NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 24, 2024*
Decided July 25, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-3403

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROLLIE MITCHELL,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:08-cr-00016-SEB-TAB-01

Sarah Evans Barker,
Judge.

ORDER

Rollie Mitchell, a federal prisoner, moved for a reduced sentence under § 404(b) of the First Step Act, Pub. L. 115-391, 132 Stat. 5194, 5222 (2018). The district court reduced his sentence of life imprisonment to 480 months, the current statutory

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* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

maximum, and five years' supervised release, but it declined to reduce the prison term any further. Because the district court did not abuse its discretion, we affirm.

A jury found Mitchell guilty in 2009 of knowingly distributing 50 grams or more of cocaine base, *see* 21 U.S.C. § 841(a), to a confidential informant. At the time, the baseline statutory range for the offense was ten years to life imprisonment. *Id.* § 841(b)(1)(A)(iii) (effective 1996–2010). Mitchell was subject to an enhanced minimum, however, because of a prior state conviction. *See* 21 U.S.C. § 851. At sentencing, the district court found that Mitchell had participated in the murder of the informant, whose identity had been revealed erroneously (and tragically). The court therefore adjusted Mitchell's offense level upward under § 2A1.1 of the United States Sentencing Guidelines, which is cross-referenced in in the drug-distribution guideline, § 2D1.1(d)(1). This resulted in a total offense level of 43. With Mitchell's criminal history category of IV, the Guidelines called for life imprisonment, which the court imposed.

Mitchell appealed his sentence. He argued that applying the murder cross-reference was unconstitutional because the court found the underlying facts by only a preponderance of the evidence. We rejected that argument and affirmed his sentence. *See United States v. Mitchell*, 635 F.3d 990, 992–93 (7th Cir. 2011). Mitchell then filed two motions for collateral relief under 28 U.S.C. § 2255. The district court denied them, and he did not appeal the rulings.

In the meantime, Congress passed the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010), to reduce the sentencing disparities for offenses involving crack, versus powder, cocaine. *United States v. Fowowe*, 1 F.4th 522, 525 (7th Cir. 2021). The Act reduced the imprisonment range for offenses under § 841(b)(1)(B)(iii) (which now applied to Mitchell's offense) from ten years to life to five to forty years, unless an enhanced minimum applied. *United States v. Shaw*, 957 F.3d 734, 736–37 (7th Cir. 2020). But this change did not apply to sentences that became final before the effective date of the Fair Sentencing Act until the First Step Act made the applicable provision retroactive and allowed prisoners to seek reduced sentences under § 404(b). *See id.* at 737; First Step Act § 404(b).

Mitchell then filed two § 404(b) motions to reduce his sentence in 2023—one by himself, and one through counsel. In his pro se motion, Mitchell repeated the argument from his appeal that applying the murder cross-reference based on uncharged conduct and a judge's factual findings by a preponderance of the evidence was unconstitutional. The counseled motion argued that Mitchell was entitled to a sentence reduction under

§ 404(b) because he was convicted of a covered offense whose maximum sentence had since been reduced through retroactive application of the Fair Sentencing Act. Counsel also raised the argument that, in its discretion, the court should reduce Mitchell's sentence to time served—then, about 15 years—because of this court's holding that one of his state convictions could not be used as a predicate for an enhanced minimum sentence under § 851. *See United States v. De La Torre*, 940 F.3d 938, 952 (7th Cir. 2019). Counsel's motion further contended that the murder cross-reference unjustly inflated the sentence, also warranting a discretionary reduction. (The motion also requested relief under § 603 of the First Step Act, but that issue is not raised on appeal.) The government conceded that Mitchell was eligible for relief under § 404(b), but it urged the district court, in its discretion, not to reduce Mitchell's sentence.

The district court granted Mitchell's motions in part and denied them in part. It agreed that Mitchell was eligible for relief under § 404(b) and that, after *De La Torre*, his prior state offense could not be used today as a predicate for the enhanced statutory minimum. But it declined to reduce his sentence below the new statutory maximum (also the guidelines range) of 40 years' imprisonment. The court reasoned that mitigating sentencing factors—letters of support from Mitchell's friends and family, his completion of numerous educational courses in prison, and his low recidivism risk—were outweighed by aggravating ones: the seriousness of his original crime, his extensive criminal and prison disciplinary history, and his participation in the informant's murder. The court separately addressed Mitchell's pro se arguments and noted that current law still permits the application of the murder cross-reference based on judge-made findings by a preponderance of the evidence.

On appeal, Mitchell (who proceeds pro se) argues that the district court abused its discretion when it declined to grant a larger sentence reduction. There is no dispute in this case about Mitchell's eligibility for relief under § 404(b), which is the "step one" question. *See Fowowe*, 1 F.4th at 527. Therefore, we view his arguments as reasons why, at the second step, the court should have exercised its discretion to reduce his sentence further. *Id.* We review the denial of a § 404(b) motion for abuse of discretion. *Id.* at 526.

Mitchell first argues that the district court abused its discretion in declining to consider the constitutionality of using judge-found facts about uncharged conduct to increase guidelines offense levels. He points to various judicial dissents and concurrences that question the practice of using uncharged or acquitted conduct to increase sentences as support. *See, e.g., Jones v. United States*, 574 U.S. 948, 949–50 (2014) (Scalia, J., dissenting from the denial of cert.); *United States v. Bell*, 808 F.3d 926, 927–28

(D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of the reh'g en banc). In Mitchell's view, these opinions demonstrate that the law in this area is changing. In his reply brief, he refines this argument, clarifying his contention that under *Concepcion v. United States*, 597 U.S. 481, 487 (2022), the district court was required to address the legal developments he raised in his motion. He submits that the court erred by failing to account for changes in the law when justifying the size of the reduction.

Mitchell's argument fails because he misconstrues current law and the purpose of a § 404(b) motion. True, in resolving motions under § 404(b) of the First Step Act, district courts must address post-sentencing changes in the law when parties raise them. *Concepcion*, 597 U.S. at 487. But there has been no change in law regarding the use of uncharged conduct to increase a defendant's offense level. (The law's treatment of acquitted conduct is not relevant to Mitchell's situation.) As long as it does not treat the Sentencing Guidelines as mandatory, a district court need only find facts supporting an offense-level increase by a preponderance of the evidence.[1] *See United States v. Booker*, 543 U.S. 220, 233 (2005); *United States v. Miedzianowski*, 60 F.4th 1051, 1057 (7th Cir. 2023). Mitchell urges us to revisit his argument that this principle violated the Constitution. But we rejected this argument in his direct appeal, and without "an intervening change in the law, or some other special circumstance," we will not revisit an issue in the case that we already decided. *See United States v. Robinson*, 29 F.4th 370, 374 (7th Cir. 2022). In any case, a motion under the First Step Act is not a platform for relitigating rejected challenges to the original sentence. *Miedzianowski*, 60 F.4th at 1057.

Mitchell next argues that the district court did not appropriately account for disparities between his sentence and those meted out to similarly situated defendants, but his arguments are unpersuasive. To start, it is not entirely clear who the similarly situated defendants are: He initially argues that his original sentence was unjustly higher than his co-defendants' sentences, but he later compares himself to defendants sentenced with the murder cross-reference who obtained reduced sentences. Either way, these arguments fail because the reduced sentence is within the guidelines range, and so it "necessarily complies" with the requirement to avoid unwarranted disparities under § 3553(a)(6). *See United States v. Clay*, 50 F.4th 608, 613 (7th Cir. 2022). Further, the Guidelines proscribe "unwarranted" disparities, *Miedzianowski*, 60 F.4th at 1058, and

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[1] Mitchell contends, erroneously, that the Sentencing Guidelines were still mandatory when he was sentenced. But the Guidelines became advisory after *United States v. Booker*, 543 U.S. 220, 245 (2005), several years before his sentencing, and the record does not reflect that the district court erroneously believed that they were mandatory.

Mitchell does not establish that any disparity here is unjustified. To the contrary, the court explained that Mitchell's offense required a 40-year sentence not only because of the related murder, but also his criminal and disciplinary history. And to the extent that Mitchell challenges disparities with his co-defendants dating back to his original sentencing, again this kind of argument is not proper in a § 404(b) motion. *Id.* at 1057.

Finally, Mitchell contends that the district court erroneously disregarded his mitigating arguments and considered only aggravating factors when selecting his reduced sentence, but the record does not support his argument. The court noted factors that favored Mitchell but found that the aggravating ones, like his participation in the informant's murder—an "extremely serious aggravating factor"—compelled a maximum sentence. The court's careful consideration of the sentencing factors demonstrates that it did not abuse its discretion. *See id.* at 1057 (citing *Clay*, 50 F.4th at 613–14). And while Mitchell invites us to consider his mitigating arguments anew, we do not reweigh the § 3553(a) factors on appeal. *United States v. Oregon*, 58 F.4th 298, 303 (7th Cir. 2023).

We end by addressing Mitchell's letter under Fed. R. App. P. 28(j) citing as supplement authority a decision granting compassionate release (not § 404(b) relief) to a defendant to whom Mitchell contends he is similarly situated based on the use of an uncharged murder to inflate the sentence. *See United States v. West*, No. 06-20185, 2022 WL 16743864 (E.D. Mich. Nov. 7, 2022). But in *West*, the defendant erroneously received a higher sentence based not on a guidelines adjustment, but on an element of the offense—that death resulted from the conspiracy—never proved beyond a reasonable doubt. Mitchell's situation is much different, but in any event, the Sixth Circuit reversed the district court's ruling, *United States v. West*, 70 F.4th 341, 348 (6th Cir. 2023), so the case provides no support for his arguments.

AFFIRMED

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 13, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

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Sarah Evans Barker,
Judge.

ORDER

On consideration of the petition for panel rehearing, the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for panel rehearing is **DENIED**.