FILED
United States Court of Appeals
Tenth Circuit

May 10, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NORMAN SHAW, JR.,

Defendant - Appellant.

No. 22-3251
(D.C. No. 2:05-CR-20073-JWL-1)
(D. Kan.)

ORDER AND JUDGMENT*

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

Norman Shaw, Jr., appearing pro se, appeals his sentence and the district court's denial of his post-sentencing motion for relief under Rule 35(a) of the Federal Rules of Criminal Procedure. The district court found that Mr. Shaw had committed a Grade B violation of his supervised release and sentenced him to 21 months of imprisonment. Mr. Shaw contends the district court abused its discretion in finding his conduct amounted to a Grade B violation, arguing his offense was not punishable

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

by a term of imprisonment exceeding one year. Exercising jurisdiction under 18 U.S.C. § 1291, we affirm.[1]

I. BACKGROUND

A. *Legal Background*

When a district court imposes a sentence for violation of supervised release, it "is required to consider the policy statements contained in Chapter 7 of the Sentencing Guidelines . . . ." *United States v. Ortiz-Lazaro*, 884 F.3d 1259, 1262 (10th Cir. 2018). Chapter Seven of the United States Sentencing Guidelines establishes three grades—A, B, and C—of supervised release violations, each having sentencing consequences. U.S.S.G. § 7B1.1(a).

Grade B encompasses "conduct constituting any [] federal, state, or local offense punishable by a term of imprisonment exceeding one year." *Id.* § 7B1.1(a)(2). Grade C includes "a federal, state, or local offense punishable by a term of imprisonment of one year or less" or "a violation of any other condition of supervision." *Id.* § 7B1.1(a)(3).[2] For a defendant with a criminal history category of VI, like Mr. Shaw, the Guidelines recommend a prison term of 21-27 months for a Grade B violation and 8-14 months for a Grade C violation. *Id.* § 7B1.4.

[1] Because Mr. Shaw appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

[2] Grade A is not relevant to this appeal, so we do not discuss it here.

Under federal law, the penalty for simple possession of a controlled substance carries a "term of imprisonment of not more than 1 year." 21 U.S.C. § 844(a). But if the defendant has a prior conviction that "has become final" "for any drug, narcotic, or chemical offense chargeable under the law of any State . . . he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years." *Id.* This "recidivist simple possession" is thus "punishable as a federal felony under the Controlled Substances Act." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 567-68 (2010) (quotations omitted).

B. ***Revocation Proceedings***

In 2006, Mr. Shaw pled guilty to (1) entering a bank with the intent to rob it and (2) bank robbery, both in violation of 18 U.S.C. § 2113(a). He was sentenced to two concurrent prison terms of 165 months followed by three years of supervised release. Mr. Shaw began supervised release on February 23, 2022.

On October 18, 2022, the United States Probation Office petitioned the district court for an arrest warrant and revocation of Mr. Shaw's supervised release. The petition was based, among other things, on positive drug tests for amphetamine, methamphetamine, and cocaine. It reported that he had submitted 15 positive drug tests since his supervised release began, and it alleged these tests establish Grade B violations for possessing a controlled substance in violation of the federal Controlled Substances Act, 21 U.S.C. § 844(a). The petition explained that his state drug

conviction under Missouri law from 2002 made his simple drug possession during supervised release eligible for a prison term exceeding a year under federal law.[3]

At the final revocation hearing, a probation officer testified about the probation violations, stating that Mr. Shaw had signed an admission of usage form on three occasions when he had tested positive for drug use. Counsel for Mr. Shaw conceded that his client had signed the documents but contended the Government had not "prove[d] up" the 2002 Missouri conviction, so classifying the violation as Grade B was not appropriate. ROA, Vol. III at 67-68. The district court offered to continue the hearing. Counsel stated that Mr. Shaw's "belief is that that conviction does exist, but that because it is 20 years old, it should not be a proper enhancement here." *Id.* at 68. The court asked whether Mr. Shaw would "stipulate and agree that [the Missouri] conviction did occur." Mr. Shaw, addressing the court, said, "Yes, 2002; it happened in 2002." *Id.* at 69.

The district court concluded that Mr. Shaw had violated the terms of his supervised release. It determined his violation was a Grade B because, based on his prior Missouri drug conviction, using a controlled substance while on supervised release was punishable by a prison term exceeding one year under 21 U.S.C. § 844(a). Based on the Grade B violation and a criminal history category of VI, the court revoked Mr. Shaw's supervised release and sentenced him to 21 months in

[3] Mr. Shaw had been convicted under Missouri Revised Statute § 195.202, which made it unlawful "for any person to possess or have under his control a controlled substance." Mo. Rev. Stat. § 195.202.

prison followed by 12 months of supervised release. Mr. Shaw filed a notice of intent to appeal his sentence.

Proceeding pro se, Mr. Shaw also filed a motion in district court under Federal Rule of Criminal Procedure 35(a) to correct his sentence and a motion for relief from judgment under Federal Rule of Civil Procedure 60(b).[4] In both motions, he argued that the district court erred in classifying his supervised release violation as Grade B rather than Grade C. He also moved to amend his Rule 35(a) motion to include a claim that the district court should have applied the "categorical approach" to determine whether his Missouri drug offense was a "prior [drug] conviction" under 21 U.S.C. § 844(a). ROA, Vol. I at 200-02.

The district court denied Mr. Shaw's motions. It explained that Fed. R. Crim. P. 35(a) is limited to relief from a calculation error or obvious mistake and that Fed. R. Civ. P. 60(b) is inapplicable to criminal cases. The court also held that Mr. Shaw's arguments failed on the merits because his Missouri conviction qualified as a prior conviction under 21 U.S.C. § 844(a) to make his drug possession during supervised release eligible for a sentence in excess of one year. The court thus again concluded his offense was a Grade B violation.

[4] Mr. Shaw also filed a motion to appoint counsel for a limited purpose and a motion to transfer his supervision to another district. We abated Mr. Shaw's appeal pending the resolution of his district court motions, which were denied.

II. **DISCUSSION**

Mr. Shaw challenges the procedural reasonableness of his sentence. He argues the district court erred in determining his supervised release violation was Grade B. He advances three arguments:

(1) The district court erred in relying on his Missouri conviction because it did not make the Government prove the offense. Aplt. Br. at 4.

(2) The district court erred in relying on his Missouri conviction because it was "expired" and "over 15 years old" and therefore should not have been used to determine the category of his supervised release violation. *Id.* at 2-3.

(3) His Missouri conviction "is not a controlled substance offense under the Federal Controlled Substance Act" and thus cannot serve as a predicate offense for calculating his criminal history category. Aplt. Memo. at 17; Aplt. Br. at 3.

He also disputes the district court's denial of his Rule 35(a) motion. Aplt. Br. at 4.

"Generally, we review a revocation sentence imposed by the district court to determine if it is reasoned and reasonable." *United States v. Lamirand*, 669 F.3d 1091, 1093 (10th Cir. 2012) (quotations omitted). We review the district court's application of the Guidelines for abuse of discretion. *United States v. Rodriguez*, 945 F.3d 1245, 1248 (10th Cir. 2019). In applying this standard, we review findings of fact for clear error and legal determinations de novo. *United States v. Ruby*, 706 F.3d 1221, 1225 (10th Cir. 2013).

We conclude the district court correctly determined that Mr. Shaw committed a Grade B supervised release violation.

As previously noted, the Guidelines define a Grade B violation of supervised release as conduct constituting a "federal, state, or local offense punishable by a term of imprisonment exceeding one year." U.S.S.G. § 7B1.1(a)(2). "As the Guidelines envision, the grade of the violation turns on the maximum punishment that *could* have been imposed." *Rodriguez*, 945 F.3d at 1253. Under federal law, Mr. Shaw's possession of controlled substances during his supervised release could have been punished by more than one year in prison because he had a 2002 Missouri final conviction for a "drug, narcotic, or chemical offense." 21 U.S.C. § 844(a); ROA, Vol. I at 302. The district court relied on the Missouri conviction to conclude that Mr. Shaw's simple possession of controlled substances was a Grade B violation.

Mr. Shaw contends the district court erred in considering his prior Missouri conviction for three reasons.

First, he claims the Government failed to prove his Missouri conviction. The record shows otherwise. In general, "[w]henever a prior conviction is relevant to sentencing, the government must establish the fact of that conviction by a preponderance of the evidence." *United States v. Cooper*, 375 F.3d 1041, 1052 (10th Cir. 2004). During his revocation hearing, Mr. Shaw stipulated to the 2002 Missouri conviction. *See* ROA, Vol. III at 68-69.[5] The district court did not abuse

[5] The revocation hearing transcript contains the following:

> **Court**: All right. So is it correct, Mr. Shaw, that you stipulate and agree that that conviction did occur?
> **Defendant**: Yes, Your Honor.

its discretion in relying on this stipulation. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (acknowledging that a judge may rely on "the facts . . . admitted by the defendant" at sentencing (emphasis omitted)).

Second, Mr. Shaw asserts that his Missouri conviction had "expired" or was too old to be a "prior conviction" under 21 U.S.C. § 844(a). Aplt. Br. at 2. He cites U.S.S.G. § 4A1.2(e), which limits when a district court may consider old convictions to compute a criminal history score. *Id.* This provision does not apply to § 844(a) and thus has no bearing on whether Mr. Shaw's Missouri conviction constitutes "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State" under 21 U.S.C. § 844(a).

We have held that "a district court may consider a supervisee's past drug convictions in determining the grade of a violation based on simple possession." *Rodriguez*, 945 F.3d at 1251. The text of 21 U.S.C. § 844(a) contains no expiration date for prior convictions, and Mr. Shaw does not cite any case law interpreting the

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> **Court**: And I don't need to hear anymore about it, 'cause I want you to talk to your lawyer in that respect, but I'm simply asking that in Paragraph Number—excuse me—32, it alleges a prior drug conviction in Jackson County Circuit Court, Kansas City, Missouri, with a particular docket number. You indicated you'd read the violation report. That particular conviction is true and correct, then, from your knowledge; is that correct?
> **Defendant**: Yes, 2002; it happened in 2002, Your Honor, yes.

ROA, Vol. III at 69.

federal statute to exclude older state convictions.[6] The district court thus did not err in finding that the 2002 Missouri drug conviction made Mr. Shaw eligible for a two-year sentence under § 844(a), rendering his drug use on supervised release a Grade B violation.

Third, Mr. Shaw argues the district court erred in considering his Missouri conviction because it "is not a controlled substance offense under the Federal Controlled Substance Act." Aplt. Memo. at 17. But § 844(a) does not require the prior offense to be a violation of that Act. It simply refers to "any drug, narcotic, or chemical offense chargeable under the law of any State." Mr. Shaw nonetheless asserts that the elements of Mo. Rev. Stat. § 195.202 do not match the elements of § 844(a). He says we should apply the "categorical approach" that courts use to determine whether a prior state conviction qualifies as a "serious drug offense" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). *See Descamps v. United States*, 570 U.S. 254, 260-62 (2013) (explaining the categorical approach taken under the ACCA). Although the categorical approach applies to serious drug offenses under the ACCA, it does not pertain to § 844(a).[7] His argument has no

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[6] During the hearing, counsel for Mr. Shaw stated, "Frankly, I don't see anything in [§ 844(a)] that limits a look-back period." ROA, Vol. III at 68.

[7] Mr. Shaw's Reply directs us to a recent Eighth Circuit decision holding that a Missouri conviction for the sale of cocaine was not a "serious drug offense" for purposes of the ACCA. *See* Aplt. Reply Br. at 1 (citing *United States v. Myers*, 56 F.4th 595, 598 (8th Cir. 2022)). But he fails to explain why the categorical approach under the ACCA is relevant to the definition of "prior conviction" in 21 U.S.C. § 844(a).

relevance to whether his Missouri conviction constitutes "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State" under § 844(a).

Finally, Mr. Shaw argues the district court erred in dismissing his Rule 35(a) motion for a sentence modification. Aplt. Br. at 4. Generally, a district court "has no authority to modify [a] sentence once it is imposed." *United States v. Gladney*, 44 F.4th 1253, 1259 (10th Cir. 2022) (quotations omitted) (alteration in original). Rule 35(a) contains a limited exception for a court to "correct a sentence that resulted from arithmetical, technical, or other clear error" on a motion filed within 14 days of sentencing. Mr. Shaw's arguments to the district court about his Missouri conviction were not about arithmetical, technical, or clear errors. *United States v. Lonjose*, 663 F.3d 1292, 1299 n.7 (10th Cir. 2011) (Rule 35(a) "was intended to be very narrow and to extend only to those cases in which an obvious error or mistake had occurred" (quotations omitted)). The district court thus did not err in dismissing Mr. Shaw's motion. It correctly stated that Rule 35(a) "does not provide a basis for a court to simply reconsider its sentencing decision." ROA, Vol. I at 306 (quoting *United States v. Mendoza*, 543 F.3d 1186, 1196 (10th Cir. 2008)).

Even if Mr. Shaw's arguments challenging the grade of his supervised release violation had merit, the district court could not have reviewed them through the Rule 35(a) motion. *See United States v. Gordon K.*, 257 F.3d 1158, 1162 (10th Cir. 2001) (holding the district court cannot use a Rule 35 motion to "reopen issues previously resolved at the sentencing hearing" (quotations omitted)); *see also United*

States v. Bedonie, 413 F.3d 1126, 1130 (10th Cir. 2005) (explaining that "absent some obvious oversight of a factual basis . . . there was no 'clear error'" to permit the district court's modification of a sentence under Rule 35(a)). And as we have already concluded, there were no errors in Mr. Shaw's sentencing. The district court thus did not abuse its discretion in dismissing Mr. Shaw's 35(a) motion.

III. **CONCLUSION**

We affirm the district court.[8]

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[8] We deny Mr. Shaw's motion for an expedited ruling as moot.