FILED
United States Court of Appeals
Tenth Circuit

August 30, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON MCKINNEY,

Defendant - Appellant.

Nos. 22-3090 & 22-3189
(D.C. No. 2:06-CR-20078-JWL-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **McHUGH**, Circuit Judges.

In these consolidated appeals, Jason McKinney challenges the district court's order denying his motion to reduce his sentence under 18 U.S.C. § 3582(c)(1)(A)(i), *i.e.*, denying him compassionate release. We conclude that McKinney must obtain a certificate of appealability (COA) to present one of his arguments, but he does not meet the COA standard. As to the rest of his arguments, we affirm the district court.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I. BACKGROUND & PROCEDURAL HISTORY

In 2007, McKinney pleaded guilty to possession with intent to distribute fifty grams or more of cocaine base and possession of a firearm in relation to a drug trafficking crime. At sentencing, the district court calculated the guidelines range for the drug count to be 360 months to life. We need not recount the district court's full calculation. For present purposes, we note that the district court attributed a significant quantity of drugs to McKinney based on statements made by a co-conspirator.

Ultimately, the district court sentenced McKinney to 360 months on the drug count. As for the firearm count, the district court imposed a consecutive 60-month sentence. Thus, McKinney's total sentence added up to 420 months. For reasons not relevant here, the district court later reduced McKinney's sentence on the drug count to 292 months, for a total sentence of 352 months.

McKinney eventually filed two motions in the district court seeking a reduced sentence under the compassionate release statute. In the first motion, he asserted three considerations that he deemed to be "extraordinary and compelling reasons," 18 U.S.C. § 3582(c)(1)(A)(i), justifying a sentence reduction: (1) his co-conspirator has since claimed that the prosecutor persuaded him to overstate the amount of drugs attributable to McKinney, in turn inflating the guidelines range; (2) an intervening guidelines amendment would probably lead to a lower sentencing range, had it been in effect when McKinney was sentenced; and (3) he had significantly rehabilitated himself in prison.

The district court ruled that the prosecutorial misconduct claim was, in effect, a 28 U.S.C. § 2255 claim. Because McKinney had already brought a § 2255 motion, the court held it could not exercise jurisdiction over the prosecutorial misconduct claim without this court's prior approval. *See* 28 U.S.C. § 2244(b)(3)(A). It therefore dismissed that part of McKinney's motion and denied a COA.

As to the remainder of the motion, the district court denied it on the merits. The district court found the sentencing guidelines amendment was not an extraordinary and compelling reason for a sentence reduction because, under the facts of McKinney's case, the amendment would not change anything. The court further ruled that McKinney's rehabilitation was not extraordinary or compelling. Finally, the court concluded the 18 U.S.C. § 3553(a) factors would not justify a reduced sentence in any event.

McKinney appealed from that order, which became No. 22-3090 in this court. About two months later, however, he filed a "renewed motion for compassionate release" in the district court. R. vol. 5 at 9.[1] There, he reasserted the same three bases for compassionate release contained in his first motion. To those three, he added a risk of severe COVID-19.[2]

[1] Volumes 1 through 4 of the record are identical in the two appeals at issue here. Volume 5 appears only in the second appeal, No. 22-3189.

[2] McKinney says his renewed motion contained five new issues, rather than one. These five issues were different and often overlapping aspects of his claim that COVID-19 poses a particular risk to him. Thus, the district court treated it as a single issue. We view it the same way.

The district court denied the renewed motion as to the COVID-19 argument, finding that McKinney's susceptibility to COVID-19 was not, under the circumstances, extraordinary and compelling. The district court dismissed the remainder of the motion for lack of jurisdiction, holding that McKinney's pending appeal from the order denying his first compassionate release motion divested the court of jurisdiction to reconsider arguments resolved in that order. McKinney then filed a second notice of appeal, which became No. 22-3189 in this court.

II. COA ANALYSIS (NO. 22-3090)

As noted, McKinney's first compassionate release motion asserted a prosecutorial misconduct claim, which the district court construed as an unauthorized successive § 2255 motion and dismissed for lack of jurisdiction. "[T]he district court's dismissal of an unauthorized § 2255 motion is a 'final order in a proceeding under section 2255' such that [28 U.S.C.] § 2253[(c)(1)(B)] requires [a] petitioner to obtain a COA before he or she may appeal." *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). McKinney filed an opening brief, not a COA motion, but we may construe his notice of appeal and opening brief as a request for a COA, *see United States v. Chang Hong*, 671 F.3d 1147, 1148 (10th Cir. 2011). We do so and proceed to analyze the COA question.

To merit a COA, McKinney must "ma[ke] a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And he

must make an extra showing in this circumstance because the district court denied his motion on procedural grounds, namely, lack of jurisdiction. So he must also show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

McKinney tries to recast the prosecutorial misconduct issue as one of sentencing disparity, or as an instance of clear error in calculating the drug quantity. But the claim relies on proving the prosecutor suborned perjury, which would mean his sentence was imposed in violation of the Constitution. *United States v. Wesley*, 60 F.4th 1277, 1280–81 (10th Cir. 2023). "When a federal prisoner asserts a claim that, if true, would mean 'that the sentence was imposed in violation of the Constitution or laws of the United States . . . ,' the prisoner is bringing a claim governed by § 2255." *Id.* at 1288 (quoting § 2255(a)). Thus, the district court's disposition is not debatable and we deny a COA. That portion of McKinney's appeal is dismissed. *See* 28 U.S.C. § 2253(c)(1)(B).

III. MERITS ANALYSIS

A. Compassionate Release Generally

A district court may reduce a federal prisoner's sentence when:

- "extraordinary and compelling reasons warrant such a reduction,"
- "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," and
- the court has "consider[ed] the factors set forth in section 3553(a) to the extent that they are applicable."

18 U.S.C. § 3582(c)(1)(A) & (A)(i). If the § 3553(a) factors would lead the court to deny compassionate release regardless of extraordinary and compelling reasons, the district court may skip directly to that inquiry. *See United States v. Hald*, 8 F.4th 932, 942–43 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2742 (2022).

"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). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." *Id.* (internal quotation marks omitted). Moreover, if the district court denied compassionate release based on its weighing of the § 3553(a) factors, "we cannot reverse unless we have a definite and firm conviction that the [district] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Hald*, 8 F.4th at 949 (internal quotation marks omitted).

B. Denial of Relief in No. 22-3090

The district court concluded that McKinney's first compassionate release motion did not present extraordinary and compelling reasons and the § 3553(a) factors counseled against reducing his sentence anyway. Either conclusion, if within the district court's discretion, would be enough to affirm. *See, e.g.*, *United States v. Ruffin*, 978 F.3d 1000, 1006 (6th Cir. 2020) ("[W]e may affirm the denial of relief based on the [§ 3553(a)] rationale alone."). Because we find no error in the district court's § 3553(a) analysis, we focus on that and express no opinion on whether McKinney satisfied the extraordinary-and-compelling standard.

The district court considered several matters when weighing the § 3553(a) factors:

> The court begins with the significant quantity of drugs attributed to Mr. McKinney and the inherent violence associated with the related firearms offenses. But more than that, Mr. McKinney engaged in aggravated assault in connection with a drug transaction—he attempted to shoot another individual in the face during the transaction but the firearm did not function properly. During trial preparation, multiple witnesses reported threats communicated to them by individuals associated with Mr. McKinney. Another witness reported that Mr. McKinney asked him to rewrite an affidavit in a manner that was favorable to Mr. McKinney. When that witness refused, Mr. McKinney threat[en]ed to shoot the witness. Five inmates reported to law enforcement that Mr. McKinney made threats directed at the prosecutor and her family. Mr. McKinney also has a substantial criminal history, including numerous drug offenses.

R. vol. 3 at 179.

McKinney counters that materials attached to his renewed motion refute most of this narrative. Those materials include, for example, an affidavit from McKinney asserting he never attempted to shoot someone in the face (but merely brandished a gun as a means of protecting another person) and that his fellow inmates were lying when they said he directed threats at the prosecutor and her family.

"A federal appellate court, as a general rule, will not reverse a judgment on the basis of issues not presented below." *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990). McKinney's new version of the facts was not before the district

court when it ruled on his first compassionate release motion. Thus, we will not disturb the district court's decision on this account.[3]

Beyond this, McKinney vaguely asserts that he is a changed man and the district court did not make an individualized assessment of his situation. As to being a changed man, we do not "have a definite and firm conviction that the [district] court made a clear error of judgment," *Hald*, 8 F.4th at 949 (internal quotation marks omitted), when it concluded that a sentence reduction was not warranted. We also disagree that the district court failed to make an individualized assessment. McKinney points us to nothing the district court failed to consider (other than information not before it).

For these reasons, we affirm the district court's denial of McKinney's first compassionate release motion.

C. Denial of Relief in No. 22-3189

1. Jurisdictional Dismissal

As described previously, McKinney's renewed compassionate release motion included four arguments, three of which the district court had already rejected in its order denying the first motion. Because an appeal of that order was pending (in No. 22-3090), the district court held it no longer had jurisdiction to reconsider the three duplicate arguments. *See, e.g.*, *Griggs v. Provident Consumer Disc. Co.*,

[3] We are not sure the district court could consider McKinney's affidavit anyway. Its assertions might put it in the realm of an unauthorized successive § 2255 motion. We leave that question for another day, if and when it comes up directly.

459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

McKinney points us to unpublished district court decisions granting "renewed" compassionate release motions. In those cases, the defendant's appeal of his original compassionate release motion was not pending. McKinney offers no argument why the district court's jurisdictional ruling was incorrect in light of his pending appeal. We therefore hold that McKinney waived the issue on appeal, and we will not address it further.

2. Susceptibility to a Severe Case of COVID-19

The only argument from the renewed motion that the district court addressed on its merits was McKinney's claim that he is particularly susceptible to a severe case of COVID-19 because he has a history of smoking, he is overweight, he has a family history of hypertension, heart problems, strokes, and diabetes, he is African American, and available vaccines (which he has refused) are allegedly ineffective against newer variants of the SARS-CoV-2 virus. The district court ruled that these were not extraordinary and compelling reasons to justify compassionate release because McKinney had refused a vaccine, available vaccines still provide some protection against newer variants, and McKinney had already survived two bouts of COVID-19.

This was not an abuse of discretion. "[A]ccess to vaccination" and "prior infection and recovery from COVID-19" both "presumably weigh against a finding

of extraordinary and compelling reasons." *Hald*, 8 F.4th at 939 n.5. Thus, the district court appropriately found on the record before it that McKinney's susceptibility to COVID-19 was not extraordinary and compelling.[4]

IV. CONCLUSION

We deny a COA and dismiss the portion of No. 22-3090 asserting prosecutorial misconduct. We otherwise affirm. We grant McKinney's motion to proceed on appeal without prepayment of costs or fees. As for McKinney's "Pro Se Motion to Supplement Pending Appeal on Denied Motion for Compassionate Release 18 U.S.C. 3582(c)(1)(A)," filed in both actions, we grant the motion to the extent it informs us about the outcome of his renewed compassionate release motion. To the extent McKinney also requests appointment of counsel, we deny the motion.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

[4] In the district court and in this court, McKinney has stated—without further explanation—that he refused the vaccine for religious reasons, and because of possible side effects. Even assuming this is enough to preserve the argument, we would still find no abuse of discretion based on McKinney's recovery from COVID-19 twice.