his criminal history category of VI overstated the seriousness of his previous offenses. The United States also moved for a downward departure based on Kinnard's substantial assistance in the investigation and prosecution of other offenders.

The district court denied Kinnard's motion and granted the United States' motion.

The court concluded that Kinnard's criminal history category did not substantially overrepresent the seriousness of his criminal history or the likelihood that he will commit other crimes. Specifically, the court noted that Kinnard had nine convictions since 1993 and three prior convictions for crimes of violence.

With respect to the United States' motion, the court noted that Kinnard cooperated "very well" with law enforcement. The court granted the motion, departing downward five levels, even though the United States sought only a three level departure. Taking into account the departure, the court determined that Kinnard's offense level was 24, his criminal history was 6, and the guideline range was 100 to 125 months. The court then imposed a sentence of 105 months. Kinnard timely filed a notice of appeal.

II.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We exercise jurisdiction over the sentencing order pursuant to 28 U.S.C. § 1291 and over the final sentence pursuant to 18 U.S.C. § 3742(a).

Pursuant to Third Circuit Local Appellate Rule 109.2(a), if trial counsel reviews the district court record and "is persuaded that the appeal presents no issue of even arguable merit, trial counsel may file a motion to withdraw and supporting [*Anders*] brief." Third Circuit L.A.R. 109.2(a). In considering counsel's submission, we must examine: (1) "whether counsel fulfilled the rule's requirements;" and (2) "whether an

independent review of the record presents any nonfrivolous issues." *United States v. Youla*, 241 F.3d 296, 300 (3d Cir. 2001). To satisfy the *Anders* requirements, Appellant's counsel must "satisfy the court that he or she has thoroughly scoured the record in search of appealable issues" and "explain why the issues are frivolous." *United States v. Marvin,* 211 F.3d 778, 780 (3d Cir. 2000).

First, we find that Appellant's counsel's brief, along with the Petition to Withdraw from Representation, adequately demonstrate that counsel has reviewed the record for appealable issues and explained why those issues are frivolous. Second, after our own independent analysis of the record, we agree with counsel's analysis that this appeal presents no non-frivolous issues.

We see two possible issues. First, Kinnard might challenge the district court's refusal to downwardly depart on his criminal history category. However, even before *United States v. Booker*, 543 U.S. 220 (2005), "we declined to review discretionary decisions to deny departures," *United States v. Cooper*, 437 F.3d 324, 332 (3d Cir. 2006), and *Booker* did not alter that precedent. *Cooper*, 437 F.3d at 333.

Second, Kinnard might challenge his sentence as unreasonable under *Booker*. The sentencing transcript makes clear, however, that the district court addressed the factors found in 18 U.S.C. § 3553(a) (*see* App. at p. 21), and imposed a sentence that was within the applicable guideline range. *See Cooper,* 437 F.3d at 331 ("it is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be

unreasonable.”). Indeed, Kinnard’s sentence was at the lower end of the applicable guideline range and significantly lighter than the sentence recommended by the government.

Accordingly, the sentence will be affirmed and counsel’s Petition granted.