FILED
United States Court of Appeals
Tenth Circuit

October 25, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROMAN ENRIQUE DELGADO-MONTOYA,

Defendant - Appellant.

No. 20-2125
(D.C. No. 2:15-CR-00125-KG-CG-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **EBEL**, and **EID**, Circuit Judges.

Amid the ongoing COVID-19 pandemic, appellant Roman Enrique Delgado-Montoya was serving a 120-month prison sentence for violating 8 U.S.C. § 1326(a), (b). He filed pro se, and supplemented through counsel, a motion for a sentence reduction with the district court.

Delgado-Montoya argued that his medical condition rendered him vulnerable to COVID-19 and thus qualified as an extraordinary and compelling reason, as defined by U.S.S.G. § 1B1.13(1)(A), permitting a sentence reduction through 18 U.S.C. § 3582(c)(1)(A).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

The district court denied the motion. Delgado-Montoya now appeals, arguing that the district court impermissibly bound itself to U.S.S.G. § 1B1.13(1)(A) when it concluded that he failed to demonstrate extraordinary and compelling reasons to justify a sentence reduction.

Under 28 U.S.C. § 1291, we affirm the denial of the motion for sentence reduction because the district court did not limit itself to U.S.S.G. § 1B1.13(1)(A) in its decision and if any error did occur, it was harmless.

I. FACTUAL BACKGROUND

In February 2014, the United States deported Delgado-Montoya to Mexico. In May 2014, Delgado-Montoya unlawfully reentered the United States and eventually pleaded guilty to one count of reentry by a removed alien in violation of 8 U.S.C. § 1326(a), (b).

In the presentence report, Delgado-Montoya's offense level received a two-level increase for obstruction of justice after he feigned mental health and cognitive issues and a sixteen-level increase from a prior conviction for a crime of violence. The district court sentenced Delgado-Montoya to 120 months' imprisonment. Delgado-Montoya appealed and we affirmed the sentence. *See United States v. Delgado-Montoya*, 663 F. App'x 719 (10th Cir. 2016).

Early in the COVID-19 pandemic, Delgado-Montoya submitted an undated pro se request to the Federal Bureau of Prisons for a sentence reduction. In May 2020, Delgado-Montoya filed a pro se motion with the district court for a sentence

reduction, which was then supplemented by appointed counsel. And in June 2020, Delgado-Montoya submitted through counsel a third request for a sentence reduction.

Delgado-Montoya argued that age, high cholesterol, and deteriorating eyesight rendered him vulnerable to the virus and qualified as extraordinary and compelling reasons under the commentary to the U.S. Sentencing Commission's policy statement, § 1B1.13(1)(A). And, as a result, Delgado-Montoya urged that a sentence reduction was authorized under 18 U.S.C. § 3582(c)(1)(A)(i). Delgado-Montoya also asserted that "[e]ven if this [c]ourt were to find that he does not fit within the precise contours of that scenario, this [c]ourt has the discretion and authority to find that he falls within the scope of the 'other reasons' scenario of the policy statement." Aplt. App'x Vol. I at 42. Delgado-Montoya further claimed that considering the § 3553(a) factors permitted a sentence reduction because the underlying conviction for a crime of violence, the basis for the sixteen-level enhancement, was dismissed and there was no presented risk of danger to the community.[1]

The district court denied the motion, concluding, as relevant, that Delgado-Montoya failed to allege any extraordinary and compelling reasons to justify compassionate release. After describing the effects of the First Step Act, the court stated that to find extraordinary and compelling reasons for a sentence reduction based on a defendant's medical condition, the defendant "must be" suffering from a

[1] Because Delgado-Montoya did not raise this issue on appeal, he has waived it and is not entitled to appellate relief. *See Dubbs v. Head Start, Inc.,* 336 F.3d 1194, 1202 n. 2 (10th Cir. 2003) (holding that where a party does not brief an issue on appeal, the argument is waived).

medical condition as described in the policy statement. *Id*. at 275. Later, stating that "the Sentencing Guidelines are advisory," the court found Delgado-Montoya: 1) did not allege or provide evidence of a serious health condition "or that he is at a significantly higher risk of infection and death from COVID-19"; 2) "is considered able to manage his conditions through routine, regularly scheduled appointments with clinicians for monitoring"; 3) did "not allege that [the correctional facility] has a substantial outbreak of COVID-19; 4) did not state the mother-in-law is unable to care for Delgado-Montoya's daughter; and 5) "failed to establish additional care is needed or that other reasonable options are unavailable to assist the mother-in-law and daughter." *Id.* at 275–77.

The court also noted Delgado-Montoya's progress towards his G.E.D., completion of programs, and model prison record. The district court then declined to reach the factors addressing community safety and § 3553(a). In all, after examining the facts before it, the court found Delgado-Montoya failed to allege any extraordinary and compelling reasons to justify a sentence reduction.

Delgado-Montoya timely appealed.

II. ANALYSIS

We review de novo the question of whether the district court properly understood "the scope of . . . [its] authority" under § 3582(c)(1)(A). *United States v. Maumau*, 993 F.3d 821, 830 (10th Cir. 2021); *see also United States v. Ansberry*, 976 F.3d 1108, 1126 (10th Cir. 2020).

As amended by the First Step Act, 18 U.S.C. § 3582(c)(1) states, as relevant:

> (c) **Modification of an imposed term of imprisonment**.—The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction; . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . .

18 U.S.C. § 3582(c)(1)(A)(i).

A district court may thus grant a motion for a sentence reduction if it finds that extraordinary and compelling reasons warrant a reduction, contemplates the factors in § 3553(a) as relevant, and the reduction is consistent with applicable policy statements issued by the U.S. Sentencing Commission. *United States v. McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021).

The existing policy statement by the U.S. Sentencing Commission states that extraordinary and compelling reasons exist under the following circumstances:

> (A) **Medical Condition of the Defendant.—**
>
> (i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
>
> (ii) The defendant is—
>
> (I) suffering from a serious physical or medical condition,
>
> (II) suffering from a serious functional or cognitive impairment, or
>
> (III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.
>
> (B) **Age of the Defendant.—**
>
> The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
>
> (C) **Family Circumstances.—**
>
> (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
>
> (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.
>
> (D) **Other Reasons.—**

> As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S.S.G. § 1B1.13 cmt. 1.

In our circuit, the "Sentencing Commission's existing policy statement is applicable only to motions filed by the Director of the [Bureau of Prisons], and not to motions filed directly by defendants." *Maumau*, 993 F.3d at 836–37 (10th Cir. 2021) (citing *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020)). Indeed, "if a compassionate release motion is not brought by the [Bureau of Prisons] Director, Guideline § 1B1.13" would "not, by its own terms [be considered to] apply to it." *Id.* at 837 (quoting *Brooker*, 976 F.3d at 236). Because "Guideline § 1B1.13 is not 'applicable' to compassionate release motions brought by defendants, Application Note 1(D) cannot constrain district courts' discretion to consider whether any reasons are extraordinary and compelling." *Id.*

In this case, Delgado-Montoya "directly filed" a motion for sentence reduction and therefore, under *Maumau*, the district court's discretion to grant a sentence reduction is not restrained by the commentary to U.S.S.G. § 1B1.13. Delgado-Montoya argues that the district court erred by restraining its discretion to the policy statement's commentary in finding that Delgado-Montoya did not demonstrate extraordinary and compelling reasons for a reduction. Specifically, Delgado-

Montoya points to the fact that, after describing the effects of the First Step Act, the court stated that "to find 'extraordinary and compelling reasons' for a sentence reduction based on a defendant's medical condition, the defendant *must be*" suffering from a medical condition as described in the policy statement. Aplt. App'x Vol. I at 275 (emphasis added).

The district court's statement, however, must be read in context. Delgado-Montoya focused on the commentary to the Sentencing Commission's policy statement when he argued that his medical condition and resulting vulnerability to COVID-19 amounted to an extraordinary and compelling reason under § 1B1.13. For example, Delgado-Montoya argued that his susceptibility to severe illness or death because of the "proliferation of COVID-19 in prisons, combined with . . . [his] age" caused him to "fall[] within the scope of . . . the policy statement." Aplt. App'x Vol. I at 42. It is thus entirely logical (and unsurprising) that the court would address Delgado-Montoya's argument with the commentary of § 1B1.13. Merely citing a guideline does not amount to an erroneous restraint of discretion.

Moreover, the court articulated that "the Sentencing Guidelines are advisory" only. Aplt. App'x Vol. I at 276. In this way, the court recognized that the language of § 1B1.13 did not restrict its evaluation. This is further evidence that the district court did not erroneously restrict its discretion to the policy statement's commentary.

Finally, the most important indication that the court did not erroneously constrain its discretion is the fact that it considered factors not listed in the commentary of the Sentencing Guidelines policy statement. For example, instead of

checking Delgado-Montoya's health conditions against § 1B1.13(1)(A)'s exhaustive list of qualifying conditions (terminal illness, a "serious" condition, or age-related deterioration), the court considered the totality of evidence regarding Delgado-Montoya's health conditions, risk factors, and living situation. Specifically, the court indicated it might consider compassionate release for someone whose "underlying health conditions place him at high risk of infection and death from COVID-19," a factor that is not mentioned in § 1B1.13(1)(A). Aplt. App'x Vol. I at 273. It ultimately concluded that Delgado-Montoya's health condition is manageable and under control, that he is not at a significantly high risk of infection and death from COVID-19, and that the correctional facility had no substantial COVID-19 outbreak.[2]

Notably, the court found that Delgado-Montoya did not provide evidence of a health condition rising to the level of seriousness required by § 1B1.13(1)(A) "*or* that he is at a significantly higher risk of infection and death from COVID-19." *Id.* at 275. This framing indicates that, although the court considered Delgado-Montoya's condition in light of § 1B1.13(1)(A), it did not rely exclusively on an inconsistency with the commentary to reach its conclusion. Rather, the court also based its ruling on its finding that Delgado-Montoya's COVID-19 risk, which he failed to show was unusually high, did not constitute an extraordinary and compelling reason for early release. The court's analysis thus demonstrates that it did not "constrain [its]

[2] Importantly, Delgado-Montoya does not contest any of these factual findings on appeal and has therefore waived any challenge to them. *See* supra n.1.

discretion to consider whether any reasons are extraordinary and compelling." *Maumau*, 993 F.3d at 837.

Further, Delgado-Montoya raised rehabilitation, family circumstances, and the loss of adequate care for his daughter and mother-in-law only in the context of his argument that he "is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." He argued that his efforts to enrich and educate himself and the fact that he has a release plan involving caring for his family are relevant to the court's consideration of whether a sentencing reduction is consistent with the Sentencing Commission's policies. But Delgado-Montoya did not argue that these factors constituted extraordinary and compelling reasons.

Nevertheless, the district court independently considered whether those circumstances called for a sentence reduction. For example, after commending Delgado-Montoya for his efforts at rehabilitation, the court observed, unprompted, that Congress does not consider rehabilitation alone to be an extraordinary and compelling reason for purposes of compassionate release. *Id*. (referring to 28 U.S.C. § 994(t)). Additionally, the court found no evidence that Delgado-Montoya's mother-in-law was unable to care for his daughter or that assistance was unavailable, again findings that Delgado-Montoya does not contest. Acknowledging that the commentary to the Sentencing Guidelines is "advisory," the court noted that, even so, Delgado-Montoya had not provided enough facts for his argument to succeed on a totality-of-the-circumstances analysis. Delgado-Montoya's mother-in-law never indicated "that she is unable to care for . . . [his] daughter, and . . . [Delgado-

Montoya] has failed to establish additional care is needed or that other reasonable options are unavailable" to assist his family members. Aplt. App'x Vol. I at 276. In sum, not only did the court not restrict its discretion to the confines of the Sentencing Guidelines, it considered potential arguments not raised by Delgado-Montoya in the context of extraordinary and compelling reasons.

True, the district court's decision came after this court's decisions in *McGee* and *Maumau*, both of which held that, as noted above, district courts are not bound by the examples of extraordinary and compelling reasons enumerated in the § 1B1.13 commentary, and may determine whether such reasons are present based on the totality of a defendant's circumstances. However, the district court's decision, as demonstrated above, is entirely consistent with those decisions. By not constraining its discretion to the policy statement's commentary in this case, the district court followed the correct analysis as set forth in *McGee* and *Maumau*.

In any event, if the court did commit an error, it was a harmless one.[3] Even if the court had improperly constrained its discretion, the error would not have affected its decision. In other words, assuming the court incorrectly treated the enumerated categories in the policy statement's commentary as a limitation, it still would have denied the motion for sentence reduction, concluding that none of the facts in the

[3] We address the issue of harmless error on our own initiative because it is clear from the record that any error would be harmless. *See United States v. Doe*, 572 F.3d 1162, 1175 (10th Cir. 2009).

record constituted extraordinary and compelling reasons to reduce Delgado-Montoya's sentence.

For example, the policy statement's commentary contains a list of categories under which a defendant's medical condition could fall. If the court had constrained itself to the listed conditions, it would not have included Delgado-Montoya's condition within them. One such category, as particularly relevant here, is any "serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." U.S.S.G. § 1B1.13(1)(A).

As noted above, Delgado-Montoya provided no evidence that he is at a particularly high risk of infection and death from COVID-19 and, although he alleged that the correctional facility failed to take appropriate safety precautions, he did not argue that it had a substantial outbreak. The district court noted that "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release." Aplt. App'x Vol. I at 273 (citing *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020)).

Additionally, as noted above, the court took it upon itself to assess Delgado-Montoya's family circumstances among other factors, even though he did not raise that argument in the context of "extraordinary and compelling reasons." The district court found no evidence to indicate that Delgado-Montoya's daughter could not be cared for by his mother-in-law while he served time at the correctional facility.

In sum, we conclude that, even if the district court improperly constrained its discretion, it would have reached the same result. Reliance on the policy statement thus would not have had a "substantial influence" on the outcome or leave us in "grave doubt" as to whether it had such an effect. *United States v. Cristerna-Gonzalez*, 962 F.3d 1253,1267 (10th Cir. 2020) (citations omitted).

III. CONCLUSION

By not confining its discretion to the policy statement to determine whether the presented facts amounted to extraordinary and compelling reasons to permit a sentence reduction, the district court properly understood its discretion. Furthermore, if any error did occur, it was harmless. We accordingly AFFIRM the district court's denial of the motion for a sentence reduction. We also deny Delgado-Montoya's motion to remand.

Entered for the Court

Allison H. Eid
Circuit Judge