

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 21-6180

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TOMMY PABELLON,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:97-cr-00487-HMH-2)

Submitted: July 13, 2021

Decided: July 21, 2021

Before NIEMEYER and KING, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Tommy Pabellon, Appellant Pro Se. Brandon Batson Hinton, OFFICE OF THE UNITED STATES ATTORNEY, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Tommy Pabellon appeals the district court's orders denying his motions for compassionate release and for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *United States v. Pabellon*, No. 6:97-cr-00487-HMH-2 (D.S.C. Jan. 5 & Jan. 22, 2021). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

This matter is before the court on Tommy Pabellon's ("Pabellon") motion to reconsider the court's January 5, 2021 denial of his motion for compassionate release. (Order, ECF No. 106.) The court has reviewed the motion for reconsideration and finds that the new information provided does not alter the court's previous decision. As addressed in the court's order denying the motion for compassionate release, Pabellon has been diagnosed with borderline type 2 diabetes for which he takes no medication and is monitored regularly. (Gov't Resp. Ex. 2 (2019 Medical Records 10), ECF No. 105-2.) Diabetes may place a person at higher risk from COVID-19. The Centers for Disease Control has reported that type 2 diabetes places a person at higher risk for severe illness from COVID-19. See People Who are at Higher Risk for Serious Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. Pabellon's borderline type 2 diabetes appears to be well controlled without medication. The court finds that Pabellon's borderline diabetes is not serious or debilitating. Further, Pabellon's diagnosis of borderline diabetes is insufficient to establish that he is at significant risk from COVID-19. See United States Sentencing Guidelines § 1B1.13 cmt. n 1(A). In addition, Pabellon alleges that based on his height and weight he is

obese, with a body mass index of 31.7. (Mot. Reconsideration 4, ECF No. 108.) Obesity, with a body mass index greater than 30, places a person at higher risk for complications from COVID-19. See People Who are at Higher Risk for Serious Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. A review of Pabellon's medical records reveals no diagnosis of obesity and there is no evidence that this condition is debilitating. United States v. Savoy, No. 1:08CR00272-3, 2020 WL 6733683, at *3 (M.D.N.C. Nov. 13, 2020) (unpublished) (finding that obesity is not a compelling and extraordinary reason for compassionate release as obesity is not "a chronic condition, one from which [the defendant] is not expected to recover.") Based on the foregoing, the court finds that Pabellon's current health conditions fail to establish extraordinary and compelling reasons to reduce his sentence.

Further, the United States Penitentiary (USP) – Atlanta currently has 29 inmates and 13 staff members who have tested positive for COVID-19. <https://www.bop.gov/coronavirus/>. Any number of COVID-19 cases is certainly cause for concern, and the court recognizes that USP – Atlanta has a number of COVID-19 cases. However, the Bureau of Prisons ("BOP") has modified its operations and has an effective program in place to limit the spread of COVID-19 in its facilities and to quarantine any affected persons. The BOP COVID-19 policy is more fully outlined on its website at https://www.bop.gov/coronavirus/covid19_status.jsp. Therefore, Pabellon's risk for exposure to COVID-19 at USP – Atlanta in light of his medical conditions does not establish extraordinary and compelling reasons to reduce his sentence.

Moreover, Pabellon argues that there have been changes in the law with respect to the admissibility of a decedent's testimonial statement that might change the outcome if he were

retried today under the current law. (Mot. Reconsideration 18-19, ECF No. 108.) After consideration of the totality of the record and evidence in this case, the court finds that this argument is insufficient to show extraordinary and compelling reasons to reduce his sentence.

Further, even if Pabellon were able to show extraordinary and compelling reasons to reduce his sentence, the court finds that the 18 U.S.C. § 3553(a) factors overwhelmingly do not support a reduction in this case. As the court fully addressed in its previous order, Pabellon is a dangerous person. Pabellon was sentenced to life imprisonment after being found guilty at a jury trial of (1) one count of murder with the intent to prevent testimony, (2) two counts of murder with intent to retaliate, and (3) one count of using a firearm in furtherance of a drug trafficking offense/death of person, all for activity stemming from the murder of Ricky Samuel ("Samuel"), a government informant. "Samuel [was] a Government informant who, at time of his death, had provided the Government with information regarding Pabellon's drug operations, had testified before the federal grand jury that indicted Pabellon on federal drug charges, and had been scheduled to be the key Government witness at Pabellon's then-upcoming trial on federal drug charges." United States v. Pabellon, Nos. 98-4060, 98-408, 1999 WL 305052, at *1 (4th Cir. May 14, 1999) (unpublished). Pabellon engaged in significant planning, associated co-conspirators, and paid \$15,000.00 to have Samuel killed. Id. at **2-5. Samuel was shot execution style in the back of the head by Pabellon's codefendant, Bob Fowler. Id. at *2. Further, Pabellon pled guilty to the federal drug charge of conspiracy to possess with intent to distribute crack cocaine and was sentenced to 121 months' imprisonment. United States v. Pabellon, 7:96-cr-00203-WBT.

In addition, Pabellon's disciplinary history consists of 11 offenses during his incarceration, including violations for sexual acts, fighting, assault, marijuana, homemade alcohol, and possessing a hazardous tool. The court agrees that the majority of these offenses occurred over 10 years ago. (Mot. Reconsideration 22, ECF No. 108.) However, Pabellon was sanctioned for possessing a hazardous tool in April 2019. Considering the 18 U.S.C. § 3553(a) factors, the court finds that the nature and circumstances of the offense, the history and characteristics of Pabellon, the need for the sentence to reflect the seriousness of the offense, and the need to promote respect for the law and protect the public do not support a reduction in this case. The court finds that Pabellon's life sentence promotes respect for the law, deters crime, protects the public, and is "sufficient, but not greater than necessary." For all the reasons set forth above, Pabellon's motion for reconsideration, docket number 108, is denied.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

January 22, 2021
Greenville, South Carolina