FILED
United States Court of Appeals
Tenth Circuit

September 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRELL BIRCH,

Defendant - Appellant.

No. 22-1234
(D.C. No. 1:17-CR-00135-RBJ-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

In this appeal, Jerrell Birch challenges the district court's denial of his motion for a sentence reduction under 18 U.S.C. § 3582. Because the district court did not abuse its discretion in denying Mr. Birch's request for sentence reduction, we affirm the district court's order.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

I. BACKGROUND

Mr. Birch was charged with twenty-three counts in a multidefendant drug case. He pleaded guilty to one count of conspiracy to distribute and possess with the intent to distribute (1) a quantity of a mixture and substance containing cocaine and/or (2) twenty-eight grams or more of cocaine base. The Government agreed to dismiss the remaining counts against Mr. Birch. Based on the quantity of cocaine or cocaine base, Mr. Birch's criminal history, his leadership role in the offense, and his acceptance of responsibility, the district court sentenced Mr. Birch to 96 months' imprisonment, followed by four year's supervised release—a downward departure from the U.S. Sentencing Commission Guidelines' recommended sentencing range of 188 to 235 months' imprisonment.

In April 2022, Mr. Birch filed a counseled motion requesting sentence reduction under 18 U.S.C. § 3582 (c)(1)(A)(i).[1] Under this provision, on a defendant's motion, the district court may reduce the defendant's sentence, once he has exhausted his administrative remedies, if it finds that such a reduction is (1) warranted by "extraordinary and compelling reasons"; (2) "consistent with applicable policy statements issued by the Sentencing Commission"; and (3) supported by consideration of the relevant factors set forth in § 3553(a), as

[1] Mr. Birch previously filed a pro se motion for sentence reduction. The court denied Mr. Birch's motion because it "provided no reasons for granting a modification of sentence[.]" ROA Vol II at 11. Mr. Birch's pro se motion sought reduction of his sentence on different bases than his counseled motion and is not part of the instant appeal.

applicable to the circumstances of the case. *United States v. McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021). A district court may deny the defendant's motion for sentence reduction "when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking[.]" *Id.* at 1043 (quoting *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021)).

In moving for reduction of his sentence, Mr. Birch argued that extraordinary and compelling reasons warranted an immediate reduction of his sentence to time served.[2] Specifically, Mr. Birch had been informed that one of his children, J.B., had been abused by the child's mother. J.B.'s mother had since surrendered custody, and J.B. was placed with Mr. Birch's parents. According to the motion, Mr. Birch's parents, who live separately, were sharing custody of J.B. and expressed their concern "that they can only care for [J.B.] in the very short term as they do not have the time or resources" to continue caring for J.B. ROA Vol. I at 176. J.B. was experiencing "severe emotional issues" stemming from the abuse, and Mr. Birch's parents were concerned J.B. would end up in foster care if Mr. Birch was not released to help care for his child. *Id.* Mr. Birch further argued the § 3553(a) factors supported his requested sentence reduction.

The Government opposed Mr. Birch's motion, contending that he had not demonstrated extraordinary and compelling circumstances warranting sentence

[2] Mr. Birch contended he had exhausted his administrative remedies by filing a request for compassionate release with his detention facility's warden. The Government disputed this point, but ultimately the court found Mr. Birch had exhausted his administrative remedies. The parties do not dispute the exhaustion requirement on appeal.

reduction and that the § 3553(a) factors weighed against granting Mr. Birch's release. The Government did not dispute the facts regarding Mr. Birch's child but asserted the circumstances did not present "sufficient grounds for [Mr. Birch's] release from custody." *Id.* at 190. The Government also noted that Mr. Birch had custody of J.B. "at the time of his arrest for the instant offense" and nonetheless "continued to engage in [] drug trafficking conduct" at the risk of being taken away from his child. *Id.* at 187–88. While acknowledging Mr. Birch's parents' challenges in caring for J.B., and the uncertainties about their future ability to do so, the Government argued they provided stable residences for J.B. and, "it appear[ed] at present, the child's needs [were] being met." *Id.* at 189.

The district court denied Mr. Birch's motion for sentence reduction. In doing so, the court noted the issues with J.B.'s mother had been ongoing when Mr. Birch participated in the offense conduct underlying his conviction. While "sympathetic to the situation" involving J.B., who was "in a sense another victim of Mr. Birch's and the child's mother's conduct," the court found the instant circumstances were not "an extraordinary and compelling reason to reduce what was a very fair sentence." *Id.* at 203. Although "[b]eing temporarily in the care of Mr. Birch's parents or foster care might not be ideal, . . . the child [wa]s nevertheless being cared for." *Id.*

Mr. Birch filed a timely notice of appeal of the district court's order denying his sentence reduction.

II. STANDARD OF REVIEW

"We review a district court's order denying relief on a § 3582(c)(1)(A) motion for abuse of discretion." *United States v. Hemmelgarn*, 15 F.4th 1027, 1031 (10th Cir. 2021). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." *Id.* (quotation marks omitted). The broad discretion afforded district courts in determining whether to modify a sentence "counsels in favor of deferential appellate review." *Concepcion v. United States*, 142 S. Ct. 2389, 2404 (2022). Thus, "[w]e do not disturb decisions entrusted . . . to the discretion of a district court unless we have a definite and firm conviction that the [] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *United States v. Chavez-Meza*, 854 F.3d 655, 659 (10th Cir. 2017), *aff'd*, 138 S. Ct. 1959 (2018) (internal quotation marks omitted).

III. DISCUSSION

In applying the first statutory requirement under § 3582(c)(1)(A), district courts "have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons.'" *McGee*, 992 F.3d at 1045 (quoting 18 U.S.C. § 3582(c)(1)(A)). But the court's authority is "effectively circumscribed" by the second requirement: that sentence reduction is "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* The Sentencing Commission's most recent policy statement, issued in November 2018 and set forth in U.S. Sentencing Commission Guidelines §1B1.13, delineates certain circumstances

constituting extraordinary and compelling reasons for granting sentence reduction, including the defendant's age, family circumstances, or medical condition. *See* United States Sentencing Commission, *Guidelines Manual*, §1B1.13 (Nov. 2018). However, we have previously held that Guidelines §1B1.13, which issued prior to the amendment of § 3582(c)(1)(A) in December 2018, is "applicable only to motions for sentence reductions filed by the Director of the [Bureau of Prisons], and not to motions filed directly by defendants." *McGee*, 992 F.3d at 1050; *see also United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021) (holding district court's finding of whether "extraordinary and compelling reasons warranted a reduction . . . was not constrained by the Sentencing Commission's existing policy statement, [Guidelines] §1B1.13"). Thus, currently "the district court's discretion is not restricted by any Sentencing Commission policy statements, although it would hardly be an abuse of discretion for a district court to look to the present policy statement for guidance." *United States v. Hald*, 8 F.4th 932, 938 n.4 (10th Cir. 2021).

Mr. Birch argues the district court abused its discretion by insufficiently analyzing whether he had presented extraordinary and compelling circumstances justifying sentence reduction. He contends that, "[b]ecause the district court did not explain or set forth what standard it used to determine whether extraordinary and compelling circumstances exist, this court cannot know with any certainty that the district court's analysis did not improperly rely exclusively on [Guidelines] §1B1.13[.]" Appellant's Br. at 15. Mr. Birch also submits that an analysis of the § 3553(a) factors, which the district court did not reach, reveals the court's error was

not harmless and its order should therefore be vacated and remanded for further proceedings.[3]

In denying Mr. Birch's motion for sentence reduction, the district court considered the parties' filings, "the applicable factors provided in 18 U.S.C. § 3553(a) and 18 U.S.C. § 3582(c)(1)(A), and the applicable policy statements issued by the Sentencing Commission." ROA Vol. I at 200. After outlining the parties' arguments and relevant facts, the court pronounced its factual findings and its conclusion that Mr. Birch had not presented "an extraordinary or compelling reason to reduce what was a very fair sentence." *Id.* at 203. The court's order clearly explains the court's factual findings and reasons for concluding that Mr. Birch's family circumstances do not constitute extraordinary and compelling reasons justifying sentence reduction. "[A]t bottom, the sentencing judge need only set forth enough to satisfy the appellate court that she has considered the parties' arguments and has a reasoned basis for exercising her own legal decisionmaking authority." *Hald*, 8 F.4th at 948 (brackets omitted) (quoting *Chavez-Meza*, 138 S. Ct. at 1964); *see also Concepcion*, 142 S. Ct. at 2404 (stating that "district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' nonfrivolous arguments" regarding sentence modification but are

[3] Mr. Birch briefly argues the revised sentencing approach articulated in a December 2022 Attorney General Memorandum "itself creates an independent extraordinary and compelling reason to grant relief." Appellant's Br. at 22. But as Mr. Birch acknowledges, because the 2022 Memorandum issued after the district court rendered the decision subject to this appeal, this argument was never presented to the district court. Thus, this issue is not properly before us on appeal. Should Mr. Birch choose to raise it in a subsequent § 3582 motion, the district court may consider it in the first instance.

not "required to articulate anything more than a brief statement of reasons"). Here, the district court's explanation satisfies us that it considered Mr. Birch's arguments and exercised its discretion in light of the facts and circumstances of the case. We discern no clearly erroneous finding of fact or incorrect conclusion of law in the court's exercise of that discretion.

Furthermore, "absent some indication in the record suggesting otherwise, . . . trial judges are presumed to know the law and apply it in making their decisions." *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1201 (10th Cir. 2007) (brackets omitted). Mr. Birch's argument, that we cannot know for certain that the district court did not view Guidelines §1B1.13 as binding, turns this presumption on its head. The district court's order made no reference to Guidelines §1B1.13, nor did the parties' briefing on Mr. Birch's motion. *See Maumau*, 993 F.3d at 837 (rejecting appellant's argument because "[n]othing in the district court's decision" supported its underlying premise); *cf. United States v. Carr*, 851 F. App'x 848, 853 (10th Cir. 2021) (unpublished) (noting the district court's order "relied exclusively on Guidelines §1B1.13" to define extraordinary and compelling reasons). While the court stated it considered "applicable policy statements issued by the Sentencing Commission," Guidelines §1B1.13 was not such an "applicable policy statement[]." ROA Vol. I at 200. Nothing in the court's decision suggests it actually considered Guidelines §1B1.13, let alone considered it binding. *See Hald*, 8 F.4th at 938 n.4 ("[I]t would hardly be an abuse of discretion for a district court to look to the present policy statement for guidance."). Furthermore, the district court's decision was made over a year after we

determined Guidelines §1B1.13 does not apply to motions filed directly by a defendant. *See McGee*, 992 F.3d 1035 (March 29, 2021); *Maumau*, 993 F.3d 821 (April 1, 2021); ROA Vol. I at 200–03 (July 18, 2022); *cf. Carr*, 851 F. App'x at 853 ("[T]he district court decided Ms. Carr's motion prior to any circuit court addressing [whether Guidelines §1B1.13 applied to motions filed by defendants]."). There being no contrary indication in the record, we presume the court followed *McGee* and *Maumau*.

District courts are "entrusted with wide sentencing discretion" which "carries forward to later proceedings that may modify an original sentence." *Concepcion*, 142 S. Ct. at 2389. Thus, we will not disturb the district court's decision "unless we have a definite and firm conviction that [it] made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Ruiz-Terrazas*, 477 F.3d at 1201 (internal quotation marks omitted). While we do not endorse as best practice an explanation devoid of citation to the relevant and binding legal authority, we can discern no abuse of discretion in the district court's decision.[4]

[4] Having concluded the district court did not abuse its discretion in finding Mr. Birch had not presented extraordinary and compelling reasons justifying sentence reduction, we do not consider whether any such error was harmless in light of the § 3553(a) factors.

IV. CONCLUSION

Because the district court did not abuse its discretion in denying Mr. Birch's motion for sentence reduction, we AFFIRM the court's order.

Entered for the Court

Carolyn B. McHugh
Circuit Judge