

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-4126

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TIMOTHY BALLARD,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Louise W. Flanagan, Chief District Judge. (7:10-cr-00052-FL-1)

Submitted: September 27, 2011

Decided: October 24, 2011

Before MOTZ, SHEDD, and WYNN, Circuit Judges.

Vacated and remanded for resentencing by unpublished per curiam opinion.

Thomas P. McNamara, Federal Public Defender, Stephen C. Gordon, Assistant Federal Public Defender, Raleigh, North Carolina, for Appellant. Thomas G. Walker, United States Attorney, Jennifer P. May-Parker, Kristine L. Fritz, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Timothy Ballard appeals his 180-month sentence received for his conviction in May 2009 for the distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) (2006). Ballard's sole contention on appeal is that, because he was not sentenced until after August 3, 2010, he should have been sentenced under the provisions of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (the "FSA"). Although the Government resisted this line of argument in the district court, it now agrees before this court that Ballard's sentence should be vacated and the case remanded for resentencing.

We, therefore, vacate Ballard's sentence and remand this case to the district court to permit resentencing. By this disposition, however, we indicate no view as to whether the FSA is retroactively applicable to a defendant like Ballard whose offenses were committed prior to August 3, 2010, the effective date of the FSA, but who was sentenced after that date. We leave that determination in the first instance to the district court. 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.

VACATED AND REMANDED FOR RESENTENCING