

UNPUBLISHED

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

MICHAEL LEROY DARITY,  
*Defendant-Appellant.*

No. 00-4883

UNITED STATES OF AMERICA,  
*Plaintiff-Appellant,*

v.

MICHAEL LEROY DARITY,  
*Defendant-Appellee.*

No. 01-4018

Appeals from the United States District Court  
for the Western District of North Carolina, at Asheville.  
Lacy H. Thornburg, District Judge.  
(CR-95-132)

Submitted: November 28, 2001

Decided: December 13, 2001

Before WILLIAMS and KING, Circuit Judges, and  
HAMILTON, Senior Circuit Judge.

---

No. 00-4883 affirmed and No. 01-4018 reversed and remanded by  
unpublished per curiam opinion.

---

**COUNSEL**

Scott H. Gsell, LAW OFFICES OF SCOTT GSELL, Charlotte, North Carolina, for Appellant. Robert J. Conrad, Jr., United States Attorney, Brian L. Whisler, Assistant United States Attorney, Thomas E. Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

---

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

---

**OPINION**

PER CURIAM:

These appeals arise from the district court's orders granting partial relief on Michael Darity's 28 U.S.C.A. § 2255 (West Supp. 2001) motion and denying the Government's motion to reconsider. For the reasons discussed below, we affirm in No. 00-4883 and, in No. 01-4018, we reverse the order denying the Government's motion for reconsideration and remand for reimposition of Darity's original sentence.

Darity was convicted in 1997 of conspiracy to manufacture and distribute crack cocaine, 21 U.S.C.A. §§ 841(a)(1) and 846 (West 1999), and sentenced to 384 months imprisonment, followed by five years of supervised release. This court affirmed his conviction and sentence on direct appeal. *United States v. Darity*, No. 98-4090, 1999 WL 397722 (4th Cir. June 17, 1999) (unpublished), *cert. denied*, 525 U.S. 1091 (1999).

Darity filed a § 2255 motion in the district court challenging his conviction and sentence under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Darity also claimed that he was improperly sentenced as a leader or organizer and that his attorney was ineffective for failing to stipulate to the facts surrounding his arrest. The dis-

district court granted Darity's § 2255 motion in part, reasoning that *Apprendi* applied retroactively, and reduced Darity's sentence to 240 months imprisonment. The court denied relief as to Darity's other claims. The Government filed a motion to reconsider, arguing that *Apprendi* should not be applied retroactively to cases on collateral review. The district court denied the motion. Darity and the Government appeal.

In No. 00-4883, our review of the record and the district court's opinion to the extent it denied relief on Darity's claims discloses no reversible error. Accordingly, we affirm the denial of relief on the reasoning of the district court. *United States v. Darity*, No. CR-95-132 (W.D.N.C. filed Oct. 25, 2001; entered Oct. 30, 2000).<sup>\*</sup> In light of our disposition in No. 01-4018, we deny as moot the Government's motion for summary reversal of the district court's order to the extent that it granted partial relief.

In No. 01-4018, the Government appeals from the district court's denial of its motion to reconsider the granting of relief on Darity's motion with respect to his claim under *Apprendi*. In *United States v. Sanders*, 247 F.3d 139 (4th Cir.), *cert. denied*, 2001 WL 1244813 (U.S. Nov. 13, 2001) (No. 01-6715), we held that *Apprendi* is not retroactively applicable to cases on collateral review. *Id.* at 146. The district court's order squarely conflicts with *Sanders*. We therefore reverse the district court's order denying the Government's motion for reconsideration and remand with instructions to reimpose Darity's original 384-month sentence.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

No. 00-4883 - *AFFIRMED*

No. 01-4018 - *REVERSED AND REMANDED*

---

<sup>\*</sup>Although we grant Darity's motion to file a supplemental pro se brief, we have reviewed his claims and find them to be without merit. See *United States v. McAllister*, \_\_\_ F.3d \_\_\_, No. 00-4423 (4th Cir. Nov. 8, 2001) (holding that 21 U.S.C. § 841 is not unconstitutional in light of *Apprendi*).