

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

TROY WRAGG,

Defendant.

CRIMINAL ACTION
NO. 15-398

ORDER

AND NOW, this 9th day of March 2021, upon consideration of Defendant Troy Wragg's pro se Motion for Compassionate Release Under the First Step Act (Doc. No. 350), it is **ORDERED** that Defendant's Motion (Doc. No. 350) is **DENIED**.¹

¹ On July 16, 2020, the Court denied Defendant's initial Motion for Compassionate Release in a twenty-three-page Opinion. (See Doc. Nos. 307, 308.) On November 18, 2020, the Court denied Defendant's second Motion for Compassionate Release, finding that Defendant still did not present an extraordinary and compelling reason for his release and that the 18 U.S.C. § 3553(a) sentencing factors also did not warrant his release. (See Doc No. 329.) On December 1, 2020, Defendant appealed the denial of his second Motion for Compassionate Release to the Third Circuit Court of Appeals. (See Doc. No. 339; see also 3d Cir. Docket No. 20-3430.) Because Defendant's appeal is pending, the Court lacks jurisdiction to resolve the instant Motion. Despite this jurisdictional impediment, the Court also will address the Motion on the merits and will provide an indicative ruling under Federal Rule of Criminal Procedure 37(a). For the reasons stated below, Defendant's Motion would be denied if the Third Circuit were to remand the case to this Court for consideration.

A. The Court Lacks Jurisdiction Over Defendant's Motion

As a threshold matter, the Court must determine whether it may entertain Defendant's Motion at the present time. "As a general rule the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the court of appeals." Cochran v. Birkel, 651 F.2d 1219, 1221 (6th Cir. 1981); see also Taylor v. KeyCorp, 680 F.3d 609, 616 (6th Cir. 2012) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.") (quotation marks and citation omitted).

A review of the District Court and Third Circuit dockets in this case makes it clear that this Court does not have jurisdiction over Defendant's Motion because whether his sentence should be

modified is at issue in both actions. (See Doc. No. 339) (“This notice of appeal is in response to the denial of Troy Wragg’s Emergency Motion for Compassionate release judgment that was made on November 18, 2020.”) As a result, this Court should not take any action that could “alter the status of the case as it rests before the Court of Appeals.” Dayton Indep. Sch. Dist. v. U.S. Min. Prods. Co., 906 F.2d 1059, 1063 (5th Cir. 1990) (quotation marks omitted) (citing Coastal Corp. v. Texas E. Corp., 869 F.2d 817, 820-21 (5th Cir. 1989).

Federal Rule of Criminal Procedure 37(a) (titled “Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal”) provides, however, that “[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.” Fed. R. Crim. P. 37(a). Because of the implied urgency of Defendant’s Motion, the Court will reach the merits and provide an indicative ruling under Rule 37(a). For the reasons set forth below, Defendant’s Motion would be denied if the Third Circuit were to remand the case to this Court for consideration.

B. Defendant’s Motion for Compassionate Release Would Be Denied if the Third Circuit Remanded the Case to this Court

“The First Step Act empowers criminal defendants to request compassionate release for ‘extraordinary and compelling reasons.’” United States v. Raia, 954 F.3d 594, 595 (3d Cir. 2020) (quoting 18 U.S.C. § 3582(c)(1)(A)(i)). However, before a defendant can make such a request to the Court, he “must at least ask the [Bureau of Prisons (“BOP”)] to do so on [his] behalf and give [the] BOP thirty days to respond,” Raia, 954 F.3d at 595, and if the BOP does respond adversely within the thirty days, to then exhaust any available administrative appeals during that period. See § 3582(c)(1)(A). If the defendant exhausts his administrative appeals, a court may “reduce the term of imprisonment . . . , after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction” § 3582(c)(1)(A). In short, if a district court determines that an extraordinary and compelling reason exists, it must then weigh that reason against the § 3553(a) factors to determine if a sentence reduction is warranted and, if so, the extent of such reduction. See United States v. Somerville, 463 F. Supp. 3d 585, 588 (W.D. Pa. 2020) (“[T]he [c]ourt must weigh [the] extraordinary circumstances against the ordinary sentencing factors under 18 U.S.C. § 3553(a).”). If the balance of a defendant’s extraordinary and compelling reason and the § 3553(a) factors support a reduced sentence, the court may reduce the prison term, modify the terms of supervised release, or both.

Here, Defendant has exhausted his administrative appeals, but his Motion would be denied because he has not shown an extraordinary and compelling reason for his release. Additionally, a balance of the § 3553(a) factors counsels against his release. Each will be discussed in turn below.

1. Defendant Has Not Shown an Extraordinary and Compelling Reason for His Release

Defendant still has not shown an extraordinary and compelling reason for his release. In the Opinion dated July 16, 2020, this Court held that Defendant's hypertension, epilepsy, obesity, mental health, and hyperlipidemia conditions do not establish an extraordinary and compelling reason justifying his release. (See Doc. No. 307 at 17-20.) Additionally, in the Order dated November 18, 2020, the Court found that Defendant did not show an extraordinary and compelling reason because he did not "present a significant change in any of [his] conditions." (Doc. No. 329 at 2.) Moreover, in the same Order, the Court held that Defendant's asserted seizure condition, wheelchair use, and COVID-19 diagnosis did not meet the extraordinary and compelling reason threshold. (See *id.* at 2-3.)

In the instant Motion, Defendant again presents his obesity, epilepsy, hyperlipidemia, and hypertension as extraordinary and compelling reasons for his release. (See Doc. No. 350 at 1.) He does not offer, however, any significant change in these conditions since his previous Motions were decided. Moreover, of these conditions, the Centers for Disease Control and Prevention ("CDC") has only listed obesity as causing an "increased risk of severe illness from . . . COVID-19," and hypertension as potentially causing an increased risk of severe illness. See People with Certain Medical Conditions, CENTERS FOR DISEASE AND CONTROL PREVENTION (Feb. 22, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. Despite the CDC's categorization, courts have routinely denied compassionate release based on obesity and hypertension. See, e.g., United States v. Bermudez, No. 05-044-15, 2020 WL 7338556, at *4-6 (E.D. Pa. Dec. 14, 2020) (denying compassionate release despite defendant's BMI of 61.9 kg/m²); United States v. Williams, No. 15-471, 2020 WL 4756743, at *5 (E.D. Pa. Aug. 17, 2020) (holding obesity with BMI of 31.5 kg/m² does not meet extraordinary and compelling reasons for release); United States v. Whiteman, No. 15-298, 2020 WL 4284619, at *1 (E.D. Pa. July 27, 2020) (finding mild obesity and hypertension fall short of extraordinary and compelling reasons for release).

Further, Defendant now claims that he suffers from new ailments, including Myasthenia Gravis, pre-diabetes, a prior tuberculosis infection, and that he continues to experience COVID-19 symptoms since his COVID-19 infection in October 2020. (See *id.* at 1, 5, 16.) None of these conditions present an extraordinary and compelling reason for his release. First, the CDC does not list Myasthenia Gravis, pre-diabetes, or a history of tuberculosis infection as causing either actual or potential increased risk of severe illness from COVID-19. See People with Certain Medical Conditions, *supra*. Therefore, these three conditions do not present a particularized vulnerability to COVID-19 should Defendant be reinfected with the virus. Second, Defendant has not supported his claim of continued COVID-19 symptoms with any medical records. Despite this dearth of evidentiary support, assuming Defendant continues to suffer from COVID-19 symptoms, he has not shown how these continued symptoms increase his risk of severe illness from COVID-19 if he were reinfected with the virus.

For these reasons, Defendant has not presented an extraordinary and compelling reason warranting his compassionate release.

BY THE COURT:

/s/ Joel H. Slomsky
JOEL H. SLOMSKY, J.

2. The § 3553(a) Sentencing Factors Do Not Support Defendant's Release

A balance of the § 3553(a) sentencing factors does not support his release. As the Court stated in its July 16, 2020 Opinion and November 18, 2020 Order denying Defendant's prior compassionate release Motions, the nature and circumstances of Defendant's offense and his history and characteristics continue to heavily weigh against Defendant's compassionate release. (See Doc. Nos. 307, 329.) Defendant is incarcerated because he pled guilty to ten counts of wire fraud, securities fraud, and conspiracy, and he subsequently pled guilty to an additional wire fraud offense he committed during his pretrial release. (See Doc. No. 329 at 3.) All of these offenses stemmed from a Ponzi scheme he led that defrauded hundreds of victims of \$54,532,488.57, which he owes in restitution. (See id.)

Additionally, releasing Defendant after serving only two years of his twenty-two-year sentence would not reflect the seriousness of his offenses, promote respect for the law, provide just punishment, afford adequate deterrence, nor protect the public from further crimes by Defendant. (See id.; Doc. No. 307 at 21-22); see also United States v. Pawlowski, 967 F.3d 327, 331 (3d Cir. 2020) (“[T]he time remaining in [the] sentence may . . . inform whether immediate release would be consistent with [the § 3553(a)] factors.”). Further, Defendant's sentence avoids unwarranted sentencing disparities among defendants with similar records. (See Doc. Nos. 307 at 22-23; 329 at 3.) Moreover, his need to pay restitution does not weigh for or against his release. (See ids.) Thus, for all these reasons, the § 3553(a) sentencing factors heavily weigh against modifying or reducing Defendant's sentence.

Accordingly, Defendant's Motion (Doc. No. 350) will be denied.