

NOT RECOMMENDED FOR PUBLICATION

No. 20-1530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 18, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 v.) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
 DAMIEN EDWARD DESJARDINS-RACINE,) THE WESTERN DISTRICT OF
) MICHIGAN
 Defendant-Appellant.)
)
)

Q R D E R

Before: SILER, MOORE, and BUSH, Circuit Judges.

Damien Edward Desjardins-Racine, proceeding pro se, appeals the denial of his motion for compassionate release. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2019, Desjardins-Racine pleaded guilty to possession with intent to distribute five grams or more of methamphetamine. The district court sentenced him to 87 months of imprisonment, the bottom of the recommended guidelines range, and he did not appeal.

In April 2020, Desjardins-Racine moved for compassionate release, and he asserted in a supplemental brief filed through appointed counsel that there were extraordinary and compelling reasons for his release, as required by 18 U.S.C. § 3582(c)(1)(A), because he has asthma and is at especially high risk should he contract Covid-19. He noted that there were many confirmed cases of Covid-19 among both inmates and staff at his prison, FCI Milan, and that the prison's layout does not allow for adequate preventative measures.

The government responded in opposition, arguing that the district court lacked the authority to grant Desjardins-Racine's motion because he had failed to exhaust his administrative remedies and, alternatively, that he had failed to establish that a reduction was supported by extraordinary and compelling reasons or the relevant 18 U.S.C. § 3553(a) factors.

The district court denied the motion, concluding first that § 3582(c)(1)(A)'s exhaustion requirement is mandatory and that Desjardins-Racine had failed to comply with it. The district court also reviewed the motion on the merits and concluded that Desjardins-Racine had not demonstrated extraordinary and compelling reasons for a reduction because his medical records did not reflect an asthma diagnosis or any other comorbidities, and that, even if he had, relief was not warranted as a matter of discretion because he had served less than 20% of his sentence, had a history of substance abuse, and remained a risk to himself and the community.

On appeal, Desjardins-Racine argues that he did satisfy the exhaustion requirement, pointing to his administrative request for home confinement under 18 U.S.C. § 3624(c)(2). He also argues that compassionate release is warranted based on his asthma and the prison's inadequate response to the spread of Covid-19, and he cites *United States v. Head*, No. 2:08-cr-00093, 2020 WL 3180149 (E.D. Cal. June 15, 2020), as involving similar circumstances.

We review the denial of compassionate release for an abuse of discretion. *United States v. Kincaid*, 802 F. App'x 187, 188 (6th Cir. 2020) (citing *United States v. Chambliss*, 948 F.3d 691, 693 (5th Cir. 2020)). A defendant's legal eligibility for a sentence reduction is reviewed de novo. See *United States v. Boulding*, 960 F.3d 774, 778 (6th Cir. 2020).

A district court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). One exception to this rule is compassionate release, which allows a district court to reduce a defendant's sentence if it finds, among other things, that "extraordinary and compelling reasons" warrant a reduction. 18 U.S.C. § 3582(c)(1)(A)(i). Prior to 2018, a motion for compassionate release could be made only by the Bureau of Prisons (BOP), but the First Step Act amended the statute so that defendants can move for compassionate release on their own behalf. See *United States v. Alam*, 960 F.3d 831, 834-35 (6th Cir. 2020). A defendant may do so, however, only after he has "fully exhausted all administrative rights to appeal a failure" of

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the BOP to bring a motion on his behalf or after thirty days have passed “from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A).

Desjardins-Racine argues that § 3582(c)(1)(A)’s exhaustion requirement is not mandatory and should be excused in light of the potentially catastrophic health consequences of Covid-19. But we recently held that this exhaustion requirement is mandatory when properly invoked, and we declined to carve out “an equitable exception . . . to account for irreparable harm or futility” in cases involving Covid-19. *Alam*, 960 F.3d at 835. And although Desjardins-Racine points to his administrative request for home confinement as satisfying the exhaustion requirement, that request made no mention of compassionate release and instead sought a different form of relief—a transfer in custody under § 3624(c)(2) and the CARES Act—with different eligibility requirements. Thus, the district court correctly determined that Desjardins-Racine failed to exhaust his administrative remedies.

For these reasons, we **AFFIRM** the district court’s order denying Desjardins-Racine’s motion for compassionate release.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
No. 2:18-cr-45
-v-)
Honorable Paul L. Maloney
DAMIEN DESJARDINS-RACINE,)
Defendant.)

ORDER DENYING MOTION FOR REDUCED SENTENCE

Defendant Desjardins-Racine requests the Court reduce his sentence to time served and release him to begin his term of supervised release. (ECF No. 45.) Defendant asserts that COVID-19 poses a threat to his health and relies on the statutory provision permitting compassionate release. The Court will deny the motion.

1.

Defendant pled guilty to possession with intent to distribute 5 grams or more of methamphetamine. Following the indictment, Defendant was released on a personal recognizance bond. While on bond, Defendant twice tested positive for the use of controlled substances. The Court further notes that in the Presentence Report, the probation officer concluded Defendant was responsible for over 250 grams of Ice and 32 ounces of cocaine. In August 2019, the Court sentenced Defendant to 87-month imprisonment, followed by four years of supervised release. The Bureau of Prisons calculates that Defendant would be released in May 2025.

II.

“Federal courts are forbidden, as a general matter, to ‘modify a term of imprisonment once it has been imposed,’ 18 U.S.C. § 3582(c); but the rule of finality is subject to a few narrow exceptions.” *Freeman v. United States*, 546 U.S. 522, 526 (2011); *see United States v. Curry*, 606 F.3d 323, 326 (6th Cir. 2010). In the First Step Act, Congress amended 18 U.S.C. § 3582(c)(1)(A)(i), the provision authorizing compassionate release. Prior to the amendments, only the Bureau of Prisons could file a motion with the Court seeking compassionate release. *See, e.g., Crowe v. United States*, 430 F. App’x 484, 484-85 (6th Cir. 2011) (per curiam). As amended, the statute now permits prisoners to file a motion with the court, subject to certain limitations. The statute allows a prisoner to seek relief in the courts “after the defendant has exhausted all administrative rights to appeal a failure by the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier” 18 U.S.C. § 3582(c)(1)(A). The defendant must also establish “extraordinary and compelling reasons[.]” *Id.* § 3582(c)(1)(A)(i). Finally, the court must find that the sentence reduction is consistent with applicable policy statements issued by the Sentencing Commission. *Id.* § 3582(c)(1)(A).

Although not unanimous, a consensus of district courts within this circuit have concluded that the exhaustion requirement is jurisdictional in nature or is a mandatory statutory requirement that cannot be waived by a court. *United States v. Bolze*, —F. Supp.3d—, 2020 WL 2521273, at *4 (E.D. Tenn. May 13, 2020) (collecting cases); *see, e.g., United States v. Williams*, No. 2:17cr20002-5, 2020 WL 2300206, at *4-*5 (W.D. Tenn. May 1,

2020) (declining to determine whether the exhaustion mandate is jurisdictional while simultaneously holding that it does not have discretion to excuse the failure to exhaust); *United States v. Effler*, No. 2:13cr27, 2020 WL 2025766, at *2 (E.D. Tenn. Apr. 27, 2020) (citing cases from the Northern and Southern Districts of Ohio); *United States v. Godofsky*, No. 5:16-59-KKC, 2020 WL 2188047, at *1 (E.D. Ky. May 6, 2020); *United States v. Alam*, No. 15-20351, 2020 WL 1703881, at *2 (E.D. Mich. Apr. 8, 2020) (collecting cases). Considering a combination of Supreme Court and Tenth Circuit precedent, the District Court of Kansas has reviewed the “text, context, and relevant historical treatment” of § 3582(c) to conclude that the requirement in subsection (c)(1)(A) is jurisdictional and is not merely a claim-processing rule. *United States v. Read-Forbes*, No. 12-20099, 2020 WL 1888856, at *3 (D. Kan. Apr. 16, 2020). The Fifth and Ninth Circuits have also concluded that other exhaustion requirements in § 3582(c) are jurisdictional, while the Seventh Circuit reached the opposite conclusion. *United States v. Johnson*, —F. Supp. 3d—, 2020 WL 1663360, at *4 (D. Md. Apr. 3, 2020) (concluding the exhaustion requirement in § 3582(c)(1)(A) is jurisdictional). The Sixth Circuit appears to follow the Fifth, Ninth and Tenth Circuits in holding that other provisions of § 3582 are jurisdictional limitations on a district court’s authority. The Sixth Circuit has held that § 3562(c)(2) contains a jurisdictional limitation on the district court’s authority to reduce a sentence; the sentencing guideline range must have been subsequently lowered by the Sentencing Commission. *United States v. Williams*, 607 F.3d 1123, 1125 (6th Cir. 2010). The Sixth Circuit has also held that, under the earlier version of § 3582(c)(1)(A), that federal courts lacked the authority to review the decision of the Bureau of Prisons not to seek a compassionate release for an inmate. *Crowe*, 430 F. App’x at 485.

Defendant has not exhausted the administrative remedy required by the statute. The warden at Defendant's facility in Milan, Michigan, denied his request on May 8, and notified Defendant of the right to appeal. (ECF No. 50-1 PageID.207.)

Nevertheless, the Court has considered the merits of Defendant's request. Defendant contends he is at risk because individuals at his facility have tested positive for COVID-19, the conditions of confinement make social distancing impossible, and he is asthmatic. When considering extraordinary and compelling reasons under the compassionate release provision, this Court looks at the individual defendant's characteristics and underlying health conditions and the situation at the defendant's place of incarceration. *See, e.g., Miller v. United States*, No. 16-20222-1, 2020 WL 1814084, at *4 (E.D. Mich. Apr. 9, 2020) (collecting cases).

Defendant has not established extraordinary and compelling reasons for the Court to reduce his sentence. A threat of infection which arises from the existence of COVID-19 and the conditions of incarceration generally will not establish the sort of extraordinary and compelling reasons required by statute. *See United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020). Defendant's medical records do not support his claim that he is asthmatic. His presentence report notes that Defendant did not report any medical problems. The inhaler he currently uses was issued in April 2020, after he self-reported a recurrence of childhood asthma. (ECF No. 50-1 PageID.210-11.) The records contain no medical diagnosis of asthma. The records contain no evidence of any other comorbidities.

Finally, the Court notes that any reduction of sentence would fall within my discretion. Defendant has served less than twenty percent of his sentence. Defendant has acknowledged

an addition to controlled substances. He twice tested positive while on bond. The Court concludes Defendant remains a risk to himself and the community. Therefore, even if the Court were to conclude that Defendant had exhausted his remedies and demonstrated that he meets the extraordinary and compelling standard, the Court would decline to reduce his sentence.

Accordingly, Defendant's motion to reduce sentence (ECF No. 45) is **DENIED**. IT IS SO ORDERED.

Date: May 20, 2020

/s/ Paul L. Maloney

Paul L. Maloney
United States District Judge