



USA v. McMillian et al

2020 | Cited 0 times | W.D. Virginia | June 17, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ABINGDON DIVISION

UNITED STATES OF AMERICA) Case No. 1:13CR00036-004 Case No. 1:08CR00051-001 v.)
OPINION AND ORDER JAMES THOMAS OXENDINE,) By: James P. Jones United States District
Judge Defendant.) Randy Ramseyer, Assistant United States Attorney, Abingdon, Virginia, for
United States; Brooks A. Duncan, Assistant Federal Public Defender, Roanoke, Virginia, for
Defendant.

The defendant, a federal inmate previously sentenced by this court, has filed a motion seeking compassionate release from his sentence. The motion is filed pursuant to 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194, 5239 (2018), which permits a reduction in sentence after considering the factors set forth in 18 U.S.C. § 3553(a) and if the motion has been fully briefed and is ripe for

decision.

I. Oxendine was sentenced by this court on November 10, 2014, after pleading guilty to one count of conspiring to possess with intent to distribute cocaine base and cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C), and one count of distribution of cocaine base, in violation of 21 U.S.C. §841(b)(1)(C). He was determined to have an advisory sentencing guideline range of 151 months to 188 months, based on a total offense level of 29 and a criminal history category of VI. The court sentenced him to 151 months imprisonment on each count, to run concurrently. Oxendine was on supervised release from a prior drug conviction in this court, Case No. 1:08CR00051, when he committed his new drug offenses, so his supervised release was revoked. He received a consecutive sentence of 36 months for revocation of his supervision, producing a total sentence of 187 months. 1

His present projected release date is August 29, 2028, after he completes his supervised release violation sentence. Oxendine has been diagnosed with Type II diabetes since incarcerated, although he has not been compliant with his medications. Suppl. Mot. Ex. B, Bureau of Prisons Health Servs. Clinical Encounter 2, ECF No. 668-2. Oxendine is incarcerated at FCI Gilmer, in Glenville, West Virginia. FCI Gilmer has no current coronavirus cases, and six infected inmates

1 I will consider that his motion is meant to be referencing the sentences in both cases.



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have recovered as of June 11, 2020. Federal Bureau of Prisons, COVID-19 Cases, <https://www.bop.gov/coronavirus/> (last visited June 16, 2020).

On April 21, 2020, Oxendine requested a furlough from the Bureau of Prisons until the danger posed by COVID-19 passes. Oxendine filed his pro se motion with the court on May 1, 2020, seeking a reduction in his sentence based on his purported health risks from the ongoing coronavirus pandemic. On May 16, 2020, newly appointed counsel filed a supplemental motion requesting a sentence of time served. In its response filed May 26, 2020, the United States argued that Oxendine had not exhausted his administrative remedies. The government also contended that the BOP has adopted adequate policies to protect inmates and staff from infection. The government noted health conditions, but it concluded that Oxendine is not a good candidate for

compassionate release due to his extensive criminal record and his recidivism risk. Oxendine replied that he had exhausted his administrative remedies, as 30 days had passed without a response from the Warden, and he reiterated his increased health risks if he becomes infected.

II. The court may grant a § 3582(c)(1)(A) motion by an inmate after the defendant has fully exhausted all administrative rights to appeal a failure of the 18 U.S.C. § 3582(c)(1)(A). While exhaustion of

administrative remedies is not a jurisdictional issue, 2

it is a mandatory condition *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017).

Thirty days have now elapsed since Oxendine April 21, 2020, request, and the Warden has not responded. Oxendine request for furlough did not mention § 3582, the First Step Act, or compassionate release. His requested remedy was instead more akin to the one afforded by the CARES Act, which provides BOP with the sole authority to place an inmate on home confinement. However, Oxendine did not mention the CARES Act either. A similar situation arose in *United States v. Carr*, No. 1:13CR34-001, 2020 WL 2847633 (W.D. Va. June 2, 2020). In *Carr*, the inmate requested release under the CARES Act while also noting his medical conditions and how they might be negatively impacted by the coronavirus

2 In considering § 3582(c)(2), a separate subsection setting forth another exception to the rule that a district court may not modify a sentence once imposed, the Fourth Circuit held that the lack of a prerequisite to a motion for reduction in sentence does not raise a jurisdictional issue. *United States v. May*, 855 F.3d 271, 274 75 (4th Cir. 2017) (holding (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)). I find this reasoning

persuasive as to the sister exception contained in § 3582(c)(1)(A).

pandemic. I found that his release request encompassed a request for compassionate release, even



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though it only specifically referenced the CARES Act, because the regulations governing compassionate release do not provide that a request must specifically use the words compassionate release or early release or that it must reference the applicable statute. *Id.* at *3. I find that this reasoning applies to from April 21, 2020, even though the government claims it has no record of a request for compassionate release.

request is thus ripe for my consideration. The U.S. Sentencing Guidelines before turning to the factors set forth in 18 U.S.C. § 3553(a), to the extent that they

are applicable: (1) whether extraordinary and compelling reasons warrant the reduction; (2) whether the inmate is a danger to the community, as provided in 18 U.S.C. § 3142(g); and (3) whether such a reduction is consistent with the policy statement. USSC 1B1.13.

Oxendine is 43 years old. He completed the eleventh grade but he did not graduate from high school, although he later obtained his GED. He has worked in the food industry, as a disc-jockey, and in various local factories when he was not incarcerated. Oxendine has an extensive criminal history that includes numerous convictions for drug distribution and possession. Oxendine also has a long substance abuse history. He started with marijuana and eventually expanded to cocaine and

crack cocaine. makes him vulnerable to COVID-19, however he has refused to comply with his treatment regime and consistently fails to take the medication prescribed to maintain his blood sugar levels. He has served over half of his 151-month sentence, not including the additional 36 months he must serve for his supervised release violation.

The facts supporting his conviction are serious in nature. Oxendine was involved in a crack cocaine distribution network in the Bristol region. Oxendine was not a major supplier, but there is evidence that he was a middle-man supplier for street-level dealers. The parties stipulated that Oxendine was accountable for at least 840 grams of crack cocaine, although the Presentence Investigation Report found that he was likely accountable at least 1.37 kilograms. Moreover, Oxendine was previously sentenced for drug dealing in this district, received a reduced sentence, but returned to dealing drugs shortly after being released. His demonstrated recidivism cannot be ignored. Considering these facts and the § 3553(a) factors, including the need for deterrence and to protect the public, I find that Oxendine is not qualified for such extraordinary relief.

III. For the reasons stated, it is ORDERED F No. 663, and supplemental motion, ECF No. 668, are DENIED.

ENTER: June 17, 2020 /s/ JAMES P. JONES United States District Judge

