FILED
United States Court of Appeals
Tenth Circuit

July 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARLOS TAFOYA, JR.,

Defendant - Appellant.

No. 22-2110
(D.C. No. 2:15-CR-04112-RB-JHR-1)
(D. N.M.)

ORDER AND JUDGMENT*

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

Carlos Tafoya, Jr., appearing pro se, appeals the district court's denial of his motion for compassionate release for failure to exhaust administrative remedies. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In 2016, Tafoya pleaded guilty to two drug trafficking offenses and was sentenced to 156 months of imprisonment. In 2022, he filed a pro se motion in the

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

district court for compassionate release under 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194, 5239. In relevant part, the statute authorizes a district court to reduce a term of imprisonment after considering the sentencing factors in 18 U.S.C. § 3553(a) if the court "finds that . . . extraordinary and compelling reasons warrant such a reduction," and if "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A)(i). Prior to enactment of the First Step Act, only the Director of the Bureau of Prisons (BOP) could file a motion for compassionate release on behalf of a defendant. *See, e.g.*, *United States v. Smartt*, 129 F.3d 539, 541 (10th Cir. 1997) (explaining that a defendant is not eligible for compassionate relief absent a motion by the BOP Director). Section 603(b)(1) of the First Step Act amended § 3582(c)(1)(A) to allow a defendant to file a motion for compassionate relief on his own behalf but only "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier," § 3582(c)(1)(A).

Tafoya alleged he had exhausted his administrative remedies by filing "a petition for compassionate release" with the warden of his facility, and the warden had denied his request. R., Vol. I at 30. The government opposed the motion, arguing that Tafoya had failed to exhaust his administrative remedies because he never asked the warden to reduce his sentence based on compassionate release under

§ 3582(c)(1)(A) but instead requested placement on home confinement under 18 U.S.C. § 3624(c)(2) and the Coronavirus Aid, Relief and Economic Security Act (CARES Act).[1] The district court agreed with the government and denied Tafoya's motion without prejudice for failure to exhaust administrative remedies because he never asked the warden for compassionate release.[2] This appeal followed.

II. DISCUSSION

"Exhaustion is a question of law we review de novo." *Fontenot v. Crow*, 4 F.4th 982, 1020 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2777 (2022). We construe Tafoya's pro se filings liberally, but we may not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

By regulation, "[a] request for a motion under . . . [§] 3582(c)(1)(A) shall be submitted to the Warden." 28 C.F.R. § 571.61(a) "[A]t a minimum," the request must identify "(1) [t]he extraordinary or compelling circumstances that the inmate believes warrant consideration" and "(2) [p]roposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis for the request involves the inmate's health, information on where the inmate will

[1] This exhaustion requirement is a mandatory claim-processing rule that the Government may invoke in response to a § 3582(c)(1)(A) motion. *United States v. Hemmelgarn*, 15 F.4th 1027, 1030–31 (10th Cir. 2021).

[2] The district court also construed Tafoya's motion as seeking relief under the CARES Act and dismissed that portion of the motion for lack of jurisdiction to review the denial of home confinement under the CARES Act. On appeal, Tafoya has expressly disclaimed seeking CARES Act relief, and he has not challenged the district court's CARES Act ruling. We therefore need not address that ruling.

receive medical treatment, and how the inmate will pay for such treatment." *Id.* Tafoya's request to the warden failed to meet any of these requirements.

We first note that Tafoya did not submit a request to the warden for a § 3582(c)(1)(A) motion, as the regulation requires. Instead, he submitted a "Request for Administrative Remedy," stating that he was "appealing the Covid Exemption Committee's decision to deny [him] for the *Cares Act*." R., Vol. I at 39 (emphasis added). The warden rejected the request, noting that Tafoya's Unit Team had submitted a request for placement on home confinement under the CARES Act, which "was denied by the COVID-19 Exemption Review Committee" because of his "history of violence, history of resuming criminal activity upon release from custody, and history of violating the conditions of [his] supervised release." *Id.* at 38. Thus, Tafoya did not initially submit his request to the warden as the regulation requires.

But even overlooking this procedural misstep, Tafoya's request to the warden stated only that he "[met] all the requirements for the *Cares Act*" because he has "underl[y]ing conditions," had been "a model inmate," had "program[med]" and "held a job," and has "multiple medical conditions." *Id.* at 39 (emphasis added).[3] Tafoya argues that his reference to the CARES Act was sufficient for exhaustion purposes because the CARES Act amended § 3582(c)(1)(A) and "act[s] as a statutory gateway to [§] 3582(c) compassionate release," so "the two statutes must be read

[3] Tafoya never supplied the district court with his request to the COVID-19 Exemption Review Committee. Counsel for the government represented that they had confirmed with the BOP that Tafoya never filed a request for compassionate release with the warden of his facility. *See* R., Vol. I at 63.

together." Aplt. Br. at 24. He also argues he substantially complied with 18 C.F.R. § 571.61(a)'s requirements, which, as he notes, are set out verbatim in section 2 of BOP Program Statement 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g) (2019).

We disagree. The CARES Act did not amend § 3582(c)(1)(A)'s sentence-reduction provision but instead expanded the BOP's power to place a prisoner in home confinement under a different statute, 18 U.S.C. § 3624(c)(2). *See* CARES Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (2020) (authorizing the BOP Director to "lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of [§] 3624(c)(2) . . . as the Director determines appropriate"[4]). Furthermore, the CARES Act and § 3582(c)(1)(A) provide distinct remedies. The CARES Act involves a transfer to home confinement under § 3624(c)(2), *see id.*, whereas § 3582(c)(1)(A) states that a court "may reduce the term of imprisonment." Therefore, an administrative request seeking only CARES Act relief does not meet § 3582(c)(1)(A)'s exhaustion requirement, even if a court affords a liberal construction to the request because the movant is pro se. *United States v. Purify*, No. 20-5075, 2021 WL 5758294, at *2 (10th Cir. Dec. 3, 2021) (unpublished).[5]

[4] The expanded authorization expired 30 days after termination of the national COVID-19 pandemic emergency declared by the President of the United States. *See* CARES Act § 12003(a)(2), (b)(2), 134 Stat. at 516.

[5] Although *Purify* is unpublished and therefore not precedential, we find its analysis of this issue persuasive and cite it for that purpose. *See* 10th Cir. R. 32.1(A)

Finally, Tafoya's request to the warden failed to identify any proposed release plans, as § 571.61(a)(2) requires. Because Tafoya's request to the warden sought only CARES Act relief and he failed to identify any release plans, he failed to exhaust administrative remedies for his request for § 3582(c)(1)(A) compassionate release.[6]

Tafoya's remaining arguments do not persuade us otherwise. He contends the district court overlooked that he used a form approved for initiating a request for compassionate relief. The form he cites, however, is not the "Request for Administrative Remedy" he submitted to the warden, *see* R., Vol. I at 39, but a generic "Inmate Request to Staff" form where he expressed his desire "to appeal Regions [sic] decision to denying [his] Cares Act," *id.* at 40. But even if both submissions were on forms approved for seeking § 3582(c)(1)(A) compassionate release, he still failed to alert anyone that he was seeking such relief.

("Unpublished decisions are not precedential, but may be cited for their persuasive value.").

[6] The district court identified another exhaustion problem—Tafoya did not appeal the warden's denial of relief through the Administrative Remedy Procedure, as required by 28 C.F.R. § 571.63(a). Tafoya says it was error to impose an additional layer of exhaustion because BOP Program Statement 5050.50(9) permits a defendant to file a motion for a § 3582(c)(1)(A) reduction in sentence with the sentencing court after the lapse of 30 days from the date the warden receives a request (in Tafoya's case, the warden denied his request 29 days after receiving it). Although the government has not responded to this argument in its appellate brief, it appeared to agree in the district court, stating that § 3582(c)(1)(A) "allows an inmate to file a motion in court once 30 days have passed since the receipt of the request by a warden, even if the warden denies the request within 30 days and the inmate does not thereafter appeal the denial," R., Vol. I at 62. We need not take up the merits of this issue because Tafoya's failure to request compassionate relief from the warden in accordance with 28 C.F.R. § 571.61(a) is a sufficient basis for affirming the district court's denial of his motion.

Tafoya also posits that the warden created the COVID-19 Exemption Review Committee under the authority of BOP Program Statement 5050.50(5)(b) and (6)(b) to examine factors set out in BOP Program Statement 5050.50(7) concerning review of requests for sentence reductions. To the extent he is suggesting that the Committee's review of his request for CARES Act relief therefore meant he had asked for compassionate release under § 3582(c)(1)(A), we reject the suggestion as speculative and fanciful, particularly since sections 5(b) and 6(b) of the Program Statement refer to a committee convened to consider requests for sentence reductions based on factors Tafoya never invoked (death or incapacitation of a family member caregiver of an inmate's child and the incapacitation of an inmate's spouse or registered partner).

Tafoya further alleges that no one ever informed him about the process of obtaining a reduction in his sentence, as required by BOP Program Statement 5050.50(1). Assuming the truth of his allegation, we fail to see how it affects our disposition because Tafoya has not argued he was unaware of the availability of compassionate release, and simply asking the warden for it requires no special knowledge of procedure that the BOP might have provided.[7]

[7] Tafoya also argues the merits of his motion for compassionate relief. We need not reach those arguments because the merits were not properly before the district court due to his failure to exhaust.

III. CONCLUSION

We affirm the district court's order denying Tafoya's motion for compassionate release.

Entered for the Court

Gregory A. Phillips
Circuit Judge