FILED
United States Court of Appeals
Tenth Circuit

November 2, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DOUGLAS M. SCHULER,

Defendant - Appellant.

No. 21-3104
(D.C. No. 2:11-CR-20124-JWL-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.**

Douglas M. Schuler appeals pro se the district court's denial of his motion to reconsider a previous order denying in part and dismissing in part his motion to vacate his conviction and sentence based on Federal Rule of Civil Procedure 60; Federal Rule of Criminal Procedure 36; 28 U.S.C. § 1651; and 18 U.S.C. § 3582(b).[1] Exercising our

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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.

[1] Because Schuler is proceeding pro se, we liberally construe his filings. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009). Nevertheless, a liberal construal does not include supplying additional factual allegations or constructing a legal theory on the appellant's behalf. *See Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997).

jurisdiction under 28 U.S.C. § 1291, we affirm the district court's order denying Schuler's motion to reconsider.

I.

In May 2012, Schuler pled guilty to production of child pornography in violation of 18 U.S.C. § 2251(a) pursuant to a Rule 11(c)(1)(C) plea agreement with the government. Three months later, he was sentenced to 180 months' imprisonment, followed by a five-year term of supervised release. At sentencing, the court confirmed with Schuler and his counsel, separately, that Schuler had reviewed the contents of the presentence report with his counsel, that his counsel had advised him about the report's contents, and that there were no objections or challenges to it.

The court stated clearly its intent to "impose each of the mandatory and special conditions of supervision as set forth in Part D of the presentence report." ROA Vol. I at 125. Although the court highlighted some of these conditions, it did not enumerate each one. The written judgment, however, contained each enumerated special condition of Schuler's supervised release as had been set forth in the presentence report.

Schuler filed neither an appeal nor a motion under § 2255 to vacate his conviction or sentence. Nine years after his sentencing, though, Schuler filed a motion to vacate his conviction and sentence based on Federal Rule of Civil Procedure 60; Federal Rule of Criminal Procedure 36; 28 U.S.C. § 1651; and 18 U.S.C. § 3582(b). He argued that the court's failure to "pronounce each special condition of supervised release violates his constitutional rights and that the written judgment conflicts with the oral judgment such that the court must amend the written judgment to remove the supervised release

conditions." *Id*. Additionally, Schuler asked the court to reduce his sentence to time served based on rehabilitation efforts and the continued spread of COVID-19 through his correctional facility.

On March 19, 2021, the district court denied in part and dismissed in part Schuler's request. The court first addressed Schuler's principal argument: that under Federal Rule of Criminal Procedure 36, a district court can correct a "clerical error" in a judgment. *Id*. at 126. This rule, the court held, is "clearly inapplicable" here because Schuler's allegation is not that a clerical error in the judgment occurred, but that his "constitutional rights were violated because the court did not orally pronounce the special conditions of his supervised release such that he had no opportunity to object to those conditions." *Id*.

The court compared this case to a "nearly identical" unpublished Tenth Circuit opinion, *United States v. Allison*, 531 F. App'x 904 (10th Cir. 2013). *Id*. In that case, as here, the defendant confirmed in court that he had reviewed the presentence report, the court orally announced its intent to include all of the special conditions listed in the report, and those same conditions were reproduced in the defendant's judgment and sentence. Because the "oral and written sentences did not conflict," the *Allison* court held that no error existed, and that Allison was not entitled to Rule 36 relief. *Allison*, 531 F. App'x at 905.

Additionally, the *Allison* court noted that the defendant's motion seemed to be an "attempt to get around normal appellate and post-conviction procedures." *Id.* at 905–06. The court identified the defendant's clerical error allegation as a reclassification of a

constitutional error that missed the deadlines for direct appeal and § 2255 petitioning, and therefore rejected the argument as an attempt to "'sidestep' the timeliness restrictions of those avenues." ROA Vol. I at 126–27 (citing *id*.).

In response to Schuler's argument under Fed. R. Civ. P. 60(b), the court held that it lacked jurisdiction to relieve him of the final judgment for "newly discovered evidence" that could not reasonably have been discovered earlier. *Id*. at 127 (citing *United States v. Twitty*, 2020 WL 7689700, at *2 (10th Cir. Dec. 28, 2020) (holding that because Rule 60(b) does not apply in criminal cases, it does not provide an independent source of jurisdiction in them)). The court also rejected Schuler's arguments based on 18 U.S.C. § 1651 and 18 U.S.C. § 3582(b), finding that, for the former, he is not entitled to a writ of audita querela because other remedies exist and, for the latter, the court lacked jurisdiction. *See id.* at 127–28.

Finally, the court noted that the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), requires defendants to completely exhaust all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or a thirty-day lapse from the receipt of such a request by the warden of the defendant's facility before seeking early release from prison. *Id*. at 128. Because Schuler conceded that he has not exhausted his administrative remedies, and because, according to the district court, this requirement is "jurisdictional and cannot be waived," the court

dismissed this aspect of the motion without prejudice to refiling upon a showing of exhaustion.[2] *Id*.

On April 26, 2021, Schuler filed a request for reconsideration of the district court's order, which the district court denied on June 3, 2021. Aplt. Br. at 7. In denying Schuler's motion to reconsider, the court continued to emphasize the applicability of *Allison* to this case, holding that, contra Schuler's efforts to differentiate the two, "[t]he court's reliance on *Allison* . . . was entirely appropriate." ROA Vol. I at 162. Furthermore, the court held that the two Tenth Circuit cases Schuler cites to support his argument that "special conditions of supervised release must be orally pronounced at sentencing" do not, in fact, stand for this proposition. *Id*. at 163.

The first, *United States v. Jim*, simply recognizes that, in the event of a conflict between the oral pronouncement and written judgment, the former controls. 804 F. App'x 895, 900 (10th Cir. 2020) (holding that the district court erred in imposing a special condition in its written judgment after expressly agreeing to exclude the condition during its oral pronouncement of the sentence). The second, *United States v. Blair*, holds that the district court's oral pronouncement that a defendant was completely banned from computer use was impermissibly broad. 933 F.3d 1271, 1272 (10th Cir. 2019). In

[2] Although the district court treated compassionate-release exhaustion as jurisdictional, we have since clarified that it is not. *See United States v. Hemmelgarn*, No. 20-4109, 2021 WL 4692815, at *2 (10th Cir. Oct. 8, 2021) (holding that because § 3582(c)(1)(A) contains no "language indicating that the exhaustion requirement is jurisdictional in nature, we conclude . . . [the provision's] exhaustion requirement is a claim-processing rule."). The district's erroneous jurisdictional ruling has no effect on this appeal because, as we note below, Schuler only appeals the motion to reconsider and the district court's reliance on *Allison*.

response to the government's objection that the district court did not intend the condition to reach so broadly, the *Blair* court said that "an oral pronouncement . . . controls over written language." *Id*. at 1278. Neither of these cases, thus, supports Schuler's argument that each individual special condition must be orally enumerated at sentencing. For these reasons, the district court denied in part and dismissed in part Schuler's motion for reconsideration.

Schuler then filed both a notice of appeal of the district court's denial of his motion for reconsideration and a request to proceed on appeal in forma pauperis, along with a supporting affidavit. *Id* at 2–3; *see also* Aplt. Br. App'x at 122–23. The government filed no response brief. On June 15, 2021, the district court granted Schuler permission to proceed without payment of fees. Although Schuler raised several arguments in his motion, the motion for reconsideration—and this appeal—address only the district court's reliance on *Allison*. We address this argument below.

II.

We review the district court's denial of a motion to reconsider for an abuse of discretion. *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1235 (10th Cir. 2001). Under this standard, we affirm the decision to deny reconsideration unless it was "arbitrary, capricious, whimsical, or manifestly unreasonable." *Id*. at 1236.

On appeal, Schuler insists on the inapplicability of *Allison*, and, on the other hand, the applicability of *Jim* and *Blair*. He argues that the court's written judgment did not conform to the orally pronounced sentence and that the latter should prevail over the former. Because the court said that it "does intend to impose each of the mandatory and

special conditions of supervision as set forth in . . . the presentence report," Schuler argues that it did not "clearly state[] what . . . [it] 'IS' doing at sentencing." *Id*. at 9. This contradicts, Schuler says, this circuit's consistent holding that "the special conditions to supervised release must be orally pronounced at sentencing." *Id*. at 12. To support this argument, Schuler again cites to *Jim* and *Blair*, in addition to several other Tenth Circuit cases dealing with oral pronouncements.

This body of case law, however, does not stand for the proposition that special conditions must be orally pronounced, but for the rule that "an oral pronouncement of sentence from the bench controls over . . . written language." *United States v. Marquez*, 337 F.3d 1203, 1207 n.1 (10th Cir. 2003). In this case, because the written judgment "enumerated the special conditions of . . . [Schuler's] supervised release as set forth in the presentence report," there is no conflict between the oral and written pronouncements. ROA Vol. I at 161. Thus, the rule set forth in the cases Schuler cites is inapplicable here. Schuler, therefore, has still not cited any support for his argument that the Tenth Circuit requires that special conditions of supervised release be orally pronounced at sentencing.

Furthermore, we agree with the district court that the reasoning in *Allison* applies to this case.[3] In *Allison*, the judge stated, "I intend to impose each of the mandatory and special conditions of supervision which are set forth in Part D of the presentence report." *Allison*, 531 F. App'x at 905. This is nearly identical to the district court's statement in

[3] Although *Allison* is unpublished and therefore not binding precedent, we find it persuasive and cite it for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

this case that it "does intend to impose each of the mandatory and special conditions of supervision as set forth in . . . the presentence report." Aplt. Br. at 9. As in Schuler's case, neither Allison nor his counsel objected, the conditions were "copied verbatim into the court's written judgment," and several years later, Allison moved to correct the record pursuant to Fed. R. Crim. P. 36, arguing that his constitutional rights were violated due to the "clerical error" of the conditions not having been enumerated in the oral pronouncement. *Allison*, 531 F. App'x at 905.

According to the *Allison* court, Allison alleged a "constitutional error, not a clerical error," which must be raised on direct appeal or through § 2255. *Id*. Nevertheless, the court held that no clerical error occurred because the "oral and written sentences did not conflict." *Id*. This notion is supported by the fact that Allison confirmed his opportunity to review the presentence report before sentencing, that the court had orally announced its intent to include certain parts of the report into the supervisory release conditions, and that the relevant portions were reproduced in Allison's sentence and judgment. The *Allison* court also held that "the potential for inpatient treatment is not the sort of condition that requires explanation from the bench in every instance." *Id*.

The facts in Schuler's case mirror those in *Allison*, and Schuler provides no compelling distinguishing factor. Here, as in *Allison*, Schuler couches a complaint about a constitutional rights violation, for which the filing deadlines have long passed, in terms of a clerical error. He received the same notice that Allison did from the district court, and he has provided no—nor do we think there is any—explanation for why the special

conditions listed in his presentence report *would* be "the sort of condition that requires explanation" from the district court in the form of an oral pronouncement. *Id.* The court did not abuse its discretion in relying on *Allison*. Thus, we affirm the district court's order denying Schuler's motion to reconsider.

III.

Schuler has additionally requested to proceed in forma pauperis. The district court has already granted Schuler's motion in a June 15, 2021 order. Because the motion has been granted, we need not review that determination even though Schuler appeals it.

IV.

For the foregoing reasons, we AFFIRM the district court's orders denying Schuler's motion to reconsider.

Entered for the Court

Allison H. Eid
Circuit Judge