FILED
United States Court of Appeals
Tenth Circuit

July 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDRE IVORY,

Defendant - Appellant.

No. 22-3094
(D.C. No. 2:04-CR-20044-KHV-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **KELLY**, and **ROSSMAN**, Circuit Judges.

Andre Ivory, proceeding pro se,[1] appeals the sentence imposed after the district court granted his motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] We construe pro se filings liberally. *Yang* v. *Archuleta*, 525 F.3d 925, 925 n.1 (10th Cir. 2008).

I. BACKGROUND

A. Original Proceedings

In 2005, Mr. Ivory pleaded guilty to six counts of distributing and possessing with intent to distribute cocaine base in violation of 21 U.S.C. § 841. A jury also convicted Mr. Ivory of conspiracy to kill a federal witness in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1512(k); attempted murder of a witness in violation of 18 U.S.C. § 1512(a)(1)(A); and discharge of a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1). The district court sentenced him to life in prison.[2] On direct appeal, this court affirmed Mr. Ivory's conviction and sentence. *United States* v. *Ivory*, 532 F.3d 1095 (10th Cir. 2008). On collateral review, the district court denied Mr. Ivory's motion to vacate his sentence under 28 U.S.C. § 2255, and this court dismissed the appeal of that denial as untimely.

B. Post-Conviction Relief

In 2019, we authorized Mr. Ivory to file a second or successive § 2255 motion to challenge his § 924(c) conviction after the Supreme Court decided

[2] Mr. Ivory was sentenced to 360 months for two of the drug counts, life in prison for three of the drug counts, and 240 months in prison for conspiracy to kill a witness and attempted murder of a witness, all to be served concurrently. He was also sentenced to 120 months for discharge of a firearm to be served consecutively to the other counts.

United States v. *Davis*, 139 S. Ct. 2319 (2019). In March 2020, Mr. Ivory filed a successive pro se motion under § 2255 to vacate his conviction and sentence on the § 924(c) offense. The government conceded Mr. Ivory's conspiracy to kill a witness predicate offense was no longer a crime of violence after *Davis*. But the government argued Mr. Ivory's attempted murder of a witness predicate offense still qualified as a crime of violence and thus supported Mr. Ivory's § 924(c) conviction. Before the district court ruled on Mr. Ivory's § 2255 motion, he moved to reduce his sentence under § 404(b) of the First Step Act of 2018. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222.

Several months later, the district court denied in part and dismissed in part Mr. Ivory's § 2255 motion.[3] The court granted his First Step Act motion. According to the district court, "the First Step Act eliminated the

[3] The district court rejected Mr. Ivory's claims that his guilty plea was not knowing and voluntary and that his counsel was ineffective at sentencing and on appeal. The court determined these two claims were "beyond the scope of the Tenth Circuit authorization" of Mr. Ivory's successive § 2255 motion. As to Mr. Ivory's claim that his conviction and sentence should be vacated under *Davis*, the district court concluded "the attempted killing of a witness [] qualifies as a crime of violence." ROA vol. I at 171. As a result, the court denied the remainder of Mr. Ivory's § 2255 motion. Mr. Ivory, proceeding pro se, appealed the district court's dismissal of his *Davis* claim, but this court denied Mr. Ivory a certificate of appealability and dismissed the case. *See United States* v. *Ivory*, 861 F. App'x 233 (10th Cir. 2021).

statutory minimum . . . and lowered the statutory maximum from life to 30 years" for Mr. Ivory's convictions for distribution of "more than five grams of cocaine base." ROA vol. I at 175. Before ruling on the particulars of Mr. Ivory's modified sentence, the district court appointed counsel and ordered briefing on the appropriate sentence.[4]

C. Compassionate Release Motion

On December 1, 2021, through his appointed counsel, Mr. Ivory moved for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). Mr. Ivory contended his prior juvenile drug conviction would no longer trigger a sentence enhancement under 21 U.S.C. § 851 because "§ 401 of the First Step Act narrowed the category of prior offenses that now qualify as § 851 predicates." ROA vol. II at 39. Elimination of the § 851 enhancement, he explained, would reduce the statutory maximum sentence for his drug convictions from 30 years to 20 years. According to Mr. Ivory, "the outsized effect of the § 851 enhancement, and its inapplicability under current law," together with his time served and his rehabilitation efforts, constituted

[4] Shortly after granting Mr. Ivory's First Step Act motion, the district court stayed the case pending *United States* v. *McKinney*, 859 F. App'x 256 (10th Cir. 2021) In *McKinney*, we reversed the district court's ruling that the defendant was "neither eligible for nor entitled to First Step Act relief" because erroneously "the district court conditioned his eligibility for relief on a reduction in his Guidelines range" and it was not clear what factors the court analyzed to determine "'a reduction was not warranted.'" 859 F. App'x at 257, 259. The stay was lifted on August 20, 2021.

"extraordinary and compelling reasons" for a sentence reduction to "a total term of 30 years." *See id.* at 43-45. Mr. Ivory did not address the § 3553(a) factors in his compassionate release motion.

The government opposed Mr. Ivory's request for compassionate release and asked the court to impose a sentence of at least 480 months in prison. The government primarily argued a sentence reduction was not supported by the § 3553(a) factors because Mr. Ivory's "criminal history and excessively violent nature that led to this case suggests he poses a direct danger to society upon release." *Id.* at 65. A sentence reduction to 30 years, according to the government, ran "counter relative to the nature and seriousness of [Mr. Ivory's] offense and the need for his sentence to continue to provide just punishment and otherwise promote respect for the law." *Id.*

On February 3, 2022, the district court granted Mr. Ivory's compassionate release motion. The court agreed "[Mr. Ivory's] rehabilitation, the fact that his prior juvenile offender adjudication does not qualify as a conviction for a drug felony offense, [and] the changes in the statutory ranges" on the drug counts "constitute extraordinary and compelling reasons for a reduced sentence." *Id.* at 76. In assessing the § 3553(a) factors, the district court explained Mr. Ivory's "criminal history and offense conduct are troubling" but also acknowledged Mr. Ivory "appears to have made significant progress toward rehabilitation." *Id.* at

77. On balance, the court explained it "gives less weight to [Mr. Ivory's] criminal history than his undisputed and extended rehabilitative efforts which suggest that he no longer poses a direct danger to society upon release." *Id.*

The court reduced Mr. Ivory's sentence of life imprisonment to a term of 360-months in prison. The court also imposed—*sua sponte*—an additional "special term of supervised release of 60 months to start upon release." *Id.* at 78. The court explained "a special term of supervised release of 60 months on home confinement will reduce the possibility that defendant will pose a danger upon release." *Id.* at 77. The court did not alter Mr. Ivory's originally imposed 8-year standard term of supervised release set to begin "[a]fter the special term of supervised release expires." *Id.* at 79.

D. Current Appeal

Three months after the court ruled, Mr. Ivory filed a pro se motion in the district court styled "Motion for Clarification/Notice of Appeal." Mr. Ivory sought "to gain an understanding of when exactly the 'special term' of 'home confinement' begins." *Id.* at 84. According to Mr. Ivory, ordering him to a term of home confinement after his projected release date would "violate statutory maximums of [his] sentence and parole." *Id.* at 86.

The district court declined to consider the merits of the pro se motion because Mr. Ivory was represented by counsel. The district court re-

docketed the motion as a notice of appeal. In this court, Mr. Ivory then filed a pro se "Motion for Request for Modification to Sentence/Clarification," which he later clarified would serve as his opening brief. The government chose not to submit a response brief.

We appointed the Federal Public Defender (FPD) to represent Mr. Ivory in this appeal and to file an optional supplemental brief. On September 19, 2022, the FPD notified this court Mr. Ivory "wishe[d] to stand on the pro se brief he previously filed" on June 23, 2022, and "requested that the FPD not file any additional brief." FPD Notice at 2.

II. DISCUSSION

Construing his filings liberally, the crux of Mr. Ivory's claim appears to challenge the district court's authority under § 3582(c)(1)(A)(i) to impose a "special term of supervised release of 60 months to start upon release," with the condition of home confinement. *See* ROA vol. II at 78. Mr. Ivory seems to contend the new 60-month special term of supervised release to be served on home confinement, in addition to the reimposed 8-year standard term of supervised release, is unlawful because it "violate[s] statutory maximums of [his] sentence and parole." *Id.* at 86. We start by assessing the timeliness of Mr. Ivory's appeal, and then, turning to the merits, we affirm.

A. We exercise our discretion to consider the merits of Mr. Ivory's appeal, even though his notice of appeal was untimely.

As relevant to this appeal, a criminal defendant must file a notice of appeal in the district court within 14 days after the entry of the judgment or order being appealed. Fed. R. App. P. 4(b)(1)(A). The timely filing of a notice of appeal in a criminal case is not a jurisdictional bar but an "inflexible claim-processing rule." *United States* v. *Mitchell*, 518 F.3d 740, 744 (10th Cir. 2008) ("[C]ourt-issued federal procedural rules not derived from statutes are not jurisdictional, but rather inflexible claim-processing rules."); *see also United States* v. *Randall*, 666 F.3d 1238, 1241 (10th Cir. 2011) (explaining that "a criminal defendant's failure to file a timely notice of appeal does not deprive us of jurisdiction.") (citation omitted). Rule 4(b)(1)(A)'s timeliness requirement "may be forfeited if not properly raised by the government." *United States* v. *Garduno*, 506 F.3d 1287, 1291 (10th Cir. 2007). A court may raise timeliness *sua sponte*, *United States* v. *Lantis*, 17 F.4th 35, 38 n.3 (10th Cir. 2021), but need not do so "when judicial resources and administration are not implicated and the delay has not been inordinate." *Mitchell*, 518 F.3d at 750.

On February 3, 2022, the district court entered its order granting Mr. Ivory's compassionate release motion. About three months later, on May 9,

Mr. Ivory filed in the district court his "Motion for Clarification/Notice of Appeal." The district court instructed the appeal to be docketed.

There is no question Mr. Ivory's notice of appeal was untimely under Fed. R. App. P. 4(b)(1)(A) because he filed it over 14 days after the district court entered its final order on his compassionate release motion. And we require all litigants, including those proceeding pro se, to comply with "the fundamental requirements of the Federal Rules of Civil and Appellate Procedure." *Ogden* v. *San Juan Cnty.*, 32 F.3d 452, 455 (10th Cir. 1994); *see also Requena* v. *Roberts*, 893 F.3d 1195, 1205 (10th Cir. 2018) (same). On the facts of this case, though, we decline to dismiss Mr. Ivory's pro se appeal on timeliness grounds.

First, the government has forfeited the issue. The government did not object when the district court docketed the late notice. Nor did the government raise a timeliness objection on appeal; indeed, the government declined to file any response. Because "[o]urs is an adversarial system of justice" there is a general presumption "to hold the parties responsible for raising their own defenses" including timeliness. *Mitchell*, 518 F.3d at 749. Second, we conclude the adjudication of this case does not require considerable judicial resources and administration, and under the circumstances, a three-month delay is not inordinate. We thus proceed to the merits.

B. The district court did not abuse its discretion in imposing a special term of supervised release when granting Mr. Ivory's compassionate release motion under § 3582(c)(1)(A).

Section 3582(c)(1)(A), as amended in 2018 by the First Step Act, allows defendants to move for compassionate release in the district court after exhausting administrative remedies in the Bureau of Prisons. *See United States* v. *Maumau*, 993 F.3d 821, 830 (10th Cir. 2021). The district court may grant a sentence reduction based on a compassionate release motion if it (1) "finds that extraordinary and compelling reasons warrant such a reduction"; (2) "finds that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission"; and (3) "considers the factors set forth in § 3553(a), to the extent that they are applicable." *Id.* at 831; *see also* § 3582(c)(1)(A)(i). In granting a compassionate release motion, a court may reduce a defendant's prison term and "may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment[], after considering the factors set forth in section 3553(a) to the extent that they are applicable." § 3582(c)(1)(A).

We review both a district court's decision on a compassionate release motion and its decision to impose special conditions of supervised release for an abuse of discretion. *United States* v. *Hemmelgarn*, 15 F.4th 1027, 1031 (10th Cir. 2021); *United States* v. *Begay*, 631 F.3d 1168, 1170 (10th

Cir. 2011). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact," *Hemmelgarn*, 15 F.4th at 1031 (citation omitted), or "when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable," *United States* v. *Lewis*, 594 F.3d 1270, 1277 (10th Cir. 2010) (citation omitted).

Here, the district court granted Mr. Ivory's motion under § 3582(c)(1)(A), reducing his sentence from life to 360 months in prison. The court also imposed a 60-month special term of supervised release to be served on home confinement, in addition to the 8-year standard term of supervised release imposed at his original sentencing.

Mr. Ivory claims, "the district court erred when it added an additional 'special term' of 60 months home confinement, because the court lacked jurisdiction." Aplt. Br. at 5. We discern no error. As discussed, the compassionate release statute allows courts to impose supervised release "with or without conditions" when a defendant receives a reduced sentence. § 3582(c)(1)(A). As long as the supervised release term "does not exceed the unserved portion of the original term of imprisonment" and the court considers the § 3553(a) factors, the court has the authority to impose it. *Id.* Home confinement is a permissible condition of supervised release if it is an alternative to incarceration. 18 U.S.C. § 3583(e)(4) ("The court may . . .

order the defendant to remain at his place of residence during nonworking hours . . . as an alternative to incarceration."). The advisory Sentencing Guidelines also state "[h]ome detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment." U.S.S.G. § 5F1.2.

Here, the 60-month special term of supervised release does not exceed Mr. Ivory's originally imposed life term of imprisonment and the court considered the § 3553(a) factors. Thus, we reject Mr. Ivory's argument that the district court lacked the power to impose a 60-month special term of supervised release to be served on home confinement.

Mr. Ivory also contends "it was a violation of his rights and the statutory maximum to have him serve 13 years of supervised release when the statutory maximum is 8 years." Aplt. Br. at 5. We disagree. Recall, one of Mr. Ivory's convictions was for violating 21 U.S.C. § 841(a)(1). Under § 841(b)(1)(B), the sentencing court was required to "include a term of supervised release of at least 8 years in addition to such term of imprisonment." 21 U.S.C. § 841(b)(1)(B) ("[A]ny sentence imposed under this subparagraph *shall*, . . . if there was such a prior conviction, include a

term of supervised release of at least 8 years in addition to such term of imprisonment.") (emphasis added).[5]

We have held "under the plain language of § 841(b)(1)(B) that the maximum term of supervised release is life." *United States* v. *Handley*, 678 F.3d 1185, 1189 (10th Cir. 2012). "This is because the statute does not expressly limit the maximum allowable term of supervised release a court may impose." *Id.* Moreover, under 18 U.S.C. § 3583(e)(2), a court may "extend a term of supervised release if less than the maximum authorized term was previously imposed" so long as it considers the factors in 18 U.S.C. § 3553(a). Here, because the maximum authorized supervised release term under § 841(b)(1)(B) is life, *Handley*, 678 F.3d at 1189, Mr. Ivory's 13-year term was less than the statutory maximum.

[5] Before Mr. Ivory entered a guilty plea on the drug charges, the government filed an Enhancement Information document under 21 U.S.C. § 851 to show Mr. Ivory had a prior drug felony conviction from juvenile court. In deciding Mr. Ivory's compassionate release motion, the district court recognized this prior "juvenile offender adjudication did not satisfy the definition of a 'prior conviction for a felony drug offense.'" ROA vol. II at 73 (quoting 18 U.S.C. § 841(b)(1)(C)). This, in turn, contributed in part to the court's finding of extraordinary and compelling reasons for a sentence reduction. The court explained had it "sustained an objection to the Section 851 enhancement, defendant would face no statutory minimum and a maximum of 20 years on each of counts 4 through 7" and "on counts 2 and 3, his statutory maximum would be reduced from 30 years to 20 years." *Id.* at 74; *see also* 21 U.S.C. § 841(b)(1). While the district court relied on this fact to reduce Mr. Ivory's custodial sentence, the court declined to also reduce his originally imposed supervised release term.

C. We have no authority to modify Mr. Ivory's sentence.

Mr. Ivory asks us to "modify his sentence to time served so that he may begin serving the 60 months of home confinement that was ordered by the District Court." Aplt. Br. at 11. In the alternative "[he] ask[s] the Court to remove the 60 months home confinement altogether." *Id.* Mr. Ivory argues "the fact that Covid-19 and its variants continue to spread throughout the BOP" presents "[m]ore extraordinary and compelling reason to modify" his sentence. *Id.* at 7. He also points out that "the counsel appointed to represent [him] made no mention of [his] health issues, nor that of the threat of Covid-19 to [his] health in his motion for compassionate release." *Id.* at 6.

We are sympathetic to Mr. Ivory, but the court of appeals is not the proper forum to make first-time arguments for compassionate release. *See United States* v. *Raia*, 954 F.3d 594, 596 (3d Cir. 2020) ("We cannot decide [the defendant's] compassionate-release motion in the first instance. Section 3582's text requires those motions to be addressed to the sentencing court."). Under 18 U.S.C. § 3582(c)(1)(A), only a *district court* may grant a motion for sentence reduction. *See United States* v. *McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021) ("Under the plain language of the statute, a district court may thus grant a motion for reduction of sentence."). If he chooses,

Mr. Ivory may pursue administrative remedies within BOP and, if appropriate, may file a new § 3582(c) motion in the district court.

III. CONCLUSION

We affirm the sentence imposed in the district court's February 1, 2022 order granting Mr. Ivory's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). We also grant Mr. Ivory's motion to proceed *in forma pauperis*.

ENTERED FOR THE COURT

Veronica S. Rossman
Circuit Judge