FILED
United States Court of Appeals
Tenth Circuit

September 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MIGUEL ROMERO,

Defendant - Appellant.

No. 22-3075
(D.C. No. 2:05-CR-20017-JWL-2)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **CARSON**, Circuit Judges.

Miguel Romero appeals from the district court's denial of his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

I. BACKGROUND & PROCEDURAL HISTORY

Romero and a co-conspirator ran a large marijuana and methamphetamine distribution network in the Kansas City area in the early 2000s. In 2006, a federal

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

jury convicted Romero on various charges arising from his criminal activities. Given his criminal history and the large amount of drugs involved, the Sentencing Guidelines advised a life sentence on three of those charges, and that is the sentence the district court chose to impose. We affirmed his conviction and sentence. See United States v. Verdin-Garcia, 516 F.3d 884, 888 (10th Cir. 2008).

In 2014, the United States Sentencing Commission promulgated Amendment 782 to the Sentencing Guidelines. Had Amendment 782 been in place when the district court sentenced Romero in 2006, his advisory Guidelines range would have been 360 months to life, rather than simply life. Romero accordingly moved to reduce his sentence to 360 months. See 18 U.S.C. § 3582(c)(2) (authorizing the district court to reduce the sentence of "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission").

The district court denied Romero's motion, concluding that the high end of the amended Guidelines range (i.e., life) remained the appropriate sentence. We affirmed. See United States v. Verdin-Garcia, 824 F.3d 1218, 1219 (10th Cir. 2016).

In January 2022, Romero again moved for a sentence reduction under § 3582(c)(2), again invoking Amendment 782, and again asking for a 360-month sentence. He claimed that, since his earlier motion, he had focused on rehabilitation and positive behavior and had maintained a clean disciplinary record. He also

pointed out that he had reached the age of 48, so his likelihood of recidivism was low. Finally, he offered general policy arguments against the length of sentences recommended by the Guidelines.

The government responded that Romero's motion was an untimely motion to reconsider the court's denial of § 3582(c)(2) relief in 2015. After Romero's deadline to file a reply brief lapsed, the district court issued an order adopting the government's reasoning. That order was dated March 23, 2022.

One week later (March 30), the district court received a reply brief from Romero. He argued that his motion was a new motion and the court should not deem it a motion to reconsider the 2015 denial. This argument appears to have been directed at the government's response brief—there was no hint that Romero had received the district court's March 23 order.[1]

On April 1, the district court entered a new order. The court said that Romero's "late reply" had convinced it that his new motion was not a motion to reconsider. R. vol. 2 at 66. Thus, it vacated its March 23 order. But it went on to deny Romero's motion on the merits, reasoning that life was still the appropriate sentence under the circumstances.

On April 12, Romero filed a notice of appeal, identifying the order appealed from as the district court's "order dated 3/23/2022." Id. at 68. The notice gives no

[1] Romero's certificate of service, which the government does not contest, states that he placed the reply in the prison mail system some twenty days before the district court issued its March 23 Order.

indication that Romero had received the district court's April 1 order vacating the March 23 order. When Romero filed his opening appellate brief on May 6, he argued that the court should not have deemed his motion a motion to reconsider. He therefore asked this court to vacate the *March 23* order and remand with instructions to consider his motion on the merits. However, Romero also stated he was "petitioning this court to remand and[/]or reverse the district court's order/ruling in this matter." Aplt. Opening Br. at 1. He therefore argued briefly on the merits of his motion.

In response, the government argued that the district court's *April 1* order was well within the court's discretion. The government attached a copy of that order to its brief. The government appeared to acknowledge that the April 1 order was the subject of the appeal and never alleged prejudice or lack of notice based on Romero's notice of appeal.

In reply, Romero claimed he never received the April 1 order. Apparently, Romero contends he first learned about it when he received the government's response brief. He went on to argue in reply that the April 1 order (i.e., denial of relief on the merits) was an abuse of discretion.

The following week, this court received a letter from Romero asking for "time to try to compel the [prison] mailroom and[/]or his Unit Team to act, in an effort to obtain the exhibit of proof that he never received [the April 1 order]." Letter dated July 7, 2022, at 1 (filed July 14, 2022). The government did not object.

The court received a second letter from Romero in October 2022, claiming that the prison mailroom supervisor would not disclose his "findings" without a court order. Letter dated Oct. 20, 2022 (filed Oct. 24, 2022). "Therefore," he concluded, "I would like for the Court if it finds it necessary, to order the mailroom supervisor . . . to provide[] the requested information." Id.

II. APPELLATE JURISDICTION

Federal Rule of Appellate Procedure 3(c)(1)(B) requires the appellant to "designate the judgment—or the appealable order—from which the appeal is taken" in the notice of appeal. This requirement is jurisdictional. See Smith v. Barry, 502 U.S. 244, 247–48 (1992). Romero's notice of appeal creates a jurisdictional question because it specifically refers to only the March 23 order—an order that the district court had vacated by the time Romero filed the notice of appeal. We must resolve this question before we can consider the merits. See, e.g., United States v. Battles, 745 F.3d 436, 447 (10th Cir. 2014) ("It is axiomatic that we are obliged to independently inquire into the propriety of our jurisdiction."). For these purposes, we accept Romero's representation (unchallenged by the government) that he never knew of the April 1 order until he received the government's appellate response brief.[2]

Despite Rule 3's jurisdictional nature, we "liberally construe the requirements of Rule 3. Thus, when papers are 'technically at variance with the letter of [the rule],

[2] Thus, to the extent Romero's two post-reply letters can be construed as motions, we deny them as moot.

a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.'" Smith, 502 U.S. at 248 (first citing Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 (1988); Foman v. Davis, 371 U.S. 178, 181–82 (1962); then quoting Torres, 487 U.S. at 316–17). We believe our decision in Fleming v. Evans, 481 F.3d 1249 (10th Cir. 2007), is instructive here.

In Fleming, a magistrate judge made a dispositive recommendation and the district court adopted it because no party filed a timely objection. Id. at 1253. The appellant (a pro se prisoner) then filed a notice of appeal and a motion to reconsider, stating he had timely mailed objections to the magistrate judge's recommendation. Id. The district court granted the motion to reconsider and vacated its original disposition, then entered a new order adopting the recommendation on the merits (i.e., over the appellant's objections). Id. The appellant never filed a new notice of appeal, but he did file a combined motion to proceed *in forma pauperis* and for a certificate of appealability. Id. That motion, however, continued to refer to the district court's *original* disposition (which had been vacated). Id. We nonetheless concluded that "[the] discrepancy [did] not render [his] notice of appeal ineffective. Even if a notice fails to properly designate the order from which the appeal is taken, this Court has jurisdiction if the appellant's intention was clear." Id. at 1253–54. "Although he denominated the order being appealed as the [district] court's [original disposition], that order was super[s]eded by the court's [later] order, which reached the same conclusion as the former." Id. at 1254. Thus, the appellant's filings

amounted to the "'functional equivalent' of a formal notice of appeal." Id. (quoting Smith, 502 U.S. at 248).

Fleming is an example of the principle that a pro se appellant's failure to precisely designate the judgment appealed from is not always fatal. See Sanabria v. United States, 437 U.S. 54, 67 n.21 (1978). Rule 3's requirement to "designate the judgment" means that the court and the appellee must be able to fairly infer the appellant's intent to appeal from a specific ruling by probing the notice of appeal, and that the appellee must not be misled or prejudiced. Id. Moreover, we construe notices of appeal from pro se prisoners liberally to preserve appellate jurisdiction. Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962). We also at times interpret the Rules with a degree of leniency when a pro se prisoner has done all he could to timely file a notice of appeal and is at the mercy of the postal system. Fed. R. App. P. 3 advisory committee's general note to 1967 adoption.

In Romero's notice of appeal, he designated the only final order that he had received. Both of the district court's orders reached the same ultimate conclusion—a denial of relief (although for different reasons). Romero's notice of appeal shows his clear intent to overturn the court's denial of relief. And, importantly, the government received notice and did not suffer prejudice, as shown by its full briefing on the merits of the April 1 order. The government's briefing strategy is logical because the April 1 order replaced the March 23 order. No other orders exist related to Romero's motion; thus, no legitimate confusion could exist as to what order was on appeal. We also note that Romero did all he could to file a proper notice of appeal in the face of a

mail system breakdown. These factors together establish for purposes of this case that Romero's notice of appeal sufficiently designated the April 1 order.

For these reasons, we hold that Romero's notice of appeal was effective to confer appellate jurisdiction for our review of the April 1 order.

III. ANALYSIS

"We review for an abuse of discretion a district court's decision to deny a reduction of sentence under 18 U.S.C. § 3582(c)(2)." United States v. Osborn, 679 F.3d 1193, 1195 (10th Cir. 2012).

As noted, the motion at issue was Romero's second request for § 3582(c)(2) relief. The district court's denial of the second motion was informed by its analysis of his first motion. We therefore begin with the court's reasons for denying the first motion:

> In addition to the sheer volume of drugs involved in this case, the court noted during sentencing that Mr. Romero's crimes involved weapons and the utilization of young people as recruited associates; that Mr. Romero showed no respect for the law, particularly in light of the fact that he was previously convicted of drug trafficking, was deported and, upon re-entering, engaged again in extensive drug trafficking activities; that Mr. Romero denied his guilt at his sentencing; he demonstrated a lack of remorse for his crimes; he engaged in a leadership role in the crimes; and he demonstrated a propensity to engage in criminal conduct.

United States v. Romero, No. 05-20017-02-JWL, 2015 WL 7295446, at *2 (D. Kan. Nov. 18, 2015).

When Romero filed his second motion, he focused on rehabilitation (as evidenced by a clean disciplinary record and the number of classes he has taken in prison), his advancing age, and the alleged inefficacy of long prison sentences to deter crime. But the district court

> remain[ed] convinced that a reduction is not warranted in this case, despite Mr. Romero's rehabilitative efforts while in custody and despite his assertion that a 360-month sentence is sufficient punishment for his conduct. As the court highlighted in connection with Mr. Romero's earlier motion, this case involved "the most significant quantities of drugs" that the court had seen in any prosecution and the court imposed a life sentence in September 2006 without hesitation. Moreover, Mr. Romero's crimes involved weapons and the utilization of young people as recruited associates. He has shown no respect for the law, particularly in light of the fact that he was previously convicted of drug trafficking, was deported and, upon re-entering, engaged again in extensive drug trafficking activities. He continues to demonstrate a lack of remorse for his crimes (none is expressed in his renewed motion), he engaged in a leadership role in those crimes, and he has demonstrated a propensity to engage in criminal conduct. In light of these significant circumstances, the court remains persuaded that a life sentence is appropriate under § 3553(a).

R. vol. 2 at 66–67.

On appeal, Romero insists that his district court filings show he has genuinely rehabilitated himself, so the district court should not have continued to consider the criminal conduct that put him in prison. We are skeptical that the relevant statutes allow the district court to disregard his criminal conduct. See 18 U.S.C. § 3582(c)(2) (requiring the district court to "consider[] the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable"); id. § 3553(a)(2)(A) (specifying "the

seriousness of the offense" as one factor for the district court to consider). In any event, as a practical matter, it seems to us impossible to judge rehabilitation without considering the underlying crime.[3] Finally, the record supporting Romero's rehabilitation claim is thin. The district court therefore did not abuse its discretion when it found that Romero's rehabilitative efforts did not outweigh his crime.

Romero also points out that, before trial, the government offered him a plea deal under which he would serve twenty-two years. If Romero means to say that the plea offer established an upper bound on a reasonable sentence, the argument runs into several problems. First, he offers no supporting authority. Second, if this were a viable argument, it strikes us as one he should have made on direct appeal. Third, at a minimum, Romero should have made this argument in his § 3582(c)(2) motion, but he did not. He has therefore waived the argument and we do not consider it further. See Schrock v. Wyeth, Inc., 727 F.3d 1273, 1284 (10th Cir. 2013) ("Arguments that were not raised below are 'waived for purposes of appeal.'" (quoting Quigley v. Rosenthal, 327 F.3d 1044, 1069 (10th Cir. 2003)).

Romero further insists that the district court unfairly found that he has not demonstrated remorse. He says that he had earlier filed an unsuccessful motion for a sentence reduction under § 3582(c)(1), i.e., a compassionate release motion, in which he expressed remorse. Romero seems to be saying that the district court should have kept his § 3582(c)(1) motion in mind when it decided his § 3582(c)(2) motion. But

[3] For example, one convicted of armed robbery has further to go than one convicted of shoplifting.

we cannot say it was an abuse of discretion for the district court to take each motion on its own terms.

Finally, Romero asserts that the district court purported to be "an expert in demonology" because it "suggest[ed] that Mr. Romero was possessed at birth to engage in criminal conduct." Aplt. Reply Br. at 8. We reject this caricature. The district court set forth objective circumstances that led it to conclude that Romero has "a propensity to engage in criminal conduct." R. vol. 2 at 67. Other than his argument that the district court should have accepted his rehabilitation claim, Romero does not explain why the district court's conclusion cannot reasonably follow from the objective circumstances it cited. Thus, the district court did not abuse its discretion.

IV. CONCLUSION

We affirm the district court's April 1 order denying Romero's § 3582(c)(2) motion. We grant Romero's motion for leave to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Joel M. Carson III
Circuit Judge