

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 5, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN LAMONT PEARSON,

Defendant - Appellant.

No. 18-6200
(D.C. No. 5:17-CR-00236-D-1)
(W.D. Okla.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN LAMONT PEARSON,

Defendant - Appellant.

No. 18-6201
(D.C. No. 5:17-CR-00235-D-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON, PHILLIPS, and CARSON**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

In these consolidated appeals, Kevin Lamont Pearson appeals the district court's judgments revoking his terms of supervised release in two related cases. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

In 1999 and 2000, Pearson was sentenced to terms of incarceration and supervised release in two separate but related cases. In the first case, a jury convicted Pearson of bank robbery and use of a firearm in committing a crime of violence and the district court sentenced him to a total of 160 months of imprisonment and five years of supervised release on the bank robbery count and three years of supervised release on the firearm count. In the companion case, Pearson pled guilty to lying to a grand jury and the district court sentenced him to an additional term of imprisonment and three years of supervised release. The district court ordered that the supervised release in the two cases run concurrently.

Pearson's supervised release in both cases began on October 4, 2016, subject to identical mandatory, standard, and special conditions. These conditions included that Pearson abstain from alcohol, not possess or use controlled substances or drug paraphernalia, participate in substance abuse monitoring and aftercare, not travel outside the district without permission, and submit to a search of his person and electronic devices. Other conditions of release as relevant here prohibited Pearson from possessing a gun, committing another federal, state, or local crime, or associating with others engaged in criminal activity.

Pearson repeatedly violated the alcohol and substance abuse conditions of his supervised release beginning in 2017. He also violated the conditions by traveling outside the district without permission. In response to these violations, the United States Probation Office issued verbal warnings, and it and the court increased Pearson's alcohol and substance abuse monitoring requirements.

In early October 2018, the Probation Office received information that Pearson had physically assaulted his girlfriend and that a gun had been seen at his apartment. The next day, probation officers conducted a search of the apartment where, among other things, they discovered a green leafy substance and what they believed was drug paraphernalia. The officers also seized Pearson's cell phone during the search, but Pearson refused to provide them with the password to access it. The officers were nonetheless able to access information on the cell phone by correctly guessing Pearson's password. The Probation Office later determined there were messages and/or photographs on the phone regarding Pearson's possession of a firearm and the purchasing, packaging, and distribution of marijuana.

On the same day as the search, the Probation Office submitted a petition for a warrant to revoke Pearson's supervised release, alleging four violations of his conditions of supervised release: that Pearson had failed to submit to a search of his electronic devices as required; possessed marijuana and drug paraphernalia; used alcohol and had either failed drug and alcohol tests or failed to take them; and had left the district without permission. The court authorized issuance of the warrant and Pearson was taken into custody.

After his initial appearance but before the preliminary hearing, the district court authorized an amended petition that alleged two additional violations of his release conditions: that Pearson committed a crime by physically assaulting his girlfriend and that he possessed a firearm. At the preliminary hearing, a magistrate judge concluded there was probable cause as to five of the alleged violations but not as to the sixth, that Pearson possessed a firearm.

After Pearson's preliminary hearing but before his final revocation hearing, the district court authorized a second amended petition that provided additional information regarding Pearson's alleged assault and firearm violations and alleged two additional violations: that Pearson had committed the crime of possessing marijuana with intent to distribute it and that he had associated with persons engaged in this criminal activity.

At the revocation hearing, Pearson admitted in whole or in part four of the eight violations alleged in the second amended petition, but disputed the remainder, including, as relevant to this appeal, Violation 6, that he had possessed a firearm, and Violation 7, that he had possessed marijuana with intent to distribute it. After receiving evidence, the district court found Pearson had committed the four undisputed violations and three of the four disputed violations, including Violations 6 and 7. Consequently, the court revoked Pearson's supervised release and sentenced him to 36 months of imprisonment for violating the conditions of his supervised release for his bank robbery conviction, to run consecutively with shorter sentences

imposed for violating the terms of his supervised release on the other convictions, followed by an additional term of supervised release in each case. Pearson appealed.

DISCUSSION

On appeal, Pearson argues that (1) the district court committed legal error in considering Violation 6 (possession of a firearm), and (2) the district court's finding that Pearson committed Violation 7 (possession of marijuana with intent to distribute) is not supported by sufficient evidence. We address each contention in turn.

A. District Court's Consideration of Violation 6

Pearson first contends the district court committed legal error when it considered Violation 6, the alleged firearm violation, because this violation should have been dismissed after the magistrate judge found at the preliminary hearing that there was not probable cause to believe it had occurred. We review this legal issue *de novo*. *See United States v. LeCompte*, 800 F.3d 1209, 1215 (10th Cir. 2015).

Pearson rests his argument on Fed. R. Crim. P. 32.1. It provides as relevant here that when “a person is in custody for violating a condition of . . . supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred.” Fed. R. Crim. P. 32.1(b)(1)(A). The purpose of this hearing is to ensure “there is probable cause to hold the [defendant] for the final decision of the [district court] on revocation.” *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972) (describing purpose of preliminary hearing in parole revocation proceeding); *see United States v. Ruby*, 706 F.3d 1221, 1226 (10th Cir.

2013) (holding supervised release is the functional equivalent of parole and that Rule 32.1 codifies the procedures approved in *Morrissey*). Thus, if the magistrate judge does not find probable cause “that a violation occurred,” at this preliminary hearing, Fed. R. Crim. P. 32.1(b)(1)(A), then the rule requires that he or she “dismiss the proceeding,” *id.* 32.1(b)(1)(C). But if probable cause for a violation is found, then the matter proceeds to a revocation hearing. *See id.*

Nothing in the language of Rule 32.1(b) or its purpose suggests the defendant is entitled to dismissal of individual violations if the magistrate judge determines at the preliminary hearing that probable cause exists for some but not all of the alleged violations. So long as the magistrate judge finds probable cause for at least one alleged violation, the proceeding, including any of the alleged violations the government decides to pursue, continues to a revocation hearing before the district court (unless the defendant waives this hearing). *See* Fed. R. Crim. P. 32.1(b)(1)(C), (b)(2). Pearson cites no authority to the contrary or any precedent supporting his suggestion that a district court lacks jurisdiction in these circumstances to consider any individual violations the magistrate judge found lacked probable cause.

In addition, even if there were such authority, it would not aid Pearson in this case. This is so because the magistrate judge found that probable cause was lacking for the firearm-possession violation alleged in the government’s first amended petition. But as noted above, after the preliminary hearing the government submitted and the district court accepted a second amended petition that restated this alleged

violation and described additional evidence supporting it.¹ The magistrate judge did not make a probable cause determination regarding this revised violation, and Pearson does not assert that one was required after the magistrate judge determined that probable cause existed for the other alleged violations.

In addition, Pearson does not dispute that the government could have refiled the firearm possession violation even if the magistrate judge had dismissed it at the preliminary hearing. *See Morse v. United States*, 267 U.S. 80, 85 (1925) (“[A] judgment in a preliminary examination discharging an accused person for want of probable cause is not conclusive upon the question of his guilt or innocence and constitutes no bar to a subsequent trial in the court to which the indictment is returned.”); *United States v. Kysar*, 459 F.2d 422, 423 (10th Cir. 1972) (holding that dismissal of complaint for lack of evidence sufficient to detain the defendant did not prevent the government from prosecuting the defendant for the same offense). This again indicates that the magistrate judge’s probable cause determination regarding Violation 6, under the circumstances here, did not bar district court consideration of this alleged violation.

For these reasons, we find no error in the district court’s consideration of Violation 6, the firearm possession violation, at Pearson’s revocation hearing.

¹ The government contends it located this additional evidence through a detailed review of the approximately 1500 texts, other messages, and photographs on Pearson’s phone, a review that was not completed until after the preliminary hearing. Pearson suggests the government had an obligation to complete this review before the preliminary hearing and somehow forfeited its right to rely on this additional information as a result, but cites no authority supporting this proposition.

B. Sufficiency of the Evidence regarding Violation No. 7

Pearson also argues the district court's judgments must be reversed because there was insufficient evidence to support the court's finding that Pearson committed Violation 7, possession of marijuana with an intent to distribute. The court's finding on this violation was significant because Violation 7 was the only Grade A violation found by the district court, which is the most serious type of violation for purposes of sentencing. *See* U.S. Sentencing Guidelines Manual §§ 7B1.1(a)(1), 7B1.4(a).

To revoke a term of supervised release, the district court must find by a preponderance of the evidence that the defendant violated a condition of his release. 18 U.S.C. § 3583(e)(3); *United States v. Disney*, 253 F.3d 1211, 1213 (10th Cir. 2001). We review this factual finding for clear error. *See United States v. Hall*, 984 F.2d 387, 390 (10th Cir. 1993). A factual finding is clearly erroneous if it is “without factual support in the record” or if, after considering all of the evidence, we are “left with a definite and firm conviction that a mistake has been made.” *United States v. Cortes-Gomez*, 926 F.3d 699, 708 (10th Cir. 2019). In determining whether the district court's factual finding is supported by sufficient evidence, we view the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the government, keeping in mind that it is the exclusive function of the trial court, as the trier of fact, to appraise the credibility of witnesses, determine the weight to be given their testimony, draw inferences from that testimony, and reach conclusions with respect to the facts. *See United States v. Leach*, 749 F.2d 592, 600 (10th Cir. 1984).

Applying these standards here, we see no error in the district court's finding that Pearson possessed marijuana with intent to distribute it. Its finding was supported by messages sent from Pearson's phone over a period of months regarding the sender's possession of marijuana for the purpose of distribution.

Pearson challenges this conclusion, arguing the evidence before the district court was insufficient to prove that he was the person who sent the incriminating messages. Essentially, Pearson contends that though the messages were found on his password-protected phone, someone else could have accessed his phone in each instance and sent the messages in question because the evidence established that it was easy for someone to guess Pearson's password. But the probation officer who reviewed the messages on the phone testified that it did not appear to him that anyone other than Pearson had used the phone at any point. He also testified that some of the messages regarding marijuana trafficking on Pearson's phone included location or other references that linked them to Pearson's activities in the same timeframe. Viewed in the light most favorable to the government, sufficient evidence existed for the district court to reasonably infer that Pearson sent these messages.

Pearson also argues that even if he sent the messages in question, they and their accompanying photographs failed to establish that the items discussed or shown were marijuana. But the probation officer who examined these messages testified that, based on his experience, the photographs showed packages of marijuana, and that the terms used in the messages were common street names for marijuana. This was sufficient evidence to support the conclusion that the items in question were

marijuana. Accordingly, the district court's finding that Pearson violated the conditions of his supervised release by possessing marijuana with intent to distribute was not clearly erroneous.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's judgments revoking Pearson's supervised release.

Entered for the Court

Joel M. Carson, III
Circuit Judge