NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 4, 2023*
Decided May 12, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2326

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANNYE T. McINTOSH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:05-cr-00119-JMS-TAB

Jane Magnus-Stinson,
Judge.

O R D E R

Dannye McIntosh, a federal prisoner, appeals the denial of his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). Because the district court properly ruled that his reasons for release—nonretroactive changes in law—were not extraordinary and compelling grounds for release, we affirm.

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* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

McIntosh was convicted in 2005 of possessing more than 100 kilograms of marijuana. *See* 21 U.S.C. § 841(a)(1). The court ruled that he was a "career offender" under the Sentencing Guidelines, *see* U.S.S.G. § 4B1.1 (2002), and imposed a within-guidelines sentence of 30 years' imprisonment. We affirmed on direct appeal and noted that the career-offender enhancement nearly tripled his sentence. *See United States v. Black*, Nos. 06-1803 & 06-1817, 2007 WL 959411, at *4 (7th Cir. Mar. 30, 2007).

Years later, McIntosh unsuccessfully moved to vacate his sentence under 28 U.S.C. § 2255, arguing that the "career offender" provision of the Guidelines was unconstitutionally vague. He relied on *Johnson v. United States*, 576 U.S. 591, 597 (2015), which held that a statute with similar wording was void for vagueness. The district court explained that the challenge was foreclosed by *Beckles v. United States*, 580 U.S. 256, 264–67 (2017), which observed that, unlike the statute in *Johnson*, the Guidelines are advisory, *see United States v. Booker*, 543 U.S. 220, 245 (2005), and thus the "career offender" provision is not subject to a void-for-vagueness constitutional challenge. McIntosh did not appeal the district court's decision.

McIntosh later moved for compassionate release, *see* 18 U.S.C. § 3582(c)(1)(A)(i), submitting two arguments. First, he noted that he was sentenced before the passage of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, which had since lowered the mandatory-minimum sentence for his offense from 20 to 15 years. *See* First Step Act § 401(a)(2)(i). The Act's reduction was prospective only, *see id.* § 401(c), but McIntosh argued that the change nevertheless supplied an extraordinary and compelling reason to reduce his sentence. The court disagreed. It explained that his argument was foreclosed by *United States v. Thacker*, 4 F.4th 569, 574–75 (7th Cir. 2021), which held that a nonretroactive change to a mandatory-minimum sentence was not an extraordinary and compelling reason for compassionate release. *See also United States v. Martin*, 21 F.4th 944, 946 (7th Cir. 2021).

Second, he revived the argument in his § 2255 motion that the "career offender" Guideline was unconstitutional and thus sentencing him as one was "plain error." The district court rejected this reason for compassionate release because criminal defendants who assert sentencing errors must raise them either on direct appeal or—as McIntosh did—collaterally through § 2255. *Id.* Having found no reason to reduce McIntosh's sentence, the court denied the motion.

McIntosh presents two arguments in his appeal of that decision, which we review for abuse of discretion. *United States v. Saunders*, 986 F.3d 1076, 1078 (7th Cir.

2021). First, he contends that *Thacker* was "explicitly overruled" in *Concepcion v. United States*, 142 S. Ct. 2389 (2022). He reads *Concepcion* as allowing district courts to consider nonretroactive, intervening changes of law when deciding compassionate-release motions. But we have explained that "nothing in *Concepcion* calls into question our decision in *Thacker*," *United States v. Peoples*, 41 F.4th 837, 842 (7th Cir. 2022), because *Concepcion* does not bear on *Thacker*'s "threshold question whether any given prisoner has established an 'extraordinary and compelling' reason for release," *United States v. King*, 40 F.4th 594, 596 (7th Cir. 2022). In answering that threshold question, "judges must not rely on non-retroactive statutory changes" to the law. *Id.* at 595.

McIntosh's only other contention on appeal is that he presented multiple grounds that, together, meet the threshold for relief. We have encouraged district judges to consider reasons for compassionate release cumulatively, *see United States v. Vaughn*, 62 F.4th 1071, 1072–73 (7th Cir. 2023), but the district court did not err in this regard. Nonretroactive statutory changes do not warrant compassionate release either "alone or in combination with other factors." *Thacker*, 4 F.4th at 576. That leaves McIntosh's career-offender "error," which the court properly rejected as by itself insufficient. *See Martin*, 21 F.4th at 946.

We close with a final observation. McIntosh noted in his motion for compassionate release that the career-offender Guideline was amended in 2016 to accord with *Johnson*. To the extent that he wants us to treat the amendment as warranting sentence relief under 18 U.S.C. § 3582(c)(2), which covers retroactive amendments to the Guidelines, his contention fails because the amendment is not retroactive. *See* U.S.S.G. § B1.10(a)(1), (a)(2)(A), (d).

AFFIRMED