FILED
United States Court of Appeals
Tenth Circuit

July 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PHOUC H. NGUYEN,

Defendant - Appellant.

No. 21-3181
(D.C. No. 6:94-CR-10129-JWB-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **MURPHY**, and **EID**, Circuit Judges.**

Phouc Nguyen appeals the district court's denial of his 18 U.S.C. § 3582(c)(1)(A)(i) motion for sentence reduction. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

In 1996, Nguyen was convicted of Hobbs Act robbery under 18 U.S.C. § 1951 and 18 U.S.C. § 2, and carrying a firearm in connection with a violent crime under 18

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

U.S.C. § 924(i)(1), after the robbery and killing of the owner of the Mandarin Chinese Restaurant in Wichita, Kansas. He was concurrently sentenced to 240 months in prison for the robbery and life in prison for the firearm count.

After serving approximately 25 years of his life sentence, Nguyen moved to reduce his sentence to 35 years under 18 U.S.C. § 3582(c)(1)(A)(i), claiming "the COVID-19 pandemic, combined with his high-risk medical condition[] of tuberculosis, create an extraordinary and compelling reason to grant his motion." R. Vol. I at 149 (cleaned up). Additionally, Nguyen argued in a reply brief that his "age, length of sentence, rehabilitation, and family circumstances" warranted a sentence reduction. *Id.* at 240; *see id.* at 224–34.

The district court denied the motion, finding Nguyen's initial compassionate release request to the Bureau of Prisons ("BOP") only sought a reduced sentence due to COVID-19, and that he had not exhausted all available administrative remedies regarding his other four justifications for release. Accordingly, the district court found it "lack[ed] jurisdiction to consider" any arguments beside those raised in Nguyen's initial motion. *Id.* at 242–43.

Without ruling on whether Nguyen's COVID-19 concerns constituted extraordinary and compelling circumstances, the district court found "reduction would not be warranted after consideration of the sentencing factors" as set forth in 18 U.S.C. § 3553(a). *Id.* at 243. Noting the "extremely serious" nature of Nguyen's offenses, the district court highlighted that "[t]he need for the sentence imposed to reflect the seriousness of the offense does not weigh in favor of a sentence

reduction," nor would it "furnish adequate deterrence to criminal conduct or provide just punishment." *Id.* at 245–46.

Nguyen now timely appeals, and because Nguyen proceeds pro se, we construe his filings liberally. *See United States v. Griffith*, 928 F.3d 855, 864 n.1 (10th Cir. 2019).

II.

Once a prison sentence has been imposed, "courts are generally forbidden from modifying that term of imprisonment." *United States v. Hemmelgarn*, 15 F.4th 1027, 1029 (10th Cir. 2021) (cleaned up). However, 18 U.S.C. § 3582(c)(1) provides one of the narrow exceptions to this rule. *United States v. Maumau*, 993 F.3d 821, 830–31 (10th Cir. 2021). District courts can grant a § 3582(c)(1)(A) motion "only if three requirements are met: (1) the district court finds that extraordinary and compelling reasons warrant such a reduction; (2) the district court finds that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and (3) the district court considers the factors set forth in § 3553(a), to the extent that they are applicable." *Id.* at 831. The § 3553(a) factors include, but are not limited to, the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, [] to provide just punishment for the offense," and to provide "adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2).

We review § 3582(c)(1)(A) rulings for abuse of discretion. *Hemmelgarn*, 15 F.4th at 1031. "A court abuses its discretion only when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary,

capricious or whimsical, or results in a manifestly unreasonable judgment." *United States v. Mobley*, 971 F.3d 1187, 1195 (10th Cir. 2020) (cleaned up). Alternatively, "[a] district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." *United States v. Battle*, 706 F.3d 1313, 1317 (10th Cir. 2013) (cleaned up).

III.

On appeal, Nguyen argues the district court abused its discretion (1) when it dismissed his claims for lack of jurisdiction because it failed to consider his reply brief, in which he included a copy of a second request alleging all five arguments for sentence reduction and submitted to the BOP on August 23, 2021, and (2) again when the court focused primarily on his past criminal conduct. Nguyen claims he submitted his second request "in an abundance of caution," Aplt. Br. at 11, and asked the district court to "hold his motion in abetance [sic] for 30 days for the Warden to respond to his new request," R. Vol. I at 224–25.

Nguyen also submitted a supplemental letter asking for sentence reduction or remand based upon the United States Supreme Court's decision in *United States v. Taylor*. *See* 142 S. Ct. 2015 (2022). He contends *Taylor's* clarification that an Attempted Hobbs Act robbery does not encompass a "crime of violence" also applies to aiding and abetting Hobbs Act robbery. Aplt. Fed. R. App. P. 28(j) Letter (June 28, 2022) at 1. Thus, he reasons that his sentence enhancement for carrying a firearm under § 924(c)(3)(A) cannot stand. *Id*.

Nguyen also claims that if he were sentenced today, he would face a dramatically lower sentence, which alone demonstrates an extraordinary and compelling reason for release. Referencing evolving precedent across the country, he contends the First Step Act "eliminate[s] the practice of 'stacking' sentences," which, if applied retroactively, would lead to a lower sentence. *Id.* at 4.

Regardless of the merits of these claims, the district court did not abuse its discretion because it ultimately denied Nguyen's motion based on the § 3553(a) factors, not a lack of extraordinary and compelling circumstances. Because compassionate release under § 3582(c) requires that prisoners meet all three test requirements, *United States v. Hald*, 8 F.4th 932, 937–38 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2742 (2022), the existence or non-existence of extraordinary and compelling circumstances is irrelevant if another requirement is unmet, *id.* at 942–43 ("If the most convenient way for the district court to dispose of a motion for compassionate release is to reject for failure to satisfy one of the steps, we see no benefit in requiring it to make the useless gesture of determining whether one of the other steps is satisfied.").

Nguyen then argues the district court abused its discretion in its analysis of the § 3553(a) factors, claiming the court "merely recount[ed] the considerations that supported the original sentence," and that § 3582(c)(1)(A) "necessarily envisions that the § 3553(a) factors may balance differently upon a motion for compassionate release than they did at the initial sentencing." Aplt. Br. at 13. He further maintains

that the district court did not address his "extraordinary efforts to rehabilitate and transform himself." *Id.* at 10.

But Nguyen's mere disagreement with the district court's analysis of the factors does not prove abuse of discretion. "Because the weighing of the § 3553(a) factors is committed to the discretion of the district court, we cannot reverse unless we have a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Hald*, 8 F.4th at 949 (cleaned up). We have no such conviction here, as the district court found "[t]he need for the sentence imposed to reflect the seriousness of the offense does not weigh in favor of a sentence reduction," and that a reduction wouldn't "furnish adequate deterrence to criminal conduct or provide just punishment," because of the "extremely serious" nature of Nguyen's offenses. R. Vol. I at 245.

Nguyen's supplemental argument regarding stacking does not bear upon these determinations, regardless of its accuracy, because his sentences were imposed concurrently, not stacked. Thus, the district court did not abuse its discretion because it considered the factors in light of the facts and made a reasonable determination within the bounds of permissible choice.

IV.

Nguyen's motion to proceed on appeal *in forma pauperis* is granted due to demonstrable financial need.

V.

We AFFIRM the district court's denial of Nguyen's 18 U.S.C. § 3582(c)(1)(A) motion.

Entered for the Court

Allison H. Eid
Circuit Judge