

United States Court of Appeals
Appendix A for the Fifth Circuit

No. 23-50052
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
October 13, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DANIEL THOMASON SMITH,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:16-CR-39-1

Before JONES, HIGGINSON, and Ho, *Circuit Judges.*

PER CURIAM:*

Daniel Thomason Smith, federal prisoner # 29163-380, moves for leave to proceed in forma pauperis (IFP) on appeal from the denial of his 18 U.S.C. § 3582(c)(1)(A)(i) motion for compassionate release. Smith's IFP motion challenges the district court's determination that the appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

* This opinion is not designated for publication. *See 5TH CIR. R. 47.5.*

No. 23-50052

Our inquiry into whether the appeal is taken in good faith “is limited to whether the appeal involves ‘legal points arguable on their merits (and therefore not frivolous).’” *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (citation omitted).

Smith does not address, and has therefore waived any challenge to, the denial of any of the claims raised in the § 3582(c)(1)(A)(i) motion at issue, including his request for compassionate release based upon Covid-19 and his alleged health conditions. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) (holding that pro se appellant must brief arguments to preserve them); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987) (observing that failure to identify any error in district court’s analysis is same as if appellant had not appealed). Instead, he raises a series of arguments which were not mentioned in his § 3582(c)(1)(A)(i) motion and which we will not consider. *See United States v. Thompson*, 984 F.3d 431, 432 n.1 (5th Cir. 2021). To the extent that Smith intends to challenge the denials of his subsequently filed motions for exception and judicial notice, we lack jurisdiction to consider his arguments because he did not separately file notices of appeal from the denials of those motions. *See FED. R. APP. P. 3(a)(1)*.

As he has not shown that his appeal involves a nonfrivolous issue, Smith’s motions to proceed IFP and for appointment of counsel are DENIED, and his appeal is DISMISSED in part as frivolous and in part for lack of jurisdiction. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2; Rule 3(a)(1).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

October 13, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 23-50052 USA v. Smith
USDC No. 6:16-CR-39-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: Melissa V. Mattingly, Deputy Clerk

Enclosure(s)

Mr. Joseph H. Gay Jr.

Mr. Daniel Thomason Smith

FILED

JAN 10 2023

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY *[Signature]* DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA, §
Plaintiff, §
v. § Cause No.
DANIEL THOMASON SMITH (1), § WA-16-CR-0039-AM
Defendant. §
§

ORDER

Pending before the Court is the Defendant's Motion to Reduce Sentence. (ECF No. 345.) This Court has duly considered the Defendant's motion, as well as the Government's response. (ECF No. 351.) For the following reasons, the Defendant's motion is **DENIED**.

I. BACKGROUND

On June 27, 2016, the Defendant was found guilty by jury verdict to Counts One through Twenty-One of the Indictment: Count 1-Conspiracy to Commit Health Care Fraud, in violation of 18 U.S.C. § 1349; Count 2-Aiding and Abetting Health Care Fraud, in violation of 18 U.S.C. §§ 2 and 1347; Counts Three through Thirteen-Aiding and Abetting Aggravated Identity Theft, in violation of 18 U.S.C. §§ 2 and 1028; and Counts Fourteen through Twenty-One-Aiding and Abetting False Statements Related to a Health Care Matter, in violation of 18 U.S.C. §§ 2 and 1035. (ECF Nos. 1, 320.) On February 23, 2017, the Defendant was sentenced to 324 months of imprisonment, with credit for time served for one day on December 16, 2013, and from June 27, 2016 through sentencing. (ECF No. 278.) The Defendant was ordered to serve 3 years of supervised release upon his release from imprisonment. (*Id.*)

II. ANALYSIS

This motion has been styled on the docket as a Motion to Reduce Sentence under the First Step Act, but the title the Defendant has given it is “Writ of Error and an Affidavit of Error-in-Fact and Affidavit for Regress/Release/Recoupment.” (ECF No. 345.) While this motion was pending, the Defendant filed 3 additional motions that were nominally to reduce his sentence, and 16 other motions arguing various pseudo-legal reasons for his release. This count does not include the countless motions and addendums the Defendant has filed related to several habeas corpus petitions under 28 U.S.C. § 2255. Moreover, the Defendant has filed an interminable string of Sovereign Citizen-type arguments he claims justify his release, while also arguing his factual innocence. The instant motion makes many of the same frivolous claims. For example:

1. “There is no such thing as power of inherent Sovereignty in the government of the United States.” (*Id.* at 1.)
2. “[J]udges can ONLY interface with other artificial persons...which I am NOT a part of...” (*Id.* at 2.)
3. That “the court’s jurisdiction is really just an illusion and I NEVER acquiesce(d)” (*Id.* at 3.)
4. His federal conviction is in violation of the Texas Bill of Rights (*Id.* at 3-7.)

The entire document consists of these arguments that are not founded in the law. However, page 9 of the document appears, as the Government concedes in its response, to be a request to the warden of FCI Beaumont to be a request for compassionate release in the form of home confinement. Therefore, the Court will address this request just as it did every other request for home confinement the Defendant has made and deny that request.

A. Availability of Relief

The Court: “may not modify a term of imprisonment once it has been imposed except” by motion of the Director of the Bureau of Prisons, or by motion of the defendant after he has “fully exhausted all administrative rights to appeal or a failure of the Bureau of Prisons to bring a motion

on [his] 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 Court may order a sentence reduction, "[A]fter considering the factors set forth in section 3553 (a) to the extent that they are applicable, if it finds that (i) extraordinary and compelling reasons warrant such a reduction ... and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

With respect to what constitutes, "extraordinary and compelling reasons," The Commission offers several potential circumstances, including a medical condition in which a "defendant is suffering from a terminal illness . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he . . . is not expected to recover." USSG §1B1.13 cmt. n. 1 (U.S. SENTENCING COMM'N 2018.)¹ The Commission also states, "rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement." (*Id* at n. 3.)

The Defendant argues no legitimate basis for a sentence reduction. (ECF No. 345.) His motion is based on concluding that he was "fraudulently" convicted. (*Id.*) The Court holds the Defendant has failed to demonstrate an extraordinary or compelling reason for a sentence reduction.

B. 18 U.S.C. § 3553(a) Factors

Section 3553(a) provides several factors courts must weigh when imposing a sentence and are also required consideration to grant a reduction of sentence under section 3582(c) to the extent they are applicable. The applicable sentencing factors for the court to consider are:

¹ While the commentary to § 1B1.13 is not dispositive, it may inform the Court's analysis as to what reasons may be sufficiently "extraordinary and compelling" to merit compassionate release. *See United States v. Thompson*, 984 F.3d 431, 433 (5th Cir. 2021); *see also United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021) (holding that neither the policy statement nor the commentary in § 1B1.13 are binding on a district court when addressing a prisoner's own motion under section 3582(c)(1)(A)).

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct and

(C) to protect the public from further crimes of the defendant.

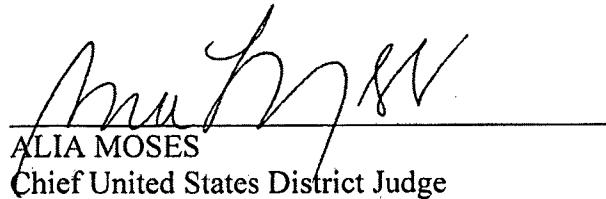
18 U.S.C. § 3553(a).

The Defendant conspired with others to defraud healthcare benefit programs, including Medicare and Medicaid, over the course of several years. (ECF No. 241.) The Defendant stole over 4.5 million dollars from those programs during this criminal scheme. (*Id.* at 13.) He also has multiple state convictions for driving while intoxicated and theft. (*Id.* at 15.) The Defendant has failed to demonstrate a reduction in his sentence would protect the community from further crimes of the Defendant, provide just punishment for the offense committed, or afford adequate deterrence to criminal conduct. Therefore, the § 3553 factors do not weigh in favor of a sentence reduction.

III. CONCLUSION

For the foregoing reasons, the Defendant's Motion to Reduce Sentence or "Writ of Error and an Affidavit of Error-in-Fact and Affidavit for Regress/Release/Recoupment." (ECF No. 345) is **DENIED**.

SIGNED on this 9th day of January, 2023.



ALIA MOSES
Chief United States District Judge

Appendix B

FILED

JUN 21 2023

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY *[Signature]*

DEPUTY CLERK

UNITED STATES OF AMERICA,
Plaintiff,

v.

DANIEL THOMASON SMITH,
Defendant.

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Case No.
WA-16-CR-0039(1)-AM

ORDER

Pending before the Court is the Defendant's "Motion to Take Judicial Notice." (ECF No. 393.) The Defendant's *pro se* filing consists of essentially one sentence and does not state what legal relief he seeks other than the title requesting that the Court take judicial notice of a recent Supreme Court decision. For the following reasons, the Defendant's motion is DENIED.

On June 27, 2016, the Defendant was found guilty by jury verdicts of several offenses. Among them were eleven counts of Aiding and Abetting Aggravated Identity Theft, in violation of 18 U.S.C. §§ 2 and 1028. (ECF Nos. 1, 320.) The Defendant has since filed at least 30 motions, "advisories," and writs in his criminal case, all of which seem to allege Sovereign Citizen-type claims, or simply reargue the same frivolous contentions for him to be released. All have been denied.

The entirety of this filing simply cites a recent decision of the United States Supreme Court and "apprise[s] this Court that [he] is aware of" *Dubin v. United States*, 599 U.S. ____ (June 8, 2023). "A motion must state the grounds on which it is based and the relief or order sought." FED. R. CRIM. P. 47. Without more detail about his requested relief or a proposed order, there is nothing for this Court to decide related to this motion. If the Defendant has a legal argument for relief that this Court can grant, he, or his counsel, may bring a motion that complies with all the relevant

rules of procedure and local rules. However, until such time, the Court denies the Defendant's request to take judicial notice of this Supreme Court case.

Accordingly, the Defendant's "Motion to Take Judicial Notice." (ECF No. 393), is **DENIED.**

SIGNED and ENTERED on this 21st day of June 2023.



ALIA MOSES
Chief United States District Judge

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