NONPRECEDENTIAL DISPOSITION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 November 22, 2023*
Decided November 27, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 23-2792

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANDREW J. JOHNSTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-cr-00517

Rebecca R. Pallmeyer, *Chief Judge*.

No. 23-3032

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANDREW J. JOHNSTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-cr-00517

Rebecca R. Pallmeyer, *Chief Judge*.

* These successive appeals have been submitted to the original panel under Operating Procedure 6(b). We have unanimously agreed to decide these cases without argument because the briefs and record adequately present the facts and legal arguments, and argument would not significantly aid the court. See Fed. R. App. P. 34(a)(2)(C).

No. 23-3066

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANDREW J. JOHNSTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-cr-00517

Rebecca R. Pallmeyer, *Chief Judge*.

O R D E R

Ever since his 2019 conviction for bank robbery, Andrew Johnston has been peppering the district court with motions and appealing from adverse decisions. We resolved two of his appeals earlier this year and three more in 2022. All were frivolous.

Today we take up three more of his appeals, which are likewise frivolous.

In No. 23-2792 Johnston contests two decisions of the district court, one denying what Johnston styles as a Rule 33 motion for a new trial and the other asking the judge to modify the conditions of his supervised release. The district court ruled that the former motion is a disguised collateral attack, which requires appellate permission (as Johnston already had filed and lost a motion under 28 U.S.C. §2255), and that the latter request is premature.

The first of these rulings is unambiguously correct. A mis-captioned Rule 33 motion is properly dismissed when the prisoner seeks the sort of relief available only under §2255. Genuine Rule 33 motions based on newly discovered evidence must be filed within three years of the jury's verdict. Rule 33 motions based on any other reasons must be filed within 14 days of the verdict—and as Johnston did not submit any newly discovered evidence bearing on his guilt, the 14-day time limit applies. (The three-year limit also has expired.)

The second ruling was within the district court's discretion. Although 18 U.S.C. §3583(e)(2) allows a judge to modify the terms and conditions of supervised release "at any time", the statute does not *compel* a judge to act on the merits whenever a prisoner asks. Judges may postpone decision until closer to release, when the appropriateness of conditions is more readily gauged. See, e.g., *United States v. Siegel*, 753 F.3d 705, 717 (7th Cir. 2014). Johnston wants to contest a condition that affects his possession of firearms and is authorized by 18 U.S.C. §3563(b)(8). Whether and when such conditions may be imposed after *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), is a question yet to be resolved by the Supreme Court. No post-*Bruen* appellate decision

addresses the validity of §3563(b)(8). Nor does any decision, before or after *Bruen*, hold that the Second Amendment prevents disarming convicted bank robbers.

In No. 23-3032 Johnston contends that the district court should have used Fed. R. Crim. P. 35 to correct what he calls a "clerical error": a restitution award that was not announced in open court at the time of sentencing. The district judge patiently pointed out to Johnston that she did not award restitution in this case but simply reiterated that restitution awarded after his prior criminal convictions remains due. There is no error, let alone one correctable under Rule 35.

In No. 23-3066 Johnston asks us to overrule multiple decisions limiting the sort of arguments that may justify compassionate relief under 18 U.S.C. §3582(c)(1)(A). Here Johnston's problem is that none of the decisions he wants us to overrule affected the district court's disposition. After carefully analyzing Johnston's arguments, the judge wrote that even if he has established an "extraordinary and compelling" reason for early release (and the judge thought that he has not), such a reason is not a sufficient condition for release. It remains essential to analyze the considerations specified by 18 U.S.C. §3553(a). The judge did so and concluded that Johnston's record of recidivism would make early release imprudent. That decision does not reflect an abuse of discretion. Johnston, who seems fixated on his argument for overruling, does not even try to contest the district judge's exercise of discretion, which makes his appeal pointless and frivolous. An appellant who does not contest all of the reasons for an adverse decision has no chance of prevailing on appeal.

With today's decision, this court has resolved five of Johnston's appeals in 2023 alone. All have been frivolous. This cavalcade of motions and appeals must cease. We now warn Johnston that future frivolous appeals will cause the court to award financial sanctions, which if unpaid will lead the court to treat his future appeals as automatically dismissed, without the need for briefing or a judicial order. See *Alexander v. United States*, 121 F.3d 312 (7th Cir. 1997).

AFFIRMED