

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

September 16, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TERRANCE WILLS,

Defendant - Appellant.

No. 21-3060
(D.C. No. 5:19-CR-40019-DDC-3)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON, BRISCOE, and PHILLIPS**, Circuit Judges.

Terrance Wills, proceeding pro se,¹ appeals the district court’s dismissal of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), as amended by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Exercising jurisdiction

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Wills is pro se, we construe his filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008). He is subject to the same procedural rules governing other litigants. See *United States v. Green*, 886 F.3d 1300, 1307 (10th Cir. 2018).

under 28 U.S.C. § 1291, we vacate the court’s dismissal and remand with instructions to deny the motion.

I. BACKGROUND

In 2019, Mr. Wills pled guilty to possession with intent to distribute heroin. The presentence investigation report calculated a guidelines range of 100 to 125 months of imprisonment. The district court sentenced Mr. Wills to 72 months of imprisonment and 60 months of supervised release. His earliest release date is March 27, 2024.

In December 2020, Mr. Wills submitted a compassionate-release request to the Bureau of Prisons (the “BOP”) under 18 U.S.C. § 3582(c)(1)(A). He cited (1) his medical conditions, including asthma, hypertension, and bronchitis; (2) his race; and (3) the spread of COVID-19. After the BOP failed to respond within 30 days, Mr. Wills filed his motion in the district court. Two months later, he filed a motion to expedite.

The district court determined that Mr. Wills satisfied the exhaustion requirements set forth in § 3582(c)(1)(A). It agreed with Mr. Wills that his asthma constituted an extraordinary and compelling circumstance under § 3582(c)(1)(A)(i). It then weighed the § 3553(a) factors and concluded that modifying Mr. Wills’s sentence was not warranted. The court noted that the government did not argue that Mr. Wills was a danger to society. It also recognized that Mr. Wills’s limited access to rehabilitative programs due to the COVID-19 pandemic somewhat favored a reduction in his sentence.

The court nonetheless concluded that the § 3553(a) factors had not shifted enough since Mr. Wills’s sentencing to justify reducing his sentence by 50 percent. It noted that Mr. Wills was initially sentenced in the midst of the pandemic, so the continuing

pandemic did not constitute a change in conditions. It also placed significant weight on the seriousness of Mr. Wills's offense. The court thus dismissed Mr. Wills's motion for compassionate release for lack of subject-matter jurisdiction and dismissed his motion to expedite as moot.

Mr. Wills timely appealed. He initially failed to prosecute his appeal, so we dismissed it. But we granted his motion to submit a late-filed brief and reinstated the appeal.

II. DISCUSSION

A. *Standard of Review*

We review a district court's ruling on a First Step Act motion for abuse of discretion. *See United States v. Mannie*, 971 F.3d 1145, 1147-48, 1154-55 (10th Cir. 2020). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." *United States v. Piper*, 839 F.3d 1261, 1265 (10th Cir. 2016) (quotations omitted).

B. *Legal Background*

Title 18 U.S.C. § 3582(c)(1)(A), as amended by Section 603(b) of the First Step Act, allows defendants to move for compassionate release in the district court after exhausting BOP administrative remedies. *See United States v. Maumau*, 993 F.3d 821, 830-31 (10th Cir. 2021). The court may grant the motion only when "(1) the district court finds that extraordinary and compelling reasons warrant such a reduction; (2) the district court finds that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and (3) the district court considers the factors set

forth in § 3553(a), to the extent that they are applicable.” *Id.* at 831; *see also* 18 U.S.C. § 3582(c)(1)(A).

The § 3553(a) factors are: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant”; (2) “the need for the sentence imposed to reflect the seriousness of the offense”; (3) “the kinds of sentences available”; (4) “the kinds of sentences available and sentencing range established for” the offense at the time of sentencing; (5) “any pertinent policy statement” in effect at the time of the defendant’s sentencing; (6) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”; and (7) “the need to provide restitution to any victims of the offense.” *Id.* § 3553(a)(1)-(7).

“[D]istrict courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking.” *Maumau*, 993 F.3d at 831 n.4 (quotations omitted); *see also United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021).

C. *Analysis*

Mr. Wills argues the district court abused its discretion by holding that the § 3553(a) factors weighed against his release.² He contends that (1) the circumstances have changed due to the spread of the Delta variant of COVID-19 and the detention facility’s inadequate response to the new variant, (2) the court insufficiently weighed the

² Mr. Wills also argues that the government erred in relying on U.S.S.G. § 1B1.13. But the district court did not rely on that policy statement when it dismissed his motion.

government's concession that Mr. Wills was not a danger to the community, and (3) the court failed to adequately consider Mr. Wills's good behavior and participation in rehabilitative programs in prison.

The district court did not abuse its discretion. The court first concluded that Mr. Wills had established that extraordinary and compelling circumstances existed due to his asthma. Turning to the § 3553(a) factors, it weighed his lack of access to rehabilitative programs against the seriousness of his offense. The court also found that since Mr. Wills had originally been sentenced during the pandemic, the ongoing health crisis did not constitute a change in conditions. It also noted that the government did not argue that Mr. Wills was a danger to the community. In reviewing the district court's consideration of both the facts establishing the extraordinary and compelling circumstances and the relevant § 3553(a) factors, we cannot say the court abused its discretion. *See United States v. Hald*, 8 F.4th 932, 947 (10th Cir. 2021).³

Although we uphold the ruling on the merits, a recent decision of this court shows that the district court should have denied Mr. Wills's motion rather than dismiss it for lack of jurisdiction. We previously have suggested in nonprecedential opinions that a failure to meet the requirements in § 3582(c)(1)(A) would deprive the court of jurisdiction. *See, e.g., United States v. Saldana*, 807 F. App'x 816, 820 (10th Cir. 2020)

³ Mr. Wills also requests that we reduce his sentence to match his completion of a drug program. But he failed to make this request before the district court, so we will not consider it for the first time on appeal. *See McDonald v. Kinder-Morgan*, 287 F.3d 992, 999 (10th Cir. 2002).

(unpublished). But we recently clarified in a published opinion that § 3582(c)(1)(A)'s requirements are not jurisdictional. *Hald*, 8 F.4th at 942 n.7.

III. CONCLUSION

We vacate the district court's order and remand with instructions to deny the motion.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge