

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 16, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARREL BAILEY,

Defendant - Appellant.

No. 23-1116
(D.C. No. 1:94-CR-00152-WJM-1)
(D. Colo.)

ORDER*

Before **HOLMES**, Chief Judge, **PHILLIPS**, and **McHUGH**, Circuit Judges.

Darrel Bailey appeals from the district court’s order modifying his term of supervised release to require him to spend up to six months in a halfway house facility. Both parties assert that Mr. Bailey’s appeal is moot. In particular, as the appellant, Mr. Bailey bears the burden of advancing a theory to support our jurisdiction. Yet he has not done so. Under the unique circumstances of this case, based on our independent assessment, we dismiss this appeal.

* 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. This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I

Mr. Bailey served over thirty years in federal prison pursuant to two separate sentences—one imposed in the District of Colorado. Upon his release, he was required to serve a term of three years of supervised release. In advance of his release, in November 2022, the U.S. Probation Office for the District of Colorado (“Probation”) petitioned the district court to modify the terms of his supervised release to require him to spend up to six months in a halfway house facility after being released from prison. Mr. Bailey opposed the petition and requested a hearing pursuant to Fed. R. Crim. P. 32.1(c).

While his motion was pending, Mr. Bailey was released from prison on March 24, 2023. The district court held the hearing on April 4, 2023, after which it granted Probation’s request and modified Mr. Bailey’s terms of supervised release to include a stay of “up to six months” in a halfway house or similar residential facility. R., Vol. II, at 5, 26–27 (Tr. Hr’g on Modification of Terms of Supervised Release, held Apr. 4, 2023). Mr. Bailey appealed from that order, arguing that the district court abused its discretion.

After the parties submitted their briefing, we asked them to address in supplemental briefing, as material here,¹ whether the passage of time had rendered Mr. Bailey’s appeal moot. Both Mr. Bailey and the government provided very similar responses. They indicated that Mr. Bailey reported to the halfway house on April 21,

¹ As discussed further in text *infra*, during the pendency of this appeal, Mr. Bailey prematurely left the halfway house. In our briefing order, we also asked the parties to address the fact that the records of the Bureau of Prisons indicated that Mr. Bailey had absconded from the halfway house. Both Mr. Bailey and the government have represented that Mr. Bailey has, in fact, not absconded. Accordingly, we do not consider the possible legal implications of an abscondment further.

2023, but almost immediately left to seek treatment for several medical issues. He did not obtain permission from his Probation Officer before leaving the facility. Crucially, however, Mr. Bailey kept his Probation Officer informed of his whereabouts—both in the immediate aftermath of his departure from the halfway house and in the following months. Mr. Bailey has since secured permanent housing, where he currently resides.

Both Mr. Bailey’s counsel and the government have confirmed that—despite Mr. Bailey having left the halfway house without permission—his Probation Officer “has determined not to ask the district court at this time to revoke or further modify Mr. Bailey’s supervised release.” Aplee.’s Suppl. Br. at 5; *see also* Aplt.’s Suppl. Br. at 3. Additionally, Mr. Bailey maintains that the district court’s order modifying his term of supervised release has “expired,” as it imposed a term of halfway house confinement for a maximum of six months and more than six months have now passed since April 21, 2023—the day that he reported to the halfway house. Aplt.’s Suppl. Br. at 4–5. Based on these facts, both parties contend that Mr. Bailey’s appeal is moot.

II

We conclude that Mr. Bailey’s appeal is moot. At all stages of litigation, we have an “independent obligation” to assess our jurisdiction. *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1208 n.10 (10th Cir. 2012) (quoting *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006)). Under the “case or controversy” requirement in Article III of the Constitution, we lack jurisdiction over questions that “cannot affect the rights of litigants” before us. *City of Albuquerque v. U.S. Dep’t of Interior*, 379 F.3d 901, 918–19 (10th Cir. 2004)

(quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). A case is moot “when the issues presented are no longer ‘live’”; in making that assessment, we consider whether we can grant relief that “will have some effect in the real world.” *Id.* at 919 (first quoting *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000); then quoting *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir. 1999)).

However, notably, the appellant ultimately bears the burden of advancing a theory to support our jurisdiction. *See Raley v. Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1275 (10th Cir. 2011). Irrespective of whether Mr. Bailey could have “conjure[d] up possible theories to invoke our legal authority to hear [his] appeal,” *id.*—a matter upon which we do not opine—he has not done so. Indeed, he unequivocally “submits that this appeal is moot,” Aplt.’s Suppl. Br. at 1, and therefore effectively states that we lack jurisdiction. Under these unique circumstances, we see no reason to disagree. The challenged term of halfway house detention has undisputedly expired, and Mr. Bailey “does not claim that [he] is suffering a collateral consequence as a result of the expired order.” *Id.* at 6 (citing *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011)). Accordingly, given the parties’ arguments and the factual circumstances underlying this appeal, we conclude that it is moot.

III

For the foregoing reasons, we dismiss Mr. Bailey’s appeal as moot.²

Entered for the Court

Jerome A. Holmes
Chief Judge

² Though both parties concede that the case is moot, *see* Aplt.’s Suppl. Br. at 1, 6; Aplee.’s Suppl. Br. at 8, neither actually moves the Court to dismiss the appeal. However, we may dismiss the appeal on mootness grounds sua sponte. *See McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) (“Because mootness is a matter of jurisdiction, a court may raise the issue sua sponte.”). We do so here.