FILED
United States Court of Appeals
Tenth Circuit

October 19, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN MAURICE WILSON,

Defendant - Appellant.

No. 20-1324
(D.C. No. 1:18-CR-00562-CMA-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

Kevin Wilson appeals the district court's order denying his motion for compassionate release. For the reasons explained below, we affirm.

Background

In 2019, Wilson pleaded guilty to one count of being a felon in possession of a firearm. His sentencing range under the United States Sentencing Guidelines was 57 to 71 months, but the district court varied downward and imposed a 46-month sentence and three years of supervised release.

In July 2020, Wilson (acting through counsel) moved for a reduced sentence

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

under the compassionate-release statute, 18 U.S.C. § 3582(c)(1)(A)(i). In his motion, Wilson noted that he had exhausted his administrative remedies by first seeking compassionate release from the prison warden, who denied that request. *See* § 3582(c)(1)(A). As extraordinary and compelling reasons justifying compassionate release, he cited his medical diagnoses of type 2 diabetes mellitus and hypertension, which placed him at a higher risk of severe illness and death from COVID-19, and the status of the COVID-19 outbreak in his federal prison. He further argued that the combination of his medical conditions and the pandemic shifted the balance of the 18 U.S.C. § 3553(a) factors to favor release.

In response, the government conceded that Wilson exhausted his administrative remedies and that Wilson's medical diagnoses in combination with the COVID-19 pandemic constituted extraordinary and compelling reasons. But it argued that the district court should deny relief because the § 3553(a) factors did not warrant early release and because Wilson posed a danger to the community.

The district court denied relief in a short, two-page order. It did not expressly discuss exhaustion or opine on the existence of extraordinary and compelling reasons, but it noted that Wilson had served less than one-third of his sentence; concluded that he was "a danger to the community," given his criminal history and the circumstances of the underlying offense; and found that "[t]he [§] 3553(a) factors weigh[ed] against early release." R. vol. 2, 13–14. Wilson appeals.

Analysis

We review the denial of a compassionate-release motion for abuse of

discretion. *United States v. Mannie*, 971 F.3d 1145, 1155 (10th Cir. 2020). "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). To the extent that the parties' arguments require interpretation of § 3582(c)(1)(A) and the district court's scope of authority under that statute, our review is de novo. *United States v. McGee*, 992 F.3d 1035, 1041 (10th Cir. 2021).

Section 3582(c)(1)(A) provides that a district court may grant a motion for a reduced sentence if, "after considering the factors set forth in [§] 3553(a)[,] . . . 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."[1] We have distilled these requirements into a three-part test, explaining that the district court may grant a compassionate-release motion only if it (1) finds extraordinary and compelling reasons warranting early release, (2) concludes that early release is consistent with applicable policy statements issued by the Sentencing Commission, and (3) determines that the § 3553(a) factors favor release. *McGee*, 992 F.3d at 1042–43. "[D]istrict courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others." *Id.* at 1043 (quoting *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021)); *see also United States v. Hald*, 8 F.4th 932,

[1] Previously, only the Director of the Bureau of Prisons could file a motion for compassionate release on behalf of a prisoner. *See McGee*, 992 F.3d at 1041–42. But under recent statutory amendments, a defendant may now file such a motion on his or her own behalf (after exhausting administrative remedies). *See id.*; § 3582(c)(1)(A).

942–43 (10th Cir. 2021) (agreeing with *McGee* that district court deciding compassionate-release motion need not proceed in any particular order).

Wilson's first argument on appeal relates to the "applicable policy statements issued by the Sentencing Commission" in step two of the compassionate-release analysis. § 3582(c)(1)(A). "The Sentencing Commission's most recent policy statement regarding sentencing reductions under § 3582(c)(1) was promulgated on November 1, 2018" and appears at U.S.S.G. § 1B1.13. *McGee*, 992 F.3d at 1048. This policy statement largely tracks the requirements of the statute, but it expands on the meaning of the phrase "extraordinary and compelling reasons" and adds an additional requirement: that the district court find the defendant is not a danger to the community. *See* § 1B1.13(2) & nn.1–2, 4. But this policy statement predates the statutory amendment allowing defendants to file compassionate-release motions. *See McGee*, 992 F.3d at 1048. As such, it constrains the district court's discretion—both by its own terms and by our precedent interpreting those terms—only for motions filed by the Director of the Bureau of Prisons. *See id.* at 1050; § 1B1.13 & n.4. For defendant-filed motions for compassionate release, like Wilson's in this case, § 1B1.13 does not limit the district court's discretion. *McGee*, 992 F.3d at 1048, 1050.

Accordingly, Wilson asserts that the district court erred by considering itself bound by the policy statement to deny relief on the basis that Wilson was a danger to the community. *See* § 1B1.13(2). Wilson agrees with the government that, because he

forfeited this argument by failing to raise it below, our review is for plain error.[2] *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) ("When a party fails to raise an argument below, we typically treat the argument as forfeited. And when an appellant raises a forfeited argument on appeal, we will reverse only if the appellant can satisfy our rigorous plain-error test." (citation omitted)); *United States v. Zander*, 794 F.3d 1220, 1233 n.5 (10th Cir. 2015) (holding that defendant adequately raised plain error by arguing for it in reply brief). "To obtain relief under the plain-error standard," Wilson must show that the error (1) occurred, (2) is plain, (3) affected his substantial rights, and (4) "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Marquez*, 898 F.3d 1036, 1045 (10th Cir. 2018) (alteration in original) (quoting *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1137 (10th Cir. 2017) (en banc)).

On the first two prongs of this test, the government agrees (in a letter of supplemental authority submitted under Federal Rule of Appellate Procedure 28(j)) that plain error occurred "*if* the district court thought itself constrained by § 1B1.13."

[2] The government alternatively argues that we should decline to consider this issue because Wilson invited error by "affirmatively ask[ing] the [district] court to consider" the policy statement. Aplee. Br. 24–25; *see also United States v. Robinson*, 993 F.3d 839, 850 (10th Cir.) (noting that we do not review invited error, which occurs when "district court[] adopt[s] a defendant's own erroneous suggestion"), *cert. denied*, 2021 WL 4508676 (Oct. 4, 2021). But although Wilson cited the policy statement in his compassionate-release motion, he offered it as only one option for how the district court could decide whether extraordinary and compelling reasons existed. Indeed, he specifically argued that the district court was "not limited to the examples of extraordinary and compelling reasons listed in . . . § 1B1.13 n.1(A)–(C)." R. vol. 3, 67. And Wilson said nothing at all about the dangerousness factor in § 1B1.13(2). Thus, we reject the government's invited-error argument.

Aplee. Rule 28(j) Letter, Mar. 31, 2021 (emphasis added); *see also United States v. Koch*, 978 F.3d 719, 726 (10th Cir. 2020) ("An error is plain if it is 'clear or obvious at the time of the appeal.'" (quoting *United States v. Salas*, 889 F.3d 681, 686–87 (10th Cir. 2018))). And the district court denied relief, in part, because "Wilson's criminal history and the circumstances of the instant offense suggest that he is a danger to the community." R. vol. 2, 13. Notably, the "danger to the community" factor in the compassionate-release context comes directly from the policy statement, not the statute. *Compare* § 3582(c)(1)(A)(i), *with* § 1B1.13(2); *see also United States v. Carralero-Escobar*, No. 20-2093, 2021 WL 2623160, at *2 (10th Cir. June 25, 2021) (unpublished) (noting that dangerousness determination "tracks a provision in the policy statement allowing relief only if the court finds that the 'defendant is not a danger to the safety of any other person or to the community'" (quoting § 1B1.13(2))).[3] But nothing in the record clarifies whether the district court erroneously considered itself bound by the policy statement to deny relief based on dangerousness or if it merely allowed the dangerousness factor to guide its decision. *Compare McGee*, 992 F.3d at 1048 (finding "that the district court erred in considering itself bound by th[e] policy statement"), *with Hald*, 8 F.4th at 938 n.4 (noting that "it would hardly be an abuse of discretion for a district court to look to the present policy statement for guidance"). Nevertheless, we assume that the district court considered itself bound by the policy statement to deny relief based on its

[3] Although unpublished, we find *Carralero-Escobar* persuasive. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

assessment of Wilson's dangerousness and thus plainly erred under our holding in *McGee*.[4] *See Carralero-Escobar*, 2021 WL 2623160, at *3 (finding first two prongs of plain error satisfied when district court denied relief based on dangerousness even though it "did not expressly cite the policy statement").

At the third prong of the plain-error analysis, Wilson must show "a reasonable probability that the error affected the outcome of the proceedings." *Koch*, 978 F.3d at 729 (quoting *United States v. Burns*, 775 F.3d 1221, 1224 (10th Cir. 2014)). He argues he satisfies this prong simply because the district court applied the wrong legal standard. But in so doing, Wilson ignores that the district court's dangerousness finding was not the exclusive basis for its decision; it also denied relief because the § 3553(a) factors did not favor early release. As such, the government is correct that Wilson cannot show the district court's error—considering itself bound by the provisions in § 1B1.13(2)—affected his substantial rights. In the absence of that error, the district court's alternative § 3553(a) ruling still stands. *See Carralero-Escobar*, 2021 WL 2623160, at *3 (holding that defendant's policy-statement argument failed at third prong because "district court expressly found that the § 3553(a) factors did not support defendant's request, a finding that warranted denying the motion independent of any policy statement"); *cf. United States v. Sherwood*, 986 F.3d 951, 953 (6th Cir. 2021) ("Because [defendant] was denied relief

[4] Because we assume that Wilson establishes this legal error, we need not and do not consider his additional argument that the district court's dangerousness finding is unsupported by the record.

exclusively due to his failure to satisfy § 1B1.13(2)'s requirement that a defendant not be a danger to the community, we reverse and remand this case to the district court for application of the remaining § 3582(c)(1)(A) factors." (emphasis added)). Accordingly, Wilson's policy-statement argument fails at the third prong of plain error and does not warrant reversal.

Next, Wilson argues that the district "court's failure to make any finding on the existence of extraordinary and compelling reasons under § 3582(c)(1)(A)(i) appears to have compromised its analysis under § 3553(a)." Aplt. Br. 26. In so arguing, Wilson acknowledges *Hald*'s conclusion that the district court need not find extraordinary and compelling reasons as a threshold matter before moving to the remaining steps of the compassionate-release analysis. *See* 8 F.4th at 942–43. But he relies on a statement in *Hald* in which "[w]e emphasize[d] that we [we]re not saying that a court can deny compassionate-release relief on the ground that release is not appropriate under § 3553(a) if the court has not considered the facts allegedly establishing extraordinary and compelling reasons for release." *Id.* at 947.

To the extent that Wilson interprets this language in *Hald* as imposing a requirement that the district court expressly consider "the facts allegedly establishing extraordinary and compelling reasons for release" in its § 3553(a) analysis, we reject Wilson's argument. *Id.* Such an interpretation contradicts the basic sentencing premise that a district court need not expressly set forth a detailed § 3553(a) analysis. *See id.* at 948. Indeed, elsewhere in *Hald*, we noted that "at initial sentencing we ordinarily do not require 'specific discussion of [§] 3553(a) factors'" for within-

Guidelines sentences and then explained that "nothing more detailed is required to justify imposing or maintaining under either paragraph of § 3582(c) a sentence within the recommended range of the applicable [G]uidelines."[5] *Id.* (quoting *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1202 (10th Cir. 2007)).

Of course, as *Hald* acknowledged, such "facts are relevant to the § 3553(a) analysis." *Id.* at 947; *see also id.* at 943 ("[V]arious facts that would support a finding of [extraordinary and compelling] reasons are relevant to the § 3553(a) analysis. But to the extent that they influence that analysis, it is irrelevant whether those facts meet the test of 'extraordinary and compelling reasons.'"). Viewed in that light, Wilson's argument shifts into a contention that the district court abused its discretion in weighing other § 3553(a) factors more heavily than the COVID-19 pandemic and Wilson's medical conditions. But we do not reweigh the district court's balancing of the § 3553(a) factors; doing so "is beyond the ambit of our review." *United States v. Lawless*, 979 F.3d 849, 856 (10th Cir. 2020). Nor do we have a "definite [or] firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice" in weighing certain factors more heavily than Wilson's medical conditions and the COVID-19 pandemic. *Ruiz-Terrazas*, 477 F.3d at 1201 (quoting *United States v. Weidner*, 437 F.3d 1023, 1042 (10th Cir. 2006)). Specifically, we find no error in the district court's conclusion that granting relief would amount to "a drastic reduction in [Wilson's] sentence [that] would neither

[5] Wilson's original sentence was outside his Guidelines range, but the district court varied downward, in Wilson's favor.

reflect the seriousness of the instant offense nor promote respect for the law." R. vol. 2, 14; *see also* § 3553(a)(2)(A). And the district court appropriately emphasized Wilson's criminal history and the circumstances of his current offense, which involved possession of two loaded guns and a distribution quantity of drugs. *See* § 3553(a)(1). We thus find no abuse of discretion in the district court's analysis.

Finally, and relatedly, Wilson argues that the district court abused its discretion by denying relief in an order that is too brief to allow for meaningful appellate review. Assuming that "district courts have equivalent duties when initially sentencing a defendant and when later modifying the sentence," a district court "'must adequately explain the chosen sentence to allow for meaningful appellate review.'" *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018) (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)). But with "respect to the brevity or length of the reasons the judge gives . . . , the 'law leaves much' to 'the judge's own professional judgment.'" *Id.* at 1966 (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007)). Stated differently, as Wilson notes, "just how much of an explanation" is required "depends . . . upon the circumstances of the particular case." *Id.* at 1965. Relevant circumstances include the simplicity (or complexity) of the case, whether the sentence-reduction judge is the same judge who imposed the original sentence, and the language of the order. *See id.* at 1964, 1967–68.

Here, the district court's brief explanation was adequate. Wilson's compassionate-release motion presented a fairly simple question of whether to grant early release based on COVID-19. Indeed, Wilson's motion focused primarily on the

medical conditions that render him particularly vulnerable to COVID-19; even his § 3553(a) argument contended that the combination of his medical conditions and the pandemic shifted the balance of those factors to favor release. *See United States v. Navarro*, 986 F.3d 668, 671–72 (6th Cir. 2021) (finding COVID-19 compassionate-release motion to be "conceptually simple" where motion "focused exclusively on" combination of defendant's medical conditions and COVID-19).

Moreover, the district-court judge who denied Wilson's motion is the same judge who originally sentenced him. From this context, we can infer the judge's familiarity with the record and relevant facts. *See Chavez-Meza*, 138 S. Ct. at 1967; *United States v. Moreno*, 793 F. App'x 705, 707 (10th Cir. 2019) (unpublished) ("[T]he judge who ordered [defendant]'s original sentence also ordered his sentence modification, so he was familiar with the record and defendant.").[6] We can also infer that "that the district court's view of the § 3553 factors had not changed by the time of [Wilson]'s motion for compassionate release." *Navarro*, 986 F.3d at 672.

Additionally, the district court expressly stated that it conducted a "complete review of the [m]otion on the merits" and considered "the applicable factors provided in [§ 3553(a)]." R. vol. 2, 13; *see also Chavez-Meza*, 138 S. Ct. at 1967 (affirming district court's brief sentence-modification order in which "judge certified (on a form) that he had 'considered' petitioner's 'motion' and had 'tak[en] into account' the relevant Guidelines policy statements and the § 3553(a) factors" (alteration in

[6] Although unpublished, we find *Moreno* persuasive. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

original) (quoting App. 106–07)). It further specifically mentioned two § 3553(a) factors that "weigh[ed] against early release": "the seriousness of the instant offense" and "promot[ing] respect for the law." R. vol. 2, 14; *see also Moreno*, 793 F. App'x at 707 (affirming sentence-modification order as sufficient in part because district court "stated in its resentencing order that it had considered the § 3553(a) factors" and "additionally explained two specific considerations for the . . . sentence"). These statements are sufficient explanation in this context. *See Chavez-Meza*, 138 S. Ct. at 1967–68 ("[G]iven the simplicity of *this* case, the judge's awareness of the arguments, his consideration of the relevant sentencing factors, and the intuitive reason why he picked [this] sentence . . . , the judge's explanation (minimal as it was) fell within the scope of the lawful professional judgment that the law confers upon the sentencing judge."); *Navarro*, 986 F.3d at 672; *Moreno*, 793 F. App'x at 707. Under these circumstances, we find no abuse of discretion in the brevity of the district court's order.

Conclusion

Even assuming the district court plainly erred by considering itself bound to deny relief based on the dangerousness factor in the policy statement at § 1B1.13, Wilson cannot show a reasonable probability of a different result because the district court also denied relief based on its independent § 3553(a) analysis. Additionally, the district court did not err by failing to expressly mention the facts allegedly establishing extraordinary and compelling reasons in its § 3553(a) analysis. Nor did the district court otherwise abuse its discretion in conducting its § 3553(a) analysis,

and its order, although brief, was sufficient to allow for meaningful appellate review.

Entered for the Court

Nancy L. Moritz
Circuit Judge