

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4077

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN LEE JOHNSON, a/k/a Lil KP, a/k/a KP,

Defendant - Appellant.

Appeal from the United States District Court for the Western
District of North Carolina, at Charlotte. Frank D. Whitney,
District Judge. (3:07-cr-00061-FDW-12)

Submitted: September 8, 2011

Decided: October 3, 2011

Before NIEMEYER, KING, and SHEDD, Circuit Judges.

Affirmed in part; vacated and remanded in part by unpublished
per curiam opinion.

Lisa S. Costner, LISA S. COSTNER, P.A., Winston-Salem, North
Carolina, for Appellant. Amy Elizabeth Ray, Assistant United
States Attorney, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin Lee Johnson appeals his conviction and the 240-month sentence imposed after he pled guilty to drug conspiracy, in violation of 21 U.S.C. §§ 841(b)(1)(A), (B), (C), (D), 846 (2006). The Government filed an information pursuant to 21 U.S.C. § 851(a)(1) (2006), setting forth two prior North Carolina felony drug convictions, thereby subjecting Johnson to a statutorily mandated minimum term of life imprisonment. Subsequently, based on Johnson's cooperation, the district court granted the Government's motion to withdraw one of the prior convictions and sentenced Johnson to the resulting statutorily mandated minimum sentence of 240 months of imprisonment. Johnson appealed.

Counsel has filed a brief in accordance with Anders v. California, 386 U.S. 738 (1967), noting no meritorious issues for appeal that would invalidate Johnson's guilty plea. Johnson filed a pro se supplemental brief and motion to modify his sentence, challenging his conviction and sentence on several grounds. The Government declined to file a brief and has not filed a motion to dismiss based on the appellate waiver contained in Johnson's written plea agreement. We have reviewed the record and conclude that the district court substantially complied with the requirements of Fed. R. Crim. P. 11 and ensured that Johnson's plea was knowing and voluntary and

supported by a sufficient factual basis. Consequently, we affirm Johnson's conviction.

We vacate Johnson's sentence, however, and remand for further proceedings in light of our recent en banc opinion in United States v. Simmons, 649 F.3d 237 (4th Cir. 2011). The present record is not sufficient to allow a determination of whether, after Simmons, Johnson's prior convictions qualify as a felony drug offense for purposes of an enhanced statutory penalty under 21 U.S.C. §§ 841(b), 851. We leave this determination to the district court on remand.

In accordance with Anders, we have reviewed the entire record in this case and have found one meritorious sentencing issue requiring remand. We therefore affirm Johnson's conviction, but vacate his sentence and remand to the district court for further proceedings consistent with this opinion. We deny Johnson's motion to modify his 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.

AFFIRMED IN PART;
VACATED AND REMANDED IN PART