

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 3, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TONY LEROY CLEVELAND,

Defendant - Appellant.

No. 21-5045
(D.C. No. 4:08-CR-00163-JFH-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

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

Tony Leroy Cleveland, proceeding pro se,¹ appeals the district court's denial of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. He also appeals the district

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Because Mr. Cleveland 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).

court's denial of his motion to reconsider. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Mr. Cleveland was released from Oklahoma state prison after serving almost 19 years for multiple armed robberies and assault and battery with a dangerous weapon. In 2008, around two years after his release, he committed four additional armed robberies in Oklahoma.

Mr. Cleveland pled guilty in federal court to two counts of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 2 and 4), and one count of interference with commerce, in violation of 18 U.S.C. § 1951 (Count 5). Under a plea agreement, the government dismissed the six remaining counts. The district court sentenced Mr. Cleveland to a prison term of 571 months: 151 months for Count 5, 120 months for Count 2, and 300 months for Count 4, all to run consecutively.

In April 2020, Mr. Cleveland requested that the Bureau of Prisons (the “BOP”) consider granting him compassionate release under 18 U.S.C. § 3582(c)(1)(A) based on his medical conditions and vulnerability to COVID-19. The BOP warden denied his request in May 2020.

In September 2020, Mr. Cleveland filed an emergency motion for compassionate release in the district court, which denied his motion on November 23, 2020. The court concluded that “the violent nature of Defendant’s offenses, along with the need for the sentence to reflect the seriousness of the offenses, provide just punishment, and afford

adequate deterrence to criminal conduct, outweigh the added potential risk posed by the COVID-19 virus.” ROA, Vol. I at 198.

Mr. Cleveland filed a motion to reconsider. He cited three factors justifying compassionate release: (1) his sentence for the two § 924(c) convictions would be shorter today, (2) severe medical issues made him vulnerable to COVID-19, and (3) he had pursued rehabilitative efforts in prison. *Id.* at 203-05. Mr. Cleveland also filed three supplements and a reply brief addressing new case law and updates concerning his medical issues.

On May 20, 2021, the district court denied Mr. Cleveland’s motion to reconsider, concluding that (1) there were no “extraordinary and compelling reasons” for relief, and (2) the § 3553(a) factors “justify the sentence.” *Id.* at 277-78. Mr. Cleveland appeals both orders.

II. DISCUSSION

A. 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 court may grant the motion 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).

“[D]istrict courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others.” *Maumau*, 993 F.3d at 831 n.4 (quotations omitted); *see also United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021). The three inquiries may “be considered in any order.” *United States v. Hald*, — F.4th —, No. 20-3195, 2021 WL 3439012, at *6 (10th Cir. Aug. 6, 2021).

B. Standard of Review

We review a district court’s ruling on a First Step Act motion for an 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).

C. Analysis

Mr. Cleveland appeals the district court’s November 23, 2020 Order denying his § 3582(c)(1)(A) motion and its May 20, 2021 Order denying his motion to reconsider. We affirm the denial of both motions.

On appeal, Mr. Cleveland makes two arguments for “extraordinary and compelling reasons” that warrant a sentence reduction. First, he argues that his medical issues, including a third surgery and inability to take the COVID-19 vaccine (because of his weakened immune system), justify compassionate release. *See* Aplt. Br. at 2; Aplt.

Reply Br. at 1. Second, he argues that, if sentenced today, he would receive a much shorter sentence.² *See* Aplt. Br. at 3-4, 6.

1. November 23, 2020 Order

The district court denied Mr. Cleveland's motion "after considering the applicable factors set forth in . . . § 3553(a) and the applicable policy statements issued by the Sentencing Commission." ROA, Vol. I at 197. We affirm based on the § 3553(a) factors.

As noted above, the district court concluded "that the violent nature of Defendant's offenses, along with the need for the sentence to reflect the seriousness of the offenses, provide just punishment, and afford adequate deterrence to criminal conduct, outweigh the added potential risk posed by the COVID-19 virus." *Id.* at 198; *see* 18 U.S.C. § 3553(a)(1)-(2). The court also cited the threat Mr. Cleveland, if released, would pose to the public. *See id.* § 3553(a)(2)(C).

Given Mr. Cleveland's violent criminal record, "[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." *Hald*, 2021 WL 3439012, at *12 (quotations and alterations omitted); *see also id.* at *11 (affirming § 3553(a) analysis

² Mr. Cleveland argues there are three reasons he would receive a lower sentence today: (1) the First Step Act's changes to sentence-stacking for § 924(c) convictions, (2) attempted Hobbs Act robbery is no longer a "crime of violence" under § 924(c), and (3) this "crime of violence" interpretation would affect his "career offender" status under the sentencing guidelines. *See* Aplt. Br. at 3-4, 6.

where “the seriousness of the offense and the need to provide adequate deterrence weighed against compassionate release”).

Because the district court did not abuse its discretion in denying Mr. Cleveland’s motion for compassionate release based on the § 3553(a) factors, we affirm the November 23, 2020 Order.

2. May 20, 2021 Order

In its May 20, 2021 Order, the district court denied Mr. Cleveland’s motion to reconsider because (1) there were no “extraordinary and compelling” reasons to warrant compassionate release, and (2) the § 3553(a) factors “justify the sentence.” ROA, Vol. I at 277-78. We again affirm based on the § 3553(a) factors.

The district court did not abuse its discretion in denying Mr. Cleveland’s motion to reconsider based on the § 3553(a) factors. It stated that Mr. Cleveland’s five state convictions for armed robbery and assault and battery with a dangerous weapon, and his “history of several arrests for violent crimes,” make him “a serial armed robber by trade, a craft interrupted only by imprisonment.” *Id.* at 278. The court continued: “The extent and serious nature” of Mr. Cleveland’s federal crimes and his “extensive and violent criminal history constitute aggravating factors that weigh against modification of the sentence.” *Id.* The court then cited several of the factors and sub-factors in § 3553(a)(1)-(2) that “justify the sentence.” *Id.*

The district court also considered mitigating circumstances before engaging in the § 3553(a) analysis. Early in the order, it cited Mr. Cleveland’s arguments that his sentence for the two § 924(c) convictions would be lower today, that he faced significant

health issues, and that “he no longer pose[d] a risk to the community.” *Id.* at 273-74.

The court’s discussion of Mr. Cleveland’s health issues and sentencing disparity shows that, as part of its § 3553(a) analysis, it “considered the facts allegedly establishing extraordinary and compelling reasons for release.” *Hald*, 2021 WL 3439012, at *9. “It is not our place to reweigh the factors and come to a different conclusion than the district court.” *United States v. Williams*, 848 F. App’x 810, 813 (10th Cir. 2021) (unpublished) (cited for persuasive value under 10th Cir. R. 32.1; Fed. R. App. P. 32.1).

III. CONCLUSION

We (1) affirm the district court’s November 23, 2020 Order denying Mr. Cleveland’s motion for compassionate release, (2) affirm its May 20, 2021 Order denying his motion to reconsider, (3) deny his motion for appointment of counsel, and (4) grant his motion for leave to proceed *in forma pauperis*.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge