

Appendix A

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TERRY WAYNE COPE, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2022 U.S. App. LEXIS 3804
No. 21-5840
February 10, 2022, Filed

Notice:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1} ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. *United States v. Cope*, 312 F.3d 757, 2002 U.S. App. LEXIS 23755 (6th Cir. Ky., Nov. 19, 2002)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Lauren Tanner Bradley, Office of the U.S. Attorney, Lexington, KY; Elaine K. Leonhard, Assistant U.S. Attorney, Office of the U.S. Attorney, Ft. Mitchell, KY.

TERRY WAYNE COPE, Defendant - Appellant, Pro se, Butner, NC.

Judges: Before: GUY, SUHRHEINRICH, and MOORE, Circuit Judges. KAREN NELSON MOORE, Circuit Judge, concurring in the judgment only.

Opinion

ORDER

Terry Wayne Cope, a pro se federal prisoner, appeals the district court's denial of his motion for compassionate release filed under 18 U.S.C. § 3582(c)(1)(A). 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 2000, a jury convicted Cope of several counts related to attempted murder and firearms offenses arising from his conspiracy with his brother to kill several people to prevent them from testifying against his brother in a separate criminal case. The district court sentenced Cope to 502 months of imprisonment. We affirmed his convictions. *United States v. Cope*, 312 F.3d 757 (6th Cir. 2002). Cope's motion to vacate under 28 U.S.C. § 2255 was unsuccessful. See *Cope v. United States*, 385 F. App'x 531 (6th Cir. 2010).

In October{2022 U.S. App. LEXIS 2} 2020, Cope moved for compassionate release under § 3582(c)(1)(A), which gives district courts the discretion to reduce a prisoner's sentence if, in relevant part, the applicable sentencing "factors set forth in [18 U.S.C. §] 3553(a)" support the reduction, and

CIRHOT

"extraordinary and compelling reasons warrant such a reduction." See 18 U.S.C. § 3582(c)(1)(A)(i); see also *United States v. Elias*, 984 F.3d 516, 518-19 (6th Cir. 2021). Even when the district court determines that the inmate meets those requirements, the "court 'may reduce the term of imprisonment,' but need not do so." *Elias*, 984 F.3d at 518 (quoting § 3582(c)(1)(A)). Cope, who was 64 years old when he filed the motion, alleged that he is "an obese, elderly, hypertensive cancer patient with a compromised immune system with a high risk of serious illness/death from corona-virus." He recounted that he was diagnosed in April 2019 with "stage II non-Hodgkin[]"s diffuse large B cell lymphoma," which is "now in remission" after "a rigorous regime of chemotherapy." He subsequently submitted medical records supporting these allegations. Cope noted that his risk from the COVID-19 pandemic was increased by being in prison, citing general figures about the Bureau of Prisons ("BOP"). He also claimed that he received a severe sentence and pointed out that he had served sixty percent of it with{2022 U.S. App. LEXIS 3} a clean disciplinary record and various achievements and that he has been deemed to have a minimal risk of recidivism. The government opposed his motion.

The district court held that Cope had not established that his medical conditions or the presence of COVID-19 in federal prisons-particularly in light of the availability of vaccination-amounted to extraordinary and compelling reasons justifying his release. The district court also held that the § 3553(a) sentencing factors militated against granting his motion.

On appeal, Cope argues that the district court erred by finding that his health in the face of the COVID-19 pandemic did not warrant relief, and that the court failed to take his post-conviction behavior into account in considering the § 3553(a) factors.

We review a district court's denial of compassionate release for an abuse of discretion. *United States v. Ruffin*, 978 F.3d 1000, 1005 (6th Cir. 2020). A district court abuses its discretion when it "relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law." *United States v. Flowers*, 963 F.3d 492, 497 (6th Cir. 2020) (quoting *United States v. White*, 492 F.3d 380, 408 (6th Cir. 2007)).

Cope first argues that the district court erred in finding that his medical issues combined with the COVID-19 pandemic did not amount to extraordinary and compelling reasons to reduce{2022 U.S. App. LEXIS 4} his sentence. He notes, however, that the "court acknowledged that [he] presented proof of five underlying health conditions which the CDC identified as risk factors for severe illness." Cope, then, seems merely to disagree with the district court's assessment of those issues. Yet the district court laid out its reasoning, see *United States v. Jones*, 980 F.3d 1098, 1113 (6th Cir. 2020), finding that Cope's medical conditions were not terminal, that he could provide himself care in prison, and that the vaccine availability had lowered the risk presented by COVID-19. On that last point, the government notes that Cope has been vaccinated, and we have held that "a defendant's incarceration during the COVID-19 pandemic-when the defendant has access to the COVID-19 vaccine-does not present an 'extraordinary and compelling reason' warranting a sentence reduction." *United States v. Lemons*, 15 F.4th 747 (6th Cir. 2021). Therefore, Cope's argument that the pandemic makes his medical conditions severe enough to merit compassionate release "is foreclosed by our recent holding" in *Lemons*. *United States v. Traylor*, 16 F.4th 485, 487 (6th Cir. 2021). Accordingly, the district court did not abuse its discretion on this issue.

That is enough to support affirming the district court's order. See *Elias*, 984 F.3d at 519. Nevertheless, Cope also argues that the district court erred in finding that the{2022 U.S. App. LEXIS 5} § 3553(a) sentencing factors did not support his release. He largely claims that the district court did not consider his post-sentencing behavior and low risk of recidivism. But there is no indication that the court failed to take these matters into account. Instead, the district court found, in its

discretion, that other factors weighed against granting Cope compassionate release. The court highlighted the "extremely serious" nature and circumstances of his offense and his criminal history, see § 3553(a)(1), and determined that Cope "remains a danger to the community," see § 3553(a)(2)(C). The court also cited the need for his sentence to promote respect for the law and provide just punishment, see § 3553(a)(2)(A), and for it to afford adequate deterrence, see § 3553(a)(2)(B). "The district court is best situated to balance the § 3553(a) factors." *Jones*, 980 F.3d at 1114 (quoting *United States v. Kincaid*, 802 F. App'x 187, 189 (6th Cir. 2020) (order)). And "[w]hen considered with the whole record, the district court's decision more than adequately explained why the § 3553(a) factors did not support a sentence reduction." *Ruffin*, 978 F.3d at 1008. Therefore, the district court did not abuse its discretion in holding that the relevant sentencing factors did not support Cope's motion for compassionate release.

Accordingly, we **AFFIRM** the district court's order.

Concur

Concur by: KAREN NELSON MOORE{2022 U.S. App. LEXIS 6}
KAREN NELSON MOORE, Circuit Judge, concurring in the judgment only. I would affirm the district court's order denying compassionate release solely on the basis of the district court's analysis of the 18 U.S.C. § 3553(a) factors.

No. 21-5840

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 30, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TERRY WAYNE COPE,

Defendant-Appellant.


ORDER

BEFORE: GUY, SUHRHEINRICH, and MOORE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT


Deborah S. Hunt, Clerk

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

Deborah S. Hunt
Clerk

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Filed: March 30, 2022

Terry Wayne Cope
F.M.C. Butner
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Butner, NC 27509

Re: Case No. 21-5840, USA v. Terry Cope
Originating Case No.: 2:99-cr-00033-1

Dear Mr. Cope,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Lauren Tanner Bradley
Ms. Elaine K. Leonhard
Mr. Charles P. Wisdom Jr.

Enclosure

**Additional material
from this filing is
available in the
Clerk's Office.**