FILED
United States Court of Appeals
Tenth Circuit

August 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRUCE SEARS,

Defendant - Appellant.

No. 22-3267
(D.C. No. 6:04-CR-10174-JWB-1)
(D. Kan.)

ORDER AND JUDGMENT*

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

Bruce Sears, a federal prisoner proceeding pro se, appeals the district court's denial of his motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), the compassionate release statute. To grant relief, the district court must find that "extraordinary and compelling reasons warrant such a reduction," and it must

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

"consider[] the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable."

The district court found that Mr. Sears's motion failed both tests. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's conclusion that Mr. Sears failed to demonstrate extraordinary and compelling reasons. We do not reach the court's weighing of the § 3553(a) factors.

I. BACKGROUND

A. *Conviction, Sentence, Appeal, and Collateral Review*

On July 4, 2004, Mr. Sears held up a Red Lobster restaurant at gunpoint. Later that year, a federal jury in the District of Kansas convicted him of Hobbs Act robbery, brandishing a firearm during and in relation to a crime of violence, and two counts of being a felon in possession of a firearm.

At sentencing, the district court addressed whether Mr. Sears should be sentenced under 18 U.S.C. § 3559(c), the federal three-strikes statute. It mandates a life sentence for anyone convicted of "a serious violent felony" who has previously committed two or more serious violent felonies. § 3559(c)(1)(A)(i). The court found that Mr. Sears's brandishing conviction qualified as a serious violent felony and that he had been convicted of three previous serious violent felonies, all under Kansas law—attempted robbery, attempted aggravated assault, and aggravated robbery. The court imposed a life sentence on the brandishing count. We affirmed on direct appeal. *See United States v. Sears*, 191 F. App'x 800, 806 (10th Cir. 2006). Mr.

Sears then filed a 28 U.S.C. § 2255 motion, which the district court denied, and we denied a certificate of appealability ("COA"). *See United States v. Sears*, 294 F. App'x 383, 384 (10th Cir. 2008).

B. ***Other Motions Seeking Relief***

Many years later, Mr. Sears moved in the district court for a writ of audita querela. He argued his sentence was inequitable in light of an intervening unpublished decision from this court, *United States v. Nicholas*, 686 F. App'x 570 (10th Cir. 2017). *Nicholas* held that robbery, as defined in Kansas, is not a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). *See Nicholas*, 686 F. App'x at 573–76. Mr. Sears urged that the ACCA analysis in *Nicholas* shows that his own Kansas convictions are not serious violent felonies under the three-strikes statute, so he should not be serving a life sentence.

The district court interpreted Mr. Sears's motion to be an unauthorized successive § 2255 motion and transferred it to this court for potential authorization. Rather than seek authorization, Mr. Sears moved to remand, arguing the district court should not have recharacterized his motion as falling under § 2255. We denied the motion and dismissed the proceeding.

A few months later, Mr. Sears moved for compassionate release under § 3582(c)(1)(A)(i). He argued that the lower sentence he would likely receive in light of *Nicholas* amounted to an "extraordinary and compelling reason[]" under the statute. The district court treated the motion as another unauthorized successive

§ 2255 motion and dismissed it for lack of jurisdiction. Mr. Sears sought a COA from this court, which we denied. Our order stated, "Sears's claim for a sentence reduction based on *Nicholas* falls squarely within the scope of § 2255, not § 3582(c)(1)(A)(i)." *United States v. Sears*, 836 F. App'x 697, 699 (10th Cir. 2020) ("*Sears III*").

Mr. Sears continued to file similar motions in the district court, which were denied. To the extent he appealed those denials, we likewise denied relief.

C. ***The Motion Now at Issue***

In September 2022, Mr. Sears filed a new compassionate-release motion, alleging that the following amounted to extraordinary and compelling reasons for a reduced sentence:

(1) his fiancée, the mother of his three children, recently passed away, leaving their 17-year-old severely autistic son in the care of Mr. Sears's two older sons (ages 20 and 21);

(2) he had made serious efforts at rehabilitation;

(3) he was young when he committed the Kansas offenses that the district court relied on to apply the three-strikes statute; and

(4) he would not have received life if sentenced today for the same conduct (relying on *Nicholas*, augmented by *United States v. Bong*, 913 F.3d 1252, 1261–65 (10th Cir. 2019), a published opinion adopting *Nicholas*'s reasoning and conclusion), and the high end of the advisory guidelines range would now be about 15 years (whereas he had already served 18 years);

Considering these reasons together, the court concluded they did not meet the extraordinary-and-compelling standard. It also held that the § 3553(a) factors

counseled against reducing Mr. Sears's sentence. The court denied relief, and this appeal timely followed.

II. **DISCUSSION**

A. ***Legal Background***

"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).

"[D]istrict courts may deny compassionate-release motions when any of the . . . prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others." *United States v. Maumau*, 993 F.3d 821, 831 n.4 (10th Cir. 2021) (internal quotation marks omitted). Thus, if (as here) the district court finds that the defendant has not shown extraordinary and compelling reasons *and* that the § 3553(a) factors counsel against a reduced sentence, we may affirm if either one of those findings was within the district court's discretion.

B. ***Extraordinary and Compelling Reasons***

We choose to focus on the district court's extraordinary-and-compelling analysis.

1. **Care for Son, Rehabilitation, Age at Time of Prior Offenses**

We start with the first three reasons Mr. Sears proffered.

First, concerning Mr. Sears's autistic son, the district court acknowledged the death of his mother, who was his primary caregiver. The court found, however, that Mr. Sears failed to show his two older sons and other family members mentioned in his filings were not caring for, and could not care for, the autistic son. Although we sympathize, we cannot say the court made "a clearly erroneous finding of fact," *Hemmelgarn*, 15 F.4th at 1031 (internal quotation marks omitted).

Second, as for rehabilitation, the district court characterized Mr. Sears's efforts as "commendable" but "not overwhelming," especially compared to the amount of time he has served. R. vol. I at 93. On appeal, he points only to the court's description of his efforts as "commendable." He has not shown that the court abused its discretion when it concluded that his rehabilitation does not meet the extraordinary-and-compelling standard.

Third, regarding Mr. Sears's youthful age (21 or younger) when he committed his prior offenses underlying application of the three-strikes statute, the district court decided that Mr. Sears's age at the time of the Red Lobster robbery (31) was a more important, countervailing consideration. Mr. Sears says nothing about this in his appellate brief. The court otherwise did not abuse its discretion. As it pointed out, Mr. Sears admitted, "I can't blame [the Red Lobster robbery] on my youth." *Id.* at 90 (internal quotation marks omitted).

In sum, although Mr. Sears raised plausible arguments on these matters, the district court acted within its discretion in concluding they did not amount to extraordinary and compelling reasons that might justify a reduced sentence.

2. **Sentencing Argument**

The foregoing is sufficient to affirm because the district court lacked jurisdiction to consider Mr. Sears's fourth argument—that he would not receive a life sentence today because the sentencing court erred when it treated his prior Kansas convictions as serious violent felonies.

We stated in *Sears III* that Mr. Sears may bring this argument only in a § 2255 motion. Although *Sears III* was unpublished, it is law of the case for Mr. Sears. *See* 18B Charles Alan Wright et al., Fed. Prac. & Proc. § 4478.2, text accompanying n.20 (3d ed., Apr. 2023 update) ("If an unpublished opinion does not command precedential force under circuit rules, law-of-the-case rules hold full sway."). We have since reached the same conclusion in a published decision, *United States v. Wesley*, 60 F.4th 1277 (10th Cir. 2023), where we said, "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)).

Because Mr. Sears had already brought one § 2255 motion, he could not bring another without this court's authorization. *See* 28 U.S.C. §§ 2244(b)(3)(A) & 2255(h); *United States v. Harper*, 545 F.3d 1230, 1232 (10th Cir. 2008). Thus, the

district court should have "refused to exercise jurisdiction" over Mr. Sears's argument that the district court should not have treated his prior Kansas convictions as serious violent felonies. *Wesley*, 60 F.4th at 1289.

III. CONCLUSION

We remand to the district court to dismiss Mr. Sears's sentencing-error argument as lacking jurisdiction. We otherwise affirm. We grant Mr. Sears's motion to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge