NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued December 13, 2023
Decided February 5, 2024

Before

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-1399

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARMEN TATE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 94-CR-00187-2

John Robert Blakey,
Judge.

ORDER

Carmen Tate was sentenced to life in prison after he was convicted of conspiracy to possess with intent to distribute cocaine, cocaine base, and heroin, 21 U.S.C. §§ 841, 846, and conspiracy to defraud the United States, 18 U.S.C. § 371. Decades later, Tate moved for a reduced sentence under § 404 of the First Step Act of 2018. Although the district court found him legally eligible, it declined to reduce his sentence after

concluding that the gravity of his crimes outweighed any mitigating factors. Because the district court did not procedurally err or abuse its discretion, we affirm.

From about 1984 through 1991, Carmen Tate and co-defendant Eddie Richardson, as leaders of a Chicago street gang, oversaw the widespread distribution of heroin, crack cocaine, and powder cocaine. In keeping with the charging and sentencing practices of that era, Tate's 1994 indictment did not specify the quantity of drugs attributable to him; instead, after the jury returned a guilty verdict, the Presentence Investigation Report (PSR) determined that Tate helped distribute 149 kilograms of heroin, 25 kilograms of cocaine base, and an undetermined amount of powder cocaine.

These drug quantities established the statutory sentencing range (up to life) and yielded a base offense level of 38 under the 1994 Sentencing Guidelines. The PSR added two levels for Tate's gun possession and four for his leadership role, for a total offense level of 44 on the drug count. The combined offense level remained 44 after grouping the drug conspiracy with the fraud conspiracy (level 20 on its own), although the Guidelines treat this as level 43 (the highest level available). Based on an effective offense level of 43 and a criminal history category of V, the PSR calculated a then-mandatory guidelines sentence of life in prison. The PSR also explained that a life sentence was independently required by 21 U.S.C. § 841(b) because Tate had been convicted of two prior felony drug offenses.

At sentencing, the judge adopted the PSR. The defendants had objected to the drug quantities reflected there, but the judge found these amounts supported by a preponderance of the trial evidence. Although the life sentence was mandatory, the judge added that it was appropriate, given the severity and extent of the crimes.

Years passed, and the sentencing landscape changed. In 2019, Tate moved for a reduction under § 404 of the First Step Act of 2018. The sentencing judge was no longer available, so the case was reassigned. After a hearing and several filings in the district court, Tate and the government agreed that Tate's crack-cocaine crime is a "covered offense" that triggers eligibility for a sentence reduction, even though his offense also involved heroin.

Despite their agreement on eligibility, the parties disputed whether a reduction was warranted. Tate contended that if he were sentenced today, he would likely receive a lower sentence. He highlighted intervening changes in the law, namely *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), which require drug quantities that trigger mandatory minimum sentences to be proven to a

jury beyond a reasonable doubt—not to a judge on a preponderance standard, as happened in the era of Tate's sentencing. (This argument about *Apprendi* was general in approach: Tate specified no grounds to think real jurors might view the previously disputed drug quantities more favorably to him than the sentencing judge did.)

Tate also cited mitigating factors, contrasting his traumatic childhood (including abuse and juvenile detention) with his post-sentencing rehabilitation (as evidenced by a lack of prison disciplinary infractions, his participation in classes and other programs, and decades of prison employment that allowed him to pay his fines). And he stressed the cost of holding aging prisoners (he was by then 65 years old) and his low apparent risk of recidivism.

The district judge, however, denied Tate's motion. The judge began by making clear his agreement with the parties on the threshold issue: Tate's crack offense made him legally eligible for a reduction under the First Step Act. But the judge then turned to the discretionary question whether a reduction was warranted—and the answer was no. To start, Tate's guidelines "range" would have been life in prison even if the First Step Act's statutory crack-cocaine penalties had been in place at the time of his sentence. On the other hand, the judge noted, Tate's prior drug offenses would not independently trigger a mandatory life sentence under today's version of 21 U.S.C. § 841(b)—so the judge factored the new statutory sentencing range (ten years to life) into his discretionary analysis.

Next came Tate's argument that the drug quantities that determined the statutory range at the original sentencing were unreliable because, under *Apprendi*, a jury rather than a judge should have found them. The district judge recognized his discretion to consider this point under *United States v. Fowowe*, 1 F.4th 522, 531–32 (7th Cir. 2021). Still, the judge determined that the heroin quantity attributed to Tate "was reasonable based on the record." And, the judge explained, the 149 kilograms of heroin was many times the 1-kilogram threshold for a 10-years-to-life range under § 841(b)(1)(A) today, and "markedly higher" than the thresholds for the top-of-the-chart offense level Tate received under both the 1994 Guidelines (30 kilograms) and the 2021 Guidelines (90 kilograms).

Additionally, the judge explained, these penalties would be unreviewable today had Tate been sentenced for distributing only heroin; the happenstance that his conspiracy *also* involved cocaine formed the sole basis for review. So, in part to avoid an

"unwarranted windfall," the judge "decline[d] to give him the retroactive benefit of *Apprendi* and *Alleyne* just because his conduct also involved cocaine base."

As for Tate's mitigating factors, the judge carefully reviewed the evidence and arguments, acknowledging Tate's challenging adolescence, his family support, and his good conduct in prison. But the judge ultimately concluded that a life sentence was warranted because Tate helped manage a violent gang and its drug trafficking operation, which went on for years and provided him with substantial profit at the cost of others' suffering.

On appeal, Tate argues that the district court committed procedural and substantive errors. Evaluating a motion for sentence reduction under § 404 entails two steps: First, the district court asks whether the defendant is legally eligible for a reduction; second, whether the court "*should* reduce the sentence" in its discretion. *United States v. McSwain*, 25 F.4th 533, 537 (7th Cir. 2022). We review step one de novo, but our review of step two is limited by the abuse-of-discretion standard. *Id.*

Tate begins with perceived procedural defects. But these rest on a misreading of the record. First, he says it is unclear whether the judge found him eligible for an exercise of discretion because, he asserts, the judge "collaps[ed]" the first and second steps of his analysis. To the contrary, the judge began with the threshold question whether Tate had a covered offense, next found him eligible for relief, and only then turned to the discretionary question whether to reduce Tate's sentence. The judge's written decision even used headings to reflect each step: "A. Defendants Remain Legally Eligible for Relief"; and "B. The Factual Record Fails to Warrant Relief."

Still, Tate asserts that the judge's discussion of heroin betrays lingering doubt about whether he was eligible. But the judge evaluated the heroin quantity only *after* expressly concluding that Tate was eligible based on his crack-cocaine quantity. The judge's point was not that Tate was ineligible, but instead that his eligibility could be seen as a mere fortuity, and that giving him relief barred to other heroin offenders might be a windfall for him. This was a permissible exercise of the judge's "broad discretion." *Concepcion v. United States*, 597 U.S. 481, 501 (2022). *But cf. United States v. Johnson*, 635 F.3d 983 (7th Cir. 2011) (The district court's analysis of disparities between defendants convicted of *same offenses* and legal ability to seek resentencing was misplaced. But here, the analysis of disparities is about defendants convicted of *different offenses*—heroin and crack offenses rather than heroin-only offenses—and their ability to be resentenced).

To be sure, Tate says he wishes to dispute the drug quantities determined at sentencing. But judges in First Step Act proceedings are entitled to stand by factual findings from the original sentencing. *United States v. Miedzianowksi*, 60 F.4th 1051, 1057 (7th Cir. 2023) (citing *United States v. Newbern*, 51 F.4th 230, 233 (7th Cir. 2022)). And in any event, Tate offers no specific reasons why a factfinder would likely determine a different quantity today that would materially impact his sentence.

Tate also suggests that nowadays an indictment that fails to specify any drug-quantity range on the front end would limit the judge to sentencing under 21 U.S.C. § 841(b)(1)(C) rather than (A); and that limitation in turn would cap his drug sentence at 20 years. (Recall that in the 1990s, the drug quantities that triggered different penalties were treated as sentencing factors found by a judge after conviction.) But this theory boils down to a demand that the court impose *Apprendi* and *Alleyne* retroactively on an old sentence. As noted, the judge exercised his discretion to not do so, and judges applying the First Step Act are not required to apply intervening judicial decisions, *McSwain*, 25 F.4th at 539.

Next, Tate argues that the judge procedurally erred by not mentioning other intervening changes in case law that Tate himself had not discussed—for instance, *Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019), which narrows the set of prior drug offenses that can be used to make a life sentence mandatory under § 841(b)(1)(A). But the judge did acknowledge generally that today's sentencing law would mean an optional rather than a mandatory life sentence; he chose to consider the new statutory range (ten years to life); and he nonetheless exercised discretion to determine that a within-guidelines sentence of life was still the right term. Citing *Najera-Rodriguez* and similar cases would not alter this reasoning.

Tate's remaining arguments center on whether the judge abused his discretion in weighing the competing factors. Tate contends that the judge placed too much weight on the nature of his offenses and too little on other concerns. But the judge adequately considered aggravating and mitigating factors. He recounted Tate's challenging adolescence, his good conduct in prison, and his support system; but the judge highlighted the length and severity of Tate's offenses, as well as his leadership role in them. Taking all of that into account, the judge reasonably determined that the record did not warrant a sentence reduction. *See Miedzianowksi*, 60 F.4th at 1057 (defendant's leadership role and long criminal activity similarly outweighed mitigating arguments). The district judge was not "required to articulate anything more than a brief statement of reasons." *Concepcion*, 597 U.S. at 501. When, as here, the judge has noted and weighed

the competing factors, then the decision about how to weigh them is not an abuse of discretion. *Miedzianowksi*, 60 F.4th at 1057.

Finally, Tate contends that the judge did not properly consider the need to avoid unwarranted sentencing disparities. He disputes the judge's characterization of a sentence reduction as an "unwarranted windfall" and highlights cases where relief was granted to defendants convicted of offenses relating to both cocaine and heroin. But the judge did not abuse his discretion here. He examined the propriety of a within-guidelines sentence of life, even with the benefit of the First Step Act and other new legal developments, before leaving the original life sentence intact. Because Tate's sentence remains within the guidelines range, which itself addresses sentencing disparities, standing by this sentence was not an abuse of discretion. *See United States v. Clay*, 50 F.4th 608, 612–14 (7th Cir. 2022).

AFFIRMED