FILED
United States Court of Appeals
Tenth Circuit

August 30, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CLARENCE LEE DAVIS,

Defendant - Appellant.

No. 23-5063
(D.C. Nos. 4:04-CR-00085-CVE-2 &
4:23-CV-00190-CVE-JFJ)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Clarence Lee Davis, proceeding pro se,[1] seeks a certificate of appealability (COA) to appeal from the district court's determination that his most recent 28 U.S.C. § 2255 motion is an unauthorized second or successive motion that it lacked jurisdiction to consider. See 28 U.S.C. § 2253(c)(1)(B). Mr. Davis has filed an application for a COA. We deny a COA and dismiss this appeal.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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. Davis appears pro se, we liberally construe his filings. Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005). But we do not make arguments for pro se litigants or otherwise advocate on their behalf. Id.

The district court found that Mr. Davis's motion was successive because he had previously filed numerous § 2255 motions. "A . . . successive motion must be certified as provided in [§] 2244 by a panel of the appropriate court of appeals . . . ." § 2255(h); see also 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Mr. Davis had not obtained the required authorization from this court, and the district court therefore dismissed his application for lack of jurisdiction.

To obtain a COA, Mr. Davis must show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 478 (2000). No reasonable jurist would find it debatable whether the district court correctly ruled as a procedural matter that Mr. Davis's § 2255 motion was unauthorized and that it therefore lacked jurisdiction. See In re Cline, 531 F.3d 1249, 1251 (10th Cir. 2008) ("A district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until this court has granted the required authorization.").

Mr. Davis does not dispute that he filed a successive § 2255 motion. Instead, he argues that he needed no authorization because he is entitled to relief based on the Supreme Court's decision in United States v. Taylor, 142 S. Ct. 2015 (2022), and § 2255(f)(3). Section 2255(f)(3) provides that a § 2255 motion is considered timely if it is filed within one year of a Supreme Court decision that creates a newly recognizable right made retroactively applicable to cases on collateral review. Mr. Davis cites no

authority for his assertion that no authorization is required for a motion filed under § 2255(f)(3). Indeed, the language and structure of § 2255 make clear that the authorization requirement of section 2255(h) applies to any second or successive § 2255 motion, including those filed in reliance on subsection (f)(3).

We deny a COA and dismiss this matter.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Case No. 04-CR-0085-002-CVE**
v.	)	
	)	**USM No.: 09484-062**
CLARENCE LEE DAVIS,	)	
	)	
Defendant.	)	

ORDER

Before the Court is defendant's motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (Dkt. # 295), filed on August 8, 2023. Defendant argues that several factors justify a reduction of sentence: the drastic difference between his aggregate 360-month sentence based on his classification as a career offender, and the lower sentence he would face today for the same conduct based on subsequent caselaw that amended qualifying predicate convictions; the validity of his § 924(c) and § 922(g)(1) convictions; the risk of contracting COVID-19 based on underlying health concerns; amendments to the Sentencing Guidelines effective November 1, 2023, revising USSG §1B1.13 standards for § 3582(c)(1)(A) reduction of sentence, and changes to USSG §4A1.1's "status points," that add criminal history points for offenses committed while under a criminal justice sentence or within two years from release from custody; his good conduct and rehabilitative efforts while imprisoned; and development of a strong release plan. Defendant argues these factors constitute extraordinary and compelling reasons warranting reduction of sentence under § 3582(c)(1)(A)(i). The Court has also reviewed a letter from defendant restating his justification for relief, citing his rehabilitative efforts, the risk of contracting COVID-19, and his interest in rejoining his family (Dkt. # 300). Defendant requests that the Court reduce his sentence to time served and that he be immediately released from custody.

On August 15, 2023, the Court found that defendant had exhausted his administrative rights giving the Court authority to consider defendant's motion (Dkt. # 296). On October 11, 2023, plaintiff filed a response in opposition to reduction of sentence (Dkt. # 301).

In September 2004, defendant was found guilty by jury trial as to counts one through three and five of the second superseding indictment, alleging conspiracy to commit armed bank robbery, in violation of 18 U.S.C. § 371 (count 1); armed bank robbery, in violation of 18 U.S.C. §§ 2113(a), (d) and 2 (count 2); brandishing, carrying, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (count 3); and felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (count 5). On February 28, 2005, United States District Judge James H. Payne sentenced defendant to a total term of imprisonment of 360 months: 60 months as to count one, 276 months as to count two and 120 months as to count five, all to run concurrently each with the other, and 84 months as to count 3 to run consecutively to counts 1, 2, and 5, for a total sentence of 360 months. In determining the applicable sentencing range, the Court found that defendant was a career offender pursuant to §4B1.2 based on two prior drug distribution convictions and an assault on peace officer conviction, thereby increasing his total offense level by eleven levels. The Court further added three criminal history points under §4A1.1(d) and (e) because defendant was recently released from confinement and serving a sentence when he committed the instant offense, resulting in an aggregate sentencing range of 360 months to life. See PSR at ¶¶ 38- 39, 50, and 70. Defendant is currently imprisoned at FCI El Reno. His projected release date is June 18, 2031.

In considering defendant's motion, the Court has reviewed the three-part test adopted by the Tenth Circuit in United States v. Maumau, 993 F.3d at 831 (10th Cir. 2021) (citing United States v. Jones, 980 F.3d 1098, 1107 (6th Cir. 2020)). Step one requires the Court to determine in its discretion, whether "extraordinary and compelling reasons" exist to warrant a sentence

reduction. Step two requires that the Court find whether such reduction is consistent with applicable policy statements issued by the United States Sentencing Commission. Step three requires the Court to consider any applicable 18 U.S.C. § 3553(a) factors and determine whether the reduction authorized by steps one and two is warranted under the circumstances of the case. The Court must address all three steps when granting such motion. Maumau, 993 F.3d at 831 n.4 (citing United States v. Navarro, 986 F.3d 668, 670 (6th Cir. 2021)). See also United States v. McGee, 992 F.3d 1035 (10th Cir. 2021). However, because the policy statements of the Sentencing Commission have not been updated since enactment of the First Step Act, which amended 18 U.S.C. § 3582(c)(1)(A) to allow defendants to file motions for compassionate release directly with the Court, the existing policy statements are not applicable to motions filed directly by defendants. Maumau, 993 F.3d at 834.

Defendant argues that he would not receive a career offender enhancement today because none of his prior convictions qualifies as the necessary predicate under USSG § 4B1.1. (Dkt. # 295 at 1–2). He asserts that his assault and battery on a peace officer conviction does not qualify under the CCA as a violent crime, and that his two drug convictions do not qualify because the Oklahoma criminal statute criminalizes drugs that are not federally controlled. (Dkt. # 295 at 2). Defendant is correct that his Oklahoma conviction for assault and battery on a peace officer would not constitute a "crime of violence" today. However, his two Oklahoma drug distribution convictions continue to satisfy the Guidelines definition of a "controlled substance offense." Indeed, in United States v. Jones, 15 F.4th 1288 (10th Cir. 2021), the Tenth Circuit rejected defendant Jones' argument that § 4B1.2(b) refers only to federally controlled substances and held that his Oklahoma drug distribution convictions constituted controlled substance offenses under § 4B1.2(b). Because both of defendant's Oklahoma drug convictions remain qualifying controlled substance offenses under § 4B1.2(b), defendant would remain a career offender if sentenced today,

and would face the same guideline range of 360 month to life that led to the imposition of his 360-month sentence. See Dkt. # 301 at 7-9.

Next, defendant challenges his § 924(c) and § 922(g)(1) convictions (Dkt. # 295 at 3). Because these claims challenge the validity of his conviction and sentence, they constitute an impermissible second or successive 28 U.S.C. § 2255 motion. Defendant has previously filed § 2255 motions and has been denied a certificate of appealability. See Dkt. ## 143, 168, 176, 180, 181, 191, 196, 242, 251. As plaintiff correctly argues, "a § 3582(c)(1)(A)(i) motion may not be based on claims specifically governed by 28 U.S.C. § 2255." United States v. Wesley, 60 F.4th 1277, 1289 (10th Cir. 2023). This Court lacks jurisdiction to consider a second or successive § 2255 motion. See 28 U.S.C. § 2255(h); United States v. Nelson, 465 F.3d 1145, 1148 (10th Cir. 2006).

Defendant further argues for compassionate release based on his need for chronic medical care and the risks posed by COVID-19 (Dkt. # 295 at 4). Review of Bureau of Prisons' medical records reveals that defendant suffers from dermatological, vision, joint, and dental ailments, as well as hypothyroidism and hypertension. Although hypertension qualifies as a risk factor for severe COVID-19 infection, his health records reflect that in 2021, he contracted and recovered from COVID-19 without any complications. See Dkt. # 301, Exh. 1 at 3. Defendant's current healthcare level is level 2 – stable, chronic care; and level 1 – mental health (Dkt. # 295 at 18). Further, at FCI El Reno, where defendant is imprisoned, there are currently no reported COVID-19 positive inmates or staff members. Based on review of defendant's health concerns, evidence that FCI El Reno is following COVID-19 abatement protocols, and the fact that he contracted and fully recovered from a previous COVID-19 infection, defendant cannot show that the danger of again contracting COVID-19 provides an extraordinary or compelling reason for compassionate release.

Next, defendant asserts that amendments to the Sentencing Guidelines effective November 1, 2023, form a basis for reduction of sentence. Defendant cites revised USSG §1B1.13(b)(6) -- Unusually Long Sentence, arguing that he has served at least 10 years of the term of imprisonment and a change in the law has created a gross disparity between his sentence and the sentence likely to be imposed at the time of the § 3582 motion.[1] The amendment is not effective until November 1, 2023, and even if in effect, is not applicable because this Court has found that both of defendant's Oklahoma drug distribution convictions remain qualifying controlled substance offenses under § 4B1.2(b), and defendant would remain a career offender if sentenced today. Defendant further argues that the Sentencing Commission amended USSG §4A1.1, by striking subpart (d), which added two additional criminal history points if a defendant committed the instant offense while under a criminal justice sentence (see fn 1, at 84). However, even if the amendment were in effect, it would not alter defendant's guideline calculation. Defendant's conviction history resulted in 17 criminal history points (PSR at ¶¶ 41-49). Three additional "status points" were added under § 4A1.1(d) and (e) because defendant was serving parole terms at the time of the commission of the instant crimes, and the instant crimes were committed less than two years after release from custody, resulting in a total of 20 criminal history points and criminal history category VI (PSR at ¶¶ 49-52). If sentenced today without the addition of § 4A1.1(d) and (e) "status points," defendant's criminal history category would remain category VI because 13 or more criminal history points results in a criminal history category VI. See Ch. 5 Pt. A - Sentencing Table at 407, Guidelines Manual (November 1, 2021).

[1] Amendments to the Sentencing Guidelines, UNITED STATES SENTENCING COMMISSION, https://www.ussc.gov/guidelines/amendments/adopted-amendments-effective-november-1-2023, at 11 (last visited October 12, 2023)

Finally, defendant argues that his rehabilitative efforts while imprisoned, no rule violations for more than eight years, and development of a strong release plan justify the relief he seeks. It is true defendant has been misconduct-free since February 2015; has participated in 510 hours of self-improvement courses, earned his GED and completed English proficiency classes, and appears to offer a stable release plan. However, good institutional adjustment, standing alone, is insufficient to warrant a sentence reduction under § 3582(c)(1)(A)(i). United States v. Saldana, 807, 820 Fed.Appx. 816 (D.Kan., April 22, 2021);[2] see also 28 U.S.C. § 994(t), USSG §1B1.13.

Defendant has failed to show an extraordinary and compelling reason for compassionate release.

As the Court has found that the requirement at step one of the foregoing three-part test in Maumau has not been met, the other prerequisite steps need not be addressed. However, the Court takes note of the serious nature of the offense conduct and defendant's extensive and varied criminal history. These factors, taken together, justify the sentence imposed after consideration of the nature of the offense, characteristics of the defendant, the seriousness of the actual offense conduct, and the need to promote respect for the law, provide for just punishment, and to provide for adequate deterrence and protection of the public. 18 U.S.C. § 3553(a)(1) and (2).

IT IS THEREFORE ORDERED that defendant's motion to reduce sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (Dkt. # 295) is **denied**.

IT IS SO ORDERED this 16th day of October, 2023.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

[2] Unpublished opinions are cited for their persuasive value.