

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 21, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL LYNN CASH,

Defendant - Appellant.

No. 21-7027
(D.C. No. 6:11-CR-00057-RAW-1)
(E.D. Okla.)

ORDER AND JUDGMENT*

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

Michael Lynn Cash,¹ proceeding pro se, appeals the district court’s denial of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), as amended

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Because Mr. Cash is pro se, we construe his filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008). He is subject to the same procedural rules governing other litigants. *See United States v. Green*, 886 F.3d 1300, 1307 (10th Cir. 2018).

by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In 2012, Mr. Cash was convicted of (1) possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); (2) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A); and (3) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He was sentenced to 360 months of imprisonment.

In May 2020, Mr. Cash filed a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). After the government opposed his motion because he failed to exhaust his administrative remedies, Mr. Cash voluntarily withdrew it.

In October 2020, Mr. Cash filed a second motion for compassionate release after having exhausted his administrative remedies. He cited his (1) medical conditions, including diabetes, hypertension, hepatitis C, high cholesterol, and obesity; (2) allegedly illegally enhanced sentence; (3) status as a non-violent and non-sex offender; (4) sobriety; and (5) quarantine and reentry plan should he be released.

The district court denied his motion. It first held that Mr. Cash did not present “extraordinary and compelling circumstances” under 18 U.S.C. § 3582(c)(1)(A)(i). Although the court recognized that Mr. Cash’s medical conditions placed him at greater risk of severe illness from COVID-19, it determined the detention facility

could likely provide appropriate medical treatment. The court noted that the detention facility was administering COVID-19 vaccines to staff and inmates.

The court also held that even if Mr. Cash had established extraordinary and compelling circumstances, the § 3553(a) factors did not justify his release. It considered “his history and characteristics, the offense conduct, the need for just punishment, deterrence, and protection of the public,” and concluded these factors did not justify compassionate release. ROA, Vol. I at 191.

Mr. Cash timely appealed.

II. DISCUSSION

A. *Standard of Review*

We review a district court’s ruling on a First Step Act motion for abuse of discretion. *See United States v. Mannie*, 971 F.3d 1145, 1147-48, 1154-55 (10th Cir. 2020). “A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact.” *United States v. Piper*, 839 F.3d 1261, 1265 (10th Cir. 2016) (quotations omitted).

B. *Legal Background*

Title 18 U.S.C. § 3582(c)(1)(A), as amended by Section 603(b) of the First Step Act, allows defendants to move for compassionate release in the district court after exhausting BOP administrative remedies. *See United States v. Maumau*, 993 F.3d 821, 830-31 (10th Cir. 2021). The motion may be granted only when “(1) the district court finds that extraordinary and compelling reasons warrant such a reduction; (2) the district court finds that such a reduction is consistent with

applicable policy statements issued by the Sentencing Commission; and (3) the district court considers the factors set forth in § 3553(a), to the extent that they are applicable.” *Id.* at 831; *see also* 18 U.S.C. § 3582(c)(1)(A).

The § 3553(a) factors are: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant,” (2) “the need for the sentence imposed to reflect the seriousness of the offense,” (3) “the kinds of sentences available,” (4) “the kinds of sentences available and sentencing range established for” the offense at the time of sentencing, (5) “any pertinent policy statement” in effect at the time of the defendant’s sentencing, (6) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” and (7) “the need to provide restitution to any victims of the offense.” *Id.* § 3553(a)(1)-(7).

“[D]istrict courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking.” *Maumau*, 993 F.3d at 831 n.4 (quotations omitted); *see also United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021).

C. Analysis

Mr. Cash argues the district court abused its discretion when it (1) determined no extraordinary and compelling circumstances existed warranting his release and (2) held the § 3553(a) factors did not weigh in favor of release. We disagree.

First, the district court did not abuse its discretion in determining that Mr. Cash did not establish extraordinary and compelling circumstances.

Mr. Cash faults the district court for not adequately weighing his health conditions. But the court considered Mr. Cash’s medical conditions as part of its individualized assessment. It noted that Mr. Cash “suffers from various medical conditions, including type 2 diabetes mellitus, hypertension, hepatitis C, high cholesterol, and obesity.” ROA, Vol. I at 189. It acknowledged these conditions placed Mr. Cash “at greater risk of severe illness from COVID-19.” *Id.* at 189-90. But it concluded that the detention facility was capable of providing Mr. Cash with the requisite care. “[T]he district court’s decision indicates that its finding . . . was based on its individualized review of all the circumstances of” Mr. Cash’s case, so it did not abuse its discretion. *Maumau*, 993 F.3d at 837.

Mr. Cash argues for the first time on appeal that the district court failed to consider that (1) he could not be fully vaccinated and (2) the COVID-19 vaccines’ reduced effectiveness against the Delta variant. “An issue is waived if it was not raised below in the district court.” *Wilburn v. Mid-South Health Dev., Inc.*, 343 F.3d 1274, 1280 (10th Cir. 2003). Mr. Cash waived these arguments by failing to present them to the district court.

Second, the district court did not abuse its discretion when weighing the § 3553(a) factors. It considered that Mr. Cash (1) had a “criminal history [that] began at age 18,” (2) “was arrested and convicted of numerous crimes in Oklahoma and Texas (more than 20) prior to being convicted for the instant offenses,” (3) has a high criminal history category, (4) “committed the instant offenses while under a criminal justice sentence for manufacture of [a] controlled substance,” and (5) “has

served roughly one-third of his sentence.” ROA, Vol. I at 191. The court concluded that reducing Mr. Cash’s “sentence to time served would produce a sentence that no longer reflects the seriousness of [his] criminal conduct” and would undermine the court’s “duty to protect the public.” *Id.*

In reviewing the district court’s consideration of the relevant § 3553(a) factors, “[w]e are not left with 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.” *United States v. Hald*, 8 F.4th 932, 950 (10th Cir. 2021) (quotations and alterations omitted).

III. CONCLUSION

We affirm.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge