FILED
United States Court of Appeals
Tenth Circuit

October 8, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ADAM HEMMELGARN,

Defendant - Appellant.

No. 20-4109

Appeal from the United States District Court
for the District of Utah
(D.C. No. 1:18-CR-00069-RJS-DBP-3)

Submitted on the briefs:*

Adam Hemmelgarn, pro se.

Andrea T. Martinez, Acting United States Attorney, and Jennifer P. Williams, Assistant United States Attorney, District of Utah, Salt Lake City, Utah, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **MORITZ**, Circuit Judges.

TYMKOVICH, Chief Judge.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

Based on the outbreak of COVID-19 at FCI Lompoc, Adam Hemmelgarn—a federal prisoner—moved for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).[1] The district court denied his motion, as well as his subsequent motion for reconsideration. We affirm. We conclude the district court did not abuse its discretion in deciding Hemmelgarn had not established extraordinary and compelling reasons in support of a sentence reduction because of his health conditions or the risk of exposure to COVID-19.

I. Background

Once a term of imprisonment has been imposed, courts are generally "forbidden" from modifying that term of imprisonment. *Freeman v. United States*, 564 U.S. 522, 526 (2011). This "rule of finality is subject to a few narrow exceptions[,]" *see id.*, one of which "is contained in [18 U.S.C.] § 3582(c)(1)," sometimes called the "compassionate release" statute. *United States v. Maumau*, 993 F.3d 821, 830 (10th Cir. 2021).

Before the enactment of the First Step Act, § 3582(c)(1)(A) "only authorized the Director of the [Bureau of Prisons] to move for a reduction in a defendant's sentence"—so, "a defendant could not file a motion to reduce his or her sentence but was instead wholly dependent upon the Director of the BOP to file a motion on the defendant's behalf." *Id.* But then the First Step Act modified § 3582(c)(1)(A) by permitting a defendant to move for a reduction of his or her sentence "with the district court after

[1] In 2019, Hemmelgarn pleaded guilty to Conspiracy to Distribute Controlled Substances in violation of 21 U.S.C. § 846. The District of Utah sentenced him to 128 months of imprisonment, followed by a 36-month term of supervised release.

either exhausting administrative rights to appeal the Director of the BOP's failure to file such a motion, or the passage of 30 days from the defendant's unanswered request to the warden for such relief." *Id*. A district court presented with such a motion "may reduce the term of imprisonment . . . after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent they are applicable, if it finds that . . . 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)(i).

Thus, under the current statutory framework, a prisoner may move for compassionate release "only if three requirements are met: (1) the district court finds that extraordinary and compelling reasons warrant such a reduction; (2) the district court finds that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and (3) the district court considers the factors set forth in § 3553(a), to the extent that they are applicable." *Maumau*, 993 F.3d at 831. A district court "may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do[es] not need to address the others." *United States v. McGee*, 992 F.3d 1035, 1043 (10th Cir. 2021) (internal quotations omitted); *see also United States v. Hald*, 8 F.4th 932, 942–43 (10th Cir. 2021) ("If the most convenient way for the district court to dispose of a motion for compassionate release is to reject for failure to satisfy one of the steps, we see no benefit in requiring it to make the useless gesture of determining whether one of the other steps is satisfied.").

II. Analysis

A. Exhaustion

We first address a threshold matter: exhaustion. Hemmelgarn has failed to provide proof that he exhausted his administrative rights as is required under § 3582(c)(1)(A). In his original motion for compassionate release before the district court, Hemmelgarn indicated that he previously filed a motion for compassionate release with the prison's warden. But the document he references is not among the materials he submitted to either the district court or this court. We gave Hemmelgarn the opportunity to supplement the record to provide proof of exhaustion. He failed to do so.

Section 3582(c)(1)(A) requires exhaustion before a court may consider a motion for compassionate release. *See* 18 U.S.C. 3582(c)(1)(A). Typically, this would be the end of the line for Hemmelgarn. *See Malouf v. Securities and Exchange Comm'n*, 933 F.3d 1248, 1256 (10th Cir. 2019) ("[C]ourts lack discretion to excuse the failure to exhaust administrative remedies" required by statute.).

But Hemmelgarn's failure to exhaust does not end our inquiry here. We have yet to decide whether § 3582(c)(1)(A)'s exhaustion requirements announce a jurisdictional or a mandatory claim-processing rule.[2] Jurisdictional rules go to the courts' authority to hear a case. *See Bowles v. Russell*, 551 U.S. 205, 213 (2007). By

[2] In several unpublished opinions, panels of this court have treated § 3582(c)(1)(A) as a mandatory claim-processing rule. *See, e.g.*, *United States v. Avalos*, 856 F. App'x 199, 202 n. 2 (10th Cir. 2021); *United States v. Watson*, 851 F. App'x 136, 137 n.1 (10th Cir. 2021).

contrast, mandatory claim-processing rules do not implicate the courts' adjudicatory authority, but rather "promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017).

The distinction between the two types of rules matters here. Though the government argued that Hemmelgarn failed to exhaust his administrative remedies below, it waived any such arguments on appeal. Such a waiver would not matter if the administrative exhaustion required by § 3582(c)(1)(A) was jurisdictional—jurisdiction cannot be waived or forfeited. *See Malouf*, 933 F.3d at 1258 n.10. But if the administrative exhaustion requirement of § 3582(c)(1)(A) is just a claim-processing rule, challenges based on the failure to exhaust "can be waived or forfeited." *Id.*

The Supreme Court has recently narrowed the scope of prescriptions regarding what it considers jurisdictional. The Court has explained that

> [i]f the Legislature clearly states that a prescription counts as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue; but when Congress does not rank a prescription as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Fort Bend Cnty., Tex. v. Davis, 139 S. Ct. 1843, 1850 (2019) (alterations incorporated; internal quotation marks omitted).

Nothing in § 3582(c)(1)(A)'s language sounds in jurisdictional terms. The provision simply states that a court may consider a prisoner's compassionate release motion "upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the

defendant's behalf or the lapse of 30 days from the receipt of such request by the warden of the defendant's facility[.]" 18 U.S.C. § 3582(c)(1)(A). Because the provision does not include any language indicating that the exhaustion requirement is jurisdictional in nature, we conclude § 3582(c)(1)(A)'s exhaustion requirement is a claim-processing rule. All the other circuits that have addressed this issue have reached the same conclusion. *See United States v. Saladino*, 7 F.4th 120, 121–22 (2d Cir. 2021); *United States v. Franco*, 973 F.3d 465, 467–68 (5th Cir. 2020); *United States v. Alam*, 960 F.3d 831, 833 (6th Cir. 2020); *United States v. Sanford*, 986 F.3d 779, 782 (7th Cir. 2021); *United States v. Houck*, 2 F.4th 1082, 1084 (8th Cir. 2021); *United States v. Keller*, 2 F.4th 1278, 1282 (9th Cir. 2021); *United States v. Harris*, 989 F.3d 908, 911 (11th Cir. 2021). And we have recently applied similar reasoning in determining that § 3582(c)(1)(A)'s 'extraordinary and compelling reasons' requirement is not jurisdictional. *See Hald*, 8 F.4th at 942 n.7 ("[W]e decline to read a jurisdictional element in § 3582(c)(1)(A)'s 'extraordinary and compelling reasons' requirement when the statute itself provides no indication . . . to that effect.").

Even though Hemmelgarn failed to provide proof that he exhausted his administrative remedies, the government did not argue exhaustion on appeal. This

argument is waived. We thus proceed to review the district court's denial of Hemmelgarn's motion for compassionate release on the merits.

B. Denial of Compassionate Release

The district court denied Hemmelgarn's motion for compassionate release because it concluded he had failed to demonstrate the existence of extraordinary and compelling reasons that would warrant a sentence reduction per 18 U.S.C. § 3582(c)(1)(A)(i).

We review a district court's order denying relief on a § 3582(c)(1)(A) motion for abuse of discretion. *See United States v. Williams*, 848 F. App'x 810, 812 (10th Cir. 2021) (unpublished) (collecting cases). We likewise "review a district court's decision to reconsider a prior ruling for abuse of discretion." *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." *United States v. Battle*, 706 F.3d 1313, 1317 (10th Cir. 2013).

The district court did no such thing here. To support its conclusion that Hemmelgarn had failed to demonstrate the existence of extraordinary and compelling reasons that would warrant a sentence reduction, the district court made the following findings of fact:

- Hemmelgarn "has not identified a medical condition that would place him at high risk of severe illness from COVID-19." R. at 196.
- "The evidence before the court shows [Hemmelgarn] is receiving treatment for his medical issues." *Id.*

- "[T]here are currently no confirmed active cases among inmates at FCI Lompoc," where Hemmelgarn is incarcerated. *Id.*

These findings are not clearly erroneous.

In his motion, Hemmelgarn represented that he had mild asthma and a benign cyst on his lung. He also explained that he contracted COVID-19 in May 2020 and now suffers from muscle aches, headaches, shortness of breath, and anxiety. He added that he suffers from post-traumatic stress disorder after witnessing the death of a fellow inmate from COVID-19 complications. The district court's finding that these medical conditions identified by Hemmelgarn do not place him at a risk of severe illness from COVID-19 is not clearly erroneous. The CDC has not identified any of these medical conditions as creating a higher risk that a person with them will get severely ill from COVID-19. *See People with Certain Medical Conditions*, COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited September 8, 2021).

The district court's finding that Hemmelgarn was receiving treatment for his medical issues is also not clearly erroneous—the government provided his extensive prison medical records to the district court confirming that finding.

And finally, the district court's finding that there were no confirmed cases of COVID-19 at the time of the ruling is not clearly erroneous. Hemmelgarn has offered no assertion or evidence that this was untrue in August 2020 when the district court entered its order.

The district court was well within its discretion to deny a sentence reduction based on these findings of fact, none of which is clearly erroneous. We accordingly affirm the district court's denial of Hemmelgarn's motion for compassionate release.

We also affirm the denial of Hemmelgarn's motion for reconsideration. Such motions may be granted based on "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." *Christy*, 739 F.3d at 539 (internal quotations omitted). Hemmelgarn argued that his counsel abandoned him and failed to bring evidence to the district court's attention that would have impacted its decision on Hemmelgarn's motion for compassionate release. But the district court ruled that even with such evidence, its decision to deny Hemmelgarn's motion would not have changed. Moreover, there is no constitutional right to counsel to aid in a defendant's request for compassionate release. *See Coronado v. Ward*, 517 F.3d 1212, 1218 (10th Cir. 2008) ("There is no constitutional right to counsel beyond the direct appeal of a criminal conviction[.]"); *see also United States v. Campos*, 630 F. App'x 813, 816 (10th Cir. 2015) (unpublished) ("No right to counsel extends to a § 3582(c)(2) motion.").

Hemmelgarn further notes that the district court "stated that Mr. Hemmelgarn has already tested positive for COVID-19, as grounds for denial. The CDC has stated you can contract COVID-19 more than once, with more severity each time." Aplt. Br. at 2. Construing Hemmelgarn's argument liberally, he appears to assert that this finding was clearly erroneous. But we disagree, as Hemmelgarn takes it out of context. The district court stated:

> Defendant's Motion does not present any new evidence suggesting Defendant suffers from a medical condition that would place him at high risk of severe illness. Indeed, Defendant has already contracted and recovered from COVID-19. Thus, the court concludes once again that no extraordinary or compelling reason exists that would warrant a reduction of Defendant's sentence under 18 U.S.C. § 3582(c)(1)(A)(i).

R. at 210. But the district court's statement that Hemmelgarn recovered from COVID-19 despite his medical conditions is simply consistent with the view that those conditions do not place him at high risk of severe illness from COVID-19. Thus, this finding of fact is not clearly erroneous. Finding no abuse of discretion, *see Campos*, 630 F. App'x at 816, we affirm the district court's denial of Hemmelgarn's motion for reconsideration.[3]

Finally, we deny Hemmelgarn's motion to appoint counsel as moot.

[3] Hemmelgarn also complains on appeal that his motion for compassionate release and for reconsideration were improperly denied without a hearing. But § 3582(c)(1)(A) includes no such requirement. *See United States v. Vangh*, 990 F.3d 1138, 1140 (8th Cir. 2021) (holding 18 U.S.C. § 3582(c)(1)(A) does not require a hearing). And we have not recognized a requirement for a hearing on a motion for reconsideration.