FILED
United States Court of Appeals
Tenth Circuit

November 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARRELL WAYNE COLLINS,

Defendant - Appellant.

No. 21-6001
(D.C. No. 5:99-CR-00216-R-2)
(W.D. Okla.)

ORDER AND JUDGMENT*

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

Darrell Wayne Collins moved in district court to reduce his sentence that was imposed in 2006. He argued one of his cocaine base convictions was a "covered offense" qualifying for sentence reduction under the First Step Act of 2018 and the Fair Sentencing Act of 2010. But his sentence for the cocaine base conviction (300 months) runs concurrently with some of his sentences for his non-covered cocaine powder

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** As noted in the court's October 12, 2021 order, after examining the briefs and appellate record, this panel 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 was therefore ordered submitted without oral argument.

convictions (also 300 months each), so a reduction would not affect his sentence. The district court, relying on *United States v. Mannie*, 971 F.3d 1145 (10th Cir. 2020), thus dismissed for lack of standing due to no redressable injury.

On appeal, Mr. Collins argues for the first time that he has standing because the district court could have reduced his term of supervised release from 10 to 8 years. He states that (1) the Fair Sentencing Act reduced the minimum mandatory term of supervised release on the covered offense from 10 to 8 years, and the First Step Act made that reduction retroactive to his 2006 sentence; and (2) unlike the concurrent supervised release terms at issue in *Mannie*, which ran coextensively, Mr. Collins's concurrent supervised release terms on his non-covered offenses are shorter than his 10-year term on his Count 27 cocaine base offense.

Mr. Collins waived this argument, the only one presented on appeal, by not requesting a reduction in his supervised release term in district court in the first place. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In 2000, a federal jury convicted Mr. Collins of nine counts related to the possession and distribution of cocaine powder and cocaine base. At resentencing in 2006,[1] the district court imposed prison sentences of

[1] The district court resentenced Mr. Collins in 2006 after the court granted his 28 U.S.C. § 2255 motion in part. *See United States v. Collins*, No. CIV-03-680-M, 2006 WL 840354, at *5, *7 (W.D. Okla. Mar. 28, 2006). It resentenced Mr. Collins because he was "denied effective assistance of counsel" when he "requested his counsel to appeal [his 2002 resentence] and his counsel failed to do so." *Id.* at *5.

(1) 240 months for Count 1 (cocaine base);

(2) 48 months each for Counts 26 (cocaine base), 28 (cocaine powder), 30 (cocaine powder), and 34 (cocaine powder); and

(3) 300 months each for Counts 27 (cocaine base), 29 (cocaine powder), 31 (cocaine powder), and 35 (cocaine powder).

The sentences were set to run concurrently for a total of 300 months. The court also imposed a 10-year supervised release term for Count 27 and shorter concurrent terms for the remaining counts.

The Fair Sentencing Act of 2010 reduced the mandatory minimum sentence for certain cocaine base offenses. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372; *Mannie*, 971 F.3d at 1148-49. The First Step Act of 2018 made the reductions retroactive. *See* Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222; *Mannie*, 971 F.3d at 1149-50. Mr. Collins asserts that his 2000 cocaine base conviction on Count 27 is a "covered offense." *See* Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222.

In 2020, Mr. Collins filed a First Step Act motion under 18 U.S.C. § 3582(c)(1)(B), which provides that "the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute." He requested that his prison sentence be reduced to time served because the Fair Sentencing Act and First Step Act lowered his mandatory minimum sentence for his cocaine base offense under Count 27 from 20 to 10 years. He did not seek to reduce his 10-year supervised release term. Instead, he argued a reduced prison sentence "would leave

[him] to serve the 10 year term of supervised release imposed previously." ROA, Vol. I at 109.

The district court dismissed Mr. Collins's motion for lack of standing because he had received 300-month sentences for Counts 29, 31, and 35,[2] which were cocaine powder offenses not covered under the First Step and Fair Sentencing Acts. The non-covered sentences on Counts 29, 31, and 35 are the same length as, "and run concurrent to[,] his cocaine base sentence[]" on Count 27. *Id.* at 219. The court concluded that any reduction in Mr. Collins's cocaine base sentence for Count 27 would thus not reduce his incarceration. It did not address whether it should reduce Mr. Collins's supervised release term, let alone whether he had standing to seek a reduction.

II. **DISCUSSION**

"We have consistently stated that a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory." *Carney v. Okla. Dep't of Pub. Safety*, 875 F.3d 1347, 1351 (10th Cir. 2017) (quotations omitted). "When a party fails to raise an argument below, we typically treat the argument as forfeited." *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019). "By contrast, when a party intentionally relinquishes or abandons an argument in the district court, we usually deem it waived and refuse to consider it." *Id.* (quotations omitted); *see also United States v. Egli*, 13 F.4th 1139, 1144 (10th

[2] The district court listed Count 25, but it meant Count 35.

Cir. 2021). "[W]aiver is accomplished by intent, but forfeiture comes about through neglect." *Egli*, 13 F.4th at 1144 (quotations and alteration omitted).

We said in *Mannie* that the district court there could not "effectively reduce the length of [the defendant's] supervised release, as his term of supervised release for his covered offense runs concurrently and coextensively with the two other, noncovered offenses." 971 F.3d at 1154 n.11. Mr. Collins argues that, unlike in *Mannie*, the district court could have reduced his supervised release term because "[h]is sentence includes a ten-year term of supervised release on a covered offense that is longer than any other term imposed." Aplt. Br. at 14. He thus asserts he had standing to seek reduction of his term of supervised release.

In district court, Mr. Collins waived any request for a reduced supervised release term. As noted above, in his § 3582(c)(l)(B) motion, he did not seek a reduction of his 10-year supervised release term. *See* ROA, Vol. I at 96-110. He told the district court that the relief he requested, a reduced prison term, "would leave [him] to serve the 10 year term of supervised release imposed previously." *Id.* at 109. And as stated in Mr. Collins's reply brief, he "has not tried to hide the fact that he did not argue to the district [court] that his term of supervised release should or could be reduced." Aplt. Reply Br. at 1. Indeed, he said he "would concede the issue was waived for he never asked the court to do that." *Id.*

Mr. Collins thus did not merely forfeit a request for reduction of his term of supervised release; he waived it. *See United States v. Cook*, 997 F.2d 1312, 1316

(10th Cir. 1993) (defendant waived grounds for relief "[t]o the extent that he failed to raise these grounds in his [28 U.S.C.] § 2255 motion to the district court").[3]

III. CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[3] Mr. Collins's argument on appeal that he "had standing to bring his motion" because "Section 404 of the First Step Act permitted the district court to reduce his term of supervised release on Count 27," Aplt. Br. at 15, assumes that he moved for a reduced term. But as noted above, in his § 3582(c)(l)(B) motion, he never sought a reduction of his supervised release term. *See* ROA, Vol. I at 96-110.

Even if Mr. Collins had not waived an opportunity to request a reduction of his term of supervised release, we would still affirm because he has waived his standing argument. His failure to raise it in district court, argue plain error in his opening brief, and adequately argue plain error in his reply brief "surely marks the end of the road" for this argument. *Leffler*, 942 F.3d at 1196 (quoting *United States v. Lamirand*, 669 F.3d 1091, 1100 n.7 (10th Cir. 2012)); *see United States v. Isabella*, 918 F.3d 816, 845 (10th Cir. 2019). "This rule holds true even as to arguments in favor of subject matter jurisdiction a plaintiff-appellant failed to raise below. That is, our duty to consider unargued *obstacles* to subject matter jurisdiction does not affect our discretion to decline to consider waived arguments that might have *supported* such jurisdiction." *Tompkins v. United States Dep't of Veterans Affs.*, --- F.4th ----, 2021 WL 4944641, at *1 n.1 (10th Cir. Oct. 25, 2021) (quotations and alteration omitted); *see also Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545-46 (10th Cir. 2016).