

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TERENCE L. THOMAS,

Defendant - Appellant.

No. 22-3078
(D.C. No. 6:16-CR-10034-EFM-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **PHILLIPS, MURPHY**, and **EID**, Circuit Judges.**

Terence L. Thomas appeals the district court’s denial in part and dismissal in part of his motion for sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

In 2017, Thomas pled guilty to bank robbery under 18 U.S.C. § 2113(a) and brandishing a firearm during a Hobbs Act robbery under 18 U.S.C. § 924(c)(1). He was sentenced to 144 months’ imprisonment.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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.

In 2021, Thomas requested the Warden of Federal Medical Center Devens (“FMC Devens”) grant him compassionate release; the Warden rejected the request due to a lack of extraordinary and compelling circumstances. Thomas appealed to the Director of the Bureau of Prisons (“BOP”), alleging his mental illness constituted an extraordinary and compelling circumstance. The BOP’s Acting Regional Director denied the appeal, noting Thomas could “perform Activities of Daily Living independently” and his medical conditions were being managed appropriately. R. Vol. I at 58. Following the Acting Regional Director’s denial, the BOP instructed Thomas that he could appeal to the BOP’s General Counsel.

Thomas next filed a motion with the district court pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), requesting early and compassionate release for extraordinary and compelling circumstances. He alleged: (1) the court applied an unjust upward variance at sentencing; (2) his due process rights were violated because he could not represent himself in a prior proceeding; and (3) his mental health had deteriorated.

The district court denied in part and dismissed in part Thomas’s motion, finding Thomas failed to exhaust his administrative remedies because he neglected to raise the upward variance and due process arguments in his initial appeal to the Warden of FMC Devens. Moreover, the court found these arguments would be more appropriately brought in a 28 U.S.C. § 2255 motion and declined to rule upon them.

Concerning Thomas’s mental health claim, the court held he filed an untimely reply to his motion for release in which he contended the BOP’s administrative process was not exhausted. However, the court determined Thomas presented

evidence he suffered from a deteriorating condition and considered his health issues exhausted because: (1) his administrative appeal appeared untimely; (2) Thomas stated he had not received a reply to the appeal; and (3) the government agreed he exhausted the issue. The court then found Thomas’s mental condition was “not an extraordinary and compelling reason warranting a sentence reduction under § 3582,” and that he was “getting the medication and resources that he needs while in prison” and “doing well on the prescribed medication.” *Id.* at 66. Thomas now appeals.

II.

“We review a district court’s order denying relief on a § 3582(c)(1)(A) motion for abuse of discretion.” *United States v. Hemmelgarn*, 15 F.4th 1027, 1031 (10th Cir. 2021). Since Thomas appeals pro se, we construe his filings liberally but “will not supply additional factual allegations to round out [Thomas’s] complaint or construct a legal theory on [his] behalf.” *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997).

a.

The First Step Act allows prisoners to “file a motion for compassionate release with the district court after either exhausting administrative rights to appeal the Director of the BOP’s failure to file such a motion or the passage of 30 days from the defendant’s unanswered request to the warden for such relief.” *United States v. McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021). A district court may grant sentence reduction and compassionate release if: (1) extraordinary and compelling reasons warrant the reduction; (2) the reduction is consistent with applicable policy

statements issued by the Sentencing Commission; and (3) the court considers the factors set forth in § 3553(a), if applicable. *Id.*

b.

Thomas alleges the district court erred in applying an upward variance and that his due process rights were violated because he could not previously represent himself. The court declined to address these issues, finding they were more appropriately brought in a § 2255 motion.

We agree. The district court did not abuse its discretion in declining to rule on the claims, notwithstanding their merits. “An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances,” or “when it issues an arbitrary, capricious, whimsical or manifestly unreasonable judgment.” *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108, 1117 (10th Cir. 2021) (cleaned up). Here, the district court’s finding was permissible because § 3582 does not support claims which should be brought under § 2255. *United States v. Sears*, No. 04-10174-JTM, 2020 WL 3288083, at *1 (D. Kan. June 18, 2020) (“A motion under § 3582 is not a substitute for civil post-conviction relief.”). The district court acted within its discretion when it dismissed the upward variance and due process claims.

c.

Finally, Thomas argues his mental health warrants compassionate release. The district court found Thomas’s mental condition was not an extraordinary and compelling reason justifying a sentence reduction under § 3582. On appeal, Thomas

states he “would like the American disabilities act [sic] applied.” Aplt. Br. at 4. However, we affirm because the court did not abuse its discretion when it found Thomas’s mental health was not an extraordinary and compelling reason warranting a sentence reduction. “[D]istrict courts, in carrying out step one of § 3582(c)(1)(A)’s three-part statutory test, possess the authority to determine for themselves what constitutes extraordinary and compelling reasons” *United States v. Maumau*, 993 F.3d 821, 832 (10th Cir. 2021) (cleaned up).

“If the most convenient way for the district court to dispose of a motion for compassionate release is to reject it for failure to satisfy one of the steps, we see no benefit in requiring it to make the useless gesture of determining whether one of the other steps is satisfied.” *United States v. Hald*, 8 F.4th 932, 942–43 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2742 (2022). Thus, our analysis ends here.

III.

We AFFIRM the district court’s partial denial and partial dismissal of Thomas’s motion for compassionate release.

Entered for the Court

Allison H. Eid
Circuit Judge