

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 10, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTGOMERY CARL AKERS,

Defendant - Appellant.

No. 21-3051
(D.C. No. 2:04-CR-20089-KHV-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH, MURPHY, and CARSON**, Circuit Judges.**

Defendant Montgomery Carl Akers sought compassionate release under 18 U.S.C. § 3582(c)(1)(A) from a 327-month sentence, which the district court imposed in 2006. The district court denied relief, so Defendant appealed. We affirm, exercising jurisdiction under 28 U.S.C. § 1291.

Defendant resides at the United States Penitentiary at Marion, Illinois (“USP Marion”). He argued below that he is at high risk of severe illness or death should he contract COVID-19. The district court denied Defendant’s motion for three reasons.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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.

First, he had not exhausted available administrative remedies. Second, he had not shown “extraordinary and compelling reasons” for release. And third, the 18 U.S.C. § 3553(a) sentencing factors did not support a sentence reduction. Because we agree with the first reason, we do not address the others.

Section 3582(c) governs the modification of a term of imprisonment. Under § 3582(c)(1)(A), either the Director of the Bureau of Prisons (“BOP”) or the defendant may move for a reduction. But before the defendant can make that motion, he must exhaust BOP administrative remedies. *Id.* To begin that process, the defendant must submit a request to the warden of his facility. *See United States v. Ward*, 832 F. App’x 334, 335 (5th Cir. 2020). If, however, the defendant’s request remains unanswered 30 days after the warden receives it, the statute considers the administrative process exhausted. 28 U.S.C. § 3582(c)(1)(A). Here, Defendant submitted a request and the Warden of USP Marion denied that request within 30 days. But, the district court found, Defendant did not show that he completed the administrative appeals process, as the statute requires.

We have not decided whether the exhaustion requirement should be treated as jurisdictional or as a claims-processing rule. But even if it is the latter, the district court lacked authority to excuse Defendant’s failure—a fact the district court recognized. *See Malouf v. Sec. Exch. Comm’n*, 933 F.3d 1248, 1256 (10th Cir. 2019) (“courts lack the discretion to excuse the failure to exhaust administrative remedies” when the exhaustion requirement comes from a statute). *See also Ross v. Blake*, 136 S. Ct. 1850, 1856–57 (2016). So either way, Defendant must show the

district court that he “fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on his behalf.” 18 U.S.C. § 3582(c)(1)(A).

Having thoroughly reviewed the record and Defendant’s briefing, we agree with the district court that Defendant failed to show he fully exhausted his available BOP remedies. Defendant did not show in his motion, or in his memorandum in support, that he fulfilled the exhaustion requirement. So the government raised exhaustion as a defense in its response. Defendant tried to show exhaustion in his reply, to which he attached an exhibit. But that argument and exhibit only showed that the Warden (1) denied his request and (2) explained how he should make an administrative appeal. Neither of Defendant’s supplemental filings to the district court made any further reference to the exhaustion issue. Defendant never provided documentation that he completed the administrative appeals process, nor did he even claim that he completed it.

On appeal, Defendant provided a two-page exhibit to his brief, which he says shows he completed the appeals process. One page of the exhibit is a “Central Office Administrative Remedy Appeal” form, the contents of which are illegible. The other page is a letter denying Defendant’s appeal. But Defendant has one serious problem.¹ The letter is dated March 16, 2021—well after Defendant filed his motion

¹ Defendant has two other problems as well. First, the appellate brief is usually not the time or place to include evidence or documentation that does not appear in the record. And second, Defendant’s documentation is of unclear origin. Although it remains unclear, we will assume that his exhibit on appeal relates to and stemmed from the same request he submitted to the Warden.

in the district court. In fact, the district court issued its order denying the motion on March 3, 2021. So, rather than help Defendant, the new exhibit only proves that he had not exhausted his remedies when he filed his motion.

Because we agree with the district court that Defendant did not exhaust his administrative remedies, as Congress has seen fit to require, we AFFIRM.² For that same reason, we do not address the district court's alternative grounds to deny the motion.

Entered for the Court

Joel M. Carson III
Circuit Judge

² We GRANT Defendant's motion to proceed *in forma pauperis* on appeal.