

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 10, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHNNIE RAY BRAGG, JR.,

Defendant - Appellant.

No. 22-6164
(D.C. No. 5:12-CR-00065-D-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON, BACHARACH, and ROSSMAN**, Circuit Judges.

Johnnie Ray Bragg, Jr., proceeding pro se, sought compassionate release, and the district court denied his motion. He did not appeal. Many months later, he moved for reconsideration, and the district court denied that request. Mr. Bragg now timely appeals from the denial of his motion for reconsideration. Under the applicable standards that guide our review, we discern no abuse of discretion and affirm.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Mr. Bragg pleaded guilty pursuant to a plea agreement in August 2012 to conspiring to distribute controlled substances, in violation of 21 U.S.C. § 846, and conspiring to commit money laundering of the drug-sale proceeds, in violation of 18 U.S.C. § 1956(h). He was sentenced to 480 months in prison, which was a downward variance from the 720-month advisory Sentencing Guidelines sentence. Mr. Bragg appealed, but this court granted the government's motion to enforce the appeal waiver in his plea agreement and dismissed his appeal.

In August 2021, Mr. Bragg filed a “Motion for Compassionate Release/Reduction in Sentence under 18 U.S.C. 3582(c)(1)(A)(i) of the First Step Act of 2018.” R., vol. I at 280. Section 3582(c)(1)(A)(i) permits a district court to reduce a sentence, after considering the factors set forth in 18 U.S.C. § 3553, if the court finds that “extraordinary and compelling reasons warrant such a reduction.”

Mr. Bragg contended he could demonstrate extraordinary and compelling reasons for relief based on intervening changes in the law. He argued, were he sentenced today, one prior conviction would not have counted under the Sentencing Guidelines, and he would have avoided application of the career-offender Guideline. He also insisted the § 3553 factors weighed in his favor because he is a non-violent drug offender, his codefendants received lower sentences than he did, he incurred only four disciplinary infractions while in custody, he has a positive employment and rehabilitative history in prison, and he has a solid home plan for his release.

In adjudicating the motion, the district court “proceed[ed] directly to consider the § 3553(a) factors in light of the new facts that allegedly establish[ed] extraordinary and compelling reasons for relief.”¹ R., vol. I at 351. The court ultimately determined the § 3553(a) factors weighed heavily against a reduced sentence,² and denied the motion for compassionate release. Mr. Bragg did not appeal.

Seven months later, Mr. Bragg moved for reconsideration of the district court’s order denying compassionate release. He relied primarily on the Supreme

¹ Courts apply a three-step test when reviewing a motion for compassionate release: 1) whether there are extraordinary and compelling reasons warranting a sentence reduction; 2) whether a sentence reduction is consistent with applicable policy statements issued by the Sentencing Commission; and 3) whether “the reduction authorized by steps one and two is warranted in whole or in part under the particular circumstances of the case,” after considering the factors in § 3553(a). *United States v. Hald*, 8 F.4th 932, 938 (10th Cir. 2021) (internal quotation marks omitted). “[D]istrict courts may deny compassionate-release motions when any of the three prerequisites . . . is lacking and do not need to address the others.” *Id.* (internal quotation marks omitted).

² The court explained that applying the Guideline provisions applicable to Mr. Bragg’s offenses instead of the career-offender Guideline would not impact the sentence imposed because his Guideline sentence would have been life imprisonment, and the court granted a substantial downward variance when it originally sentenced Mr. Bragg. The court also explained that its assessment of Mr. Bragg’s original sentence was based on his serious criminal conduct, which was unaffected by intervening legal developments. The court rejected Mr. Bragg’s assertion that his behavior was nonviolent, noting that his current and past offenses involved firearms and threats of physical harm, and he continued to engage in similar behavior in prison where three of his four disciplinary infractions involved fighting or weapons. And it noted Mr. Bragg’s rehabilitation thus far did not warrant a compassionate release. The court therefore concluded that “[t]he serious nature and circumstances of Defendant’s offenses do not permit a finding that his term of imprisonment should be reduced to time served, which would be less than one-fourth of the sentence imposed.” R., vol. I at 354.

Court's recent decision in *Concepcion v. United States*, 142 S. Ct. 2389, 2397 (2022), which involved a motion for reduction in sentence under § 404(b) of the First Step Act of 2018.³ In *Concepcion*, the Court held “the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act.” 142 S. Ct. at 2404.

In his motion for reconsideration, Mr. Bragg argued the district court erred in applying the standard of review for compassionate release instead of the proper standard of review for a motion for relief under §§ 401⁴ and 404 of the First Step Act. He also asserted the district court erred in considering the § 3553(a) factors because the First Step Act does not require courts to consider those statutory factors. And, citing *Concepcion*, he argued the district court erred by failing to “consider any nonretroactive guidelines amendments that could have helped inform[] the court whether to reduce [his] sentence.” R., vol. I at 362.

³ “Congress passed the Fair Sentencing Act of 2010 to correct the harsh disparities between crack and powder cocaine sentencing.” *Concepcion*, 142 S. Ct. at 2396. “Section 2 of that Act increased the amount of crack cocaine needed to trigger the 5-to-40-year sentencing range from 5 grams to 28 grams.” *Id.* at 2396-97. Section 404(b) of the First Step Act “authorized district courts to impose a reduced sentence for qualifying movants as if sections 2 and 3 of the Fair Sentencing Act were in effect at the time the covered offense was committed.” *Id.* at 2397 (ellipsis and internal quotation marks omitted).

⁴ Section 401 reduced the mandatory minimum penalties for certain recidivist drug offenders and changed the definitions of which offenses would count as prior convictions under 18 U.S.C. § 841(b)(1). See First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194, 5220-21 (2018).

The district court found the motion for reconsideration untimely, but it denied the motion on the merits. According to the district court, Mr. Bragg had not sought relief under § 404 of the First Step Act. The court explained that Mr. Bragg “moved for relief under 18 U.S.C. § 3582(c)(1)(A)(i) based on alleged ‘extraordinary and compelling reasons,’” R., vol. I at 367, which suggested Mr. Bragg sought compassionate release. The district court denied the motion to reconsider for three principle reasons: (1) the court had considered the fact Mr. Bragg would no longer be subject to the career-offender enhancement of the Sentencing Guidelines when deciding whether to grant him relief from his sentence; (2) it had granted a significant downward variance when it originally imposed Mr. Bragg’s sentence; and (3) it had considered the § 3553 factors when reviewing his motion for a sentence reduction, finding they weighed against granting relief. The court also noted that the Supreme Court’s opinion in *Concepcion* did not affect its decision to reject Mr. Bragg’s requested sentence reduction. Mr. Bragg now timely appeals.⁵

II. Discussion

We review for abuse of discretion the district court’s denial of a motion for reconsideration. See *United States v. Warren*, 22 F.4th 917, 927 (10th Cir. 2022). A court may grant a motion for reconsideration “when the court has misapprehended the facts, a party’s position, or the law.” *United States v. Christy*, 739 F.3d 534, 539

⁵ We liberally construe Mr. Bragg’s pro se filings, but we do not act as his advocate. See *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

(10th Cir. 2014). “Specific grounds include: (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.” *Id.* (internal quotation marks omitted).

Mr. Bragg argues the district court: (1) abused its discretion in finding his motion for reconsideration was untimely when *Concepcion* was a change in controlling law; (2) erred by treating his motion as seeking compassionate release when he actually sought a reduction of sentence under the First Step Act of 2018; (3) abused its discretion in determining *Concepcion* does not apply; and (4) failed to address his sentencing disparity claim. As we discuss, we discern no abuse of discretion in the district court’s denial of Mr. Bragg’s motion for reconsideration.

First, we need not decide whether the district court abused its discretion in finding that Mr. Bragg’s reconsideration motion was untimely because the district court nonetheless considered the merits of the motion. The government did not object to the district court’s consideration of the merits in its response brief on appeal. We therefore proceed to consider Mr. Bragg’s arguments challenging the district court’s denial of his motion on the merits. *See Warren*, 22 F.4th at 927 (explaining that “untimeliness in [the context of a motion to reconsider] is not a jurisdictional bar, [so] we may accept the Government’s waiver and consider [the defendant’s] appeal of the denial of his motion to reconsider on the merits.”).

Contrary to Mr. Bragg’s assertion, the district court correctly treated his motion as one for compassionate release under § 3582(c)(1)(A)(i). Mr. Bragg styled his motion as a “Motion for Compassionate Release/Reduction in Sentence under

18 U.S.C. 3582(c)(1)(A)(i) of the First Step Act of 2018.” R., vol. I at 280. And consistent with a motion seeking compassionate release under § 3582(c)(1)(A)(i), he asserted his sentence should be reduced based on “extraordinary and compelling reasons” and a consideration of the § 3553(a) factors. *Id.* at 281-86. The district court correctly found *Concepcion* did not apply to his compassionate release motion because, as the district court correctly noted, *Concepcion* involved a motion for relief under § 404 of the First Step Act. Mr. Bragg offers no availing contrary argument. Under these circumstances, we are not persuaded the court applied the wrong standard of review or abused its discretion.

Mr. Bragg also faults the district court for failing to address sentencing disparities, but he did not include such an argument in his motion for reconsideration, *see id.* at 360-64. Accordingly, he has not shown the district court abused its discretion on that ground.

III. Conclusion

We affirm the district court’s judgment. We grant Mr. Bragg’s motion for leave to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Veronica S. Rossman
Circuit Judge