FILED
United States Court of Appeals
Tenth Circuit

October 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EARL MCALISTER,

Defendant - Appellant.

No. 23-7003
(D.C. No. 6:21-CR-00044-DCJ-1)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

Earl McAlister appeals his sentence, challenging several conditions of his supervised release. Because the written judgment does not conform to the orally pronounced sentence, as the government concedes, we reverse and remand.

McAlister pleaded guilty to second-degree murder. At his sentencing hearing, the district court imposed a life sentence and five years of supervised release. It also orally pronounced eight conditions of supervised release. Three days later, the district

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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 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

court entered a written judgment that memorialized this sentence but included 11 discretionary standard conditions of supervised release that had not been pronounced orally at the sentencing hearing. *See United States v. Geddes*, 71 F.4th 1206, 1213 (10th Cir. 2023) (explaining that standard conditions of supervised release "are only 'recommended' and not inevitably justified in every case" such that court "does not have to adopt them").

McAlister now appeals, asking us to vacate the newly added discretionary standard conditions and remand with instructions to strike them from the judgment.[1] Our review is for abuse of discretion, and "[a]n error of law is per se an abuse of discretion." *Id.* at 1212 (quoting *United States v. Ellis*, 23 F.4th 1228, 1238 (10th Cir. 2022)).

It is well settled that "an orally pronounced sentence controls" over a written judgment "when the two conflict." *United States v. Villano*, 816 F.2d 1448, 1450 (10th Cir. 1987) (en banc). This is because "[t]he sentencing judge must announce the sentence such that the defendant is aware of the sentence when leaving the courtroom." *Geddes*, 71 F.4th at 1214. And this rule extends to standard conditions of supervised release: "[D]istrict courts must orally pronounce discretionary conditions classified as standard by the sentencing guidelines at sentencing." *Id.* at 1215.

[1] Although McAlister's plea agreement included an appeal waiver, the government has not moved to enforce it here either by motion or in its response brief, thereby waiving the waiver. *See United States v. Calderon*, 428 F.3d 928, 930–31 (10th Cir. 2005).

Here, the district court did not orally pronounce or otherwise reference the additional 11 discretionary standard conditions of supervised release that appear in the written judgment. It erred in doing so. *See id.* at 1215–16. Indeed, "the government concedes" as much. Aplee. Br. 8. And it further agrees with McAlister that "[t]he appropriate remedy for this conflict between the orally pronounced sentence and the written judgment 'is remand for the district court to conform the written judgment to the oral sentence.'" *Id.* (quoting *Geddes*, 71 F.4th at 1217).

We therefore reverse the imposition of the 11 discretionary standard conditions of supervised release and remand for the district court to conform the written judgment to the orally pronounced sentence.

Entered for the Court

Nancy L. Moritz
Circuit Judge