FILED
United States Court of Appeals
Tenth Circuit

June 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TERRY SAMUEL, a/k/a Tex,

Defendant - Appellant.

No. 22-1111
(D.C. No. 1:08-CR-00524-PAB-2)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **KELLY**, and **ROSSMAN**, Circuit Judges.

Terry Samuel appeals the year-and-a-day prison sentence and special conditions imposed upon the revocation of his supervised release. His counsel, however, moves to withdraw, contending the appeal is frivolous. *See* 10th Cir. R. 46.4(B)(1); *Anders* v. *California*, 386 U.S. 738 (1967). After independently reviewing the record, we grant the motion to withdraw and dismiss the appeal.

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* After examining the *Anders* brief filed by Mr. Samuel's counsel and the entire appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND

Mr. Samuel pleaded guilty in 2009 to two counts of armed bank robbery in violation of 18 U.S.C. § 2113. The district court sentenced him to 126 months of imprisonment, to be followed by five years of supervised release. Mr. Samuel appealed neither the conviction nor the sentence. He was released from incarceration in May 2020, and his term of supervised release was set to expire in May 2025.

But on August 1, 2021, Mr. Samuel was arrested by Thornton, Colorado police officers for an alleged assault. A state court issued a criminal protection order on August 3. Mr. Samuel bonded out of custody on August 10. The United States Marshals Service arrested Mr. Samuel on a federal warrant for "noncompliance with his terms of supervised release" on August 25. RI.23. He was found at the alleged assault victim's house, where he was present in violation of the protection order. A United States Probation Officer petitioned to revoke Mr. Samuel's supervised release based on two violations: the violation of the criminal protection order, Colo. Rev. Stat. § 18-6-803.5(1)(a), a Grade B violation; and the failure to report to his probation officer within 72 hours of his August 1 arrest and questioning by law enforcement, a Grade C violation.[2]

[2] Probation first petitioned for revocation of supervised release on August 9, 2021, based on the alleged assault on August 1. A superseding

At the final revocation hearing on April 1, 2022,[3] the district court and the parties discussed the terms of an agreement reached between the government and Mr. Samuel.[4] According to the district court, if Mr. Samuel admitted the alleged Grade C failure-to-report violation and agreed "not to contest any of the [recommended] special conditions," Probation would dismiss the Grade B violation concerning the protective order. Mr. Samuel confirmed he had agreed to this deal and admitted the Grade C violation. RIV.11-14. Based on Mr. Samuel's admission, the district court revoked his supervised release.

The district court then calculated Mr. Samuel's advisory Guidelines range using Chapter Seven of the Sentencing Guidelines, which addresses violations of probation and supervised release. Based on Mr. Samuel's criminal history category of V and the Grade C violation, the advisory custodial range was seven to thirteen months. Mr. Samuel told the court he thought the period

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petition filed on September 2, 2021, added the violation of the protective order and the failure to report arrest and questioning. On December 13, 2021, the second superseding petition, at issue here, dropped the violation based on the alleged assault, retained the protective order and failure-to-report violations, and changed the protective order violation to a Grade B offense.

[3] Mr. Samuel had a preliminary hearing before a magistrate judge on September 2, 2021.

[4] Mr. Samuel was represented by counsel at all times relevant here.

of incarceration "should be seven months." RIV.20. But the district court instead adopted the government's recommendation, sentencing Mr. Samuel to a year and one day, followed by 46 months of supervised release. Mr. Samuel did not otherwise object to the sentence of incarceration; nor did he object to the district court's imposition of "standard" and "special conditions" of supervised release. These special terms included financial restrictions related to the payment of court-ordered restitution and mandated participation in certain treatment plans.[5]

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[5] In full, the eleven special conditions were:

(1) Mr. Samuel "must not incur new credit charges or open additional lines of credit without approval of the probation officer unless he is in compliance" with the court-imposed periodic payment obligations;
(2) Mr. Samuel "must provide the probation officer access to any requested financial information . . . until all financial obligations imposed by the Court are paid in full";
(3) Mr. Samuel "must pay the financial restitution in accordance with the schedule of payment sheet in the judgment";
(4) Mr. Samuel must "apply any monies received from income tax refunds, lottery winnings, inheritances, judgments" or other "financial gains to the outstanding Court-ordered financial obligation in this case";
(5) The probation officer is authorized to "share any financial or employment documentation relevant to Mr. Samuel with the asset recovery division of the United States Attorney's Office";
(6) "Mr. Samuel must document all income and compensation generated or received from any source" and provide this information to his probation officer;
(7) "Mr. Samuel must participate in a program of mental health treatment approved by the probation officer and follow the rules and regulations of such program";

Mr. Samuel timely filed his notice of appeal on April 12, 2022.[6]

II. STANDARD OF REVIEW

Anders imposes obligations on both Mr. Samuel's counsel and this court.

First, counsel may be relieved of his "role of an active advocate [on] behalf of his client" only "after a conscientious examination" of his client's appeal and the conclusion it is "wholly frivolous." *Anders*, 386 U.S. at 744; *cf.* *McCoy* v. *Court of Appeals of Wis., Dist. 1*, 486 U.S. 429, 438 n.10 (1988) (explaining an appeal is "wholly frivolous" when it "lacks any basis in law or fact"). He must submit a brief to both his client and this court so stating, and "indicating any potential appealable issues based on the record." *United States* v. *Calderon*, 428 F.3d 928, 930 (10th Cir. 2005) (citation omitted).

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(8) Mr. Samuel "must participate in a program of cognitive behavioral treatment approved by the probation officer and follow the rules and regulations of that program";
(9) Mr. Samuel "must abstain from the use of alcohol unless prior permission is provided by the Court";
(10) "Mr. Samuel must submit his person" and property "to a search conducted by a United States probation officer"; and
(11) Mr. Samuel "must enroll in and complete a basic parenting class at the direction of the probation officer."

RIV.25-27.

[6] On May 13, 2022, this Court granted Mr. Samuel's prior counsel's motion to withdraw and appointed his current counsel to represent Mr. Samuel for this appeal. RI.45-47 (Order of Tymkovich, C.J.).

Then, this court must perform a "full examination of all the proceedings" and decide for ourselves whether the case is indeed "wholly frivolous." *Anders*, 386 U.S. at 744.

On September 15, 2022, this court sent Mr. Samuel a copy of his counsel's *Anders* brief by certified mail, inviting him to respond by October 17, 2022. Receiving no response, the court *sua sponte* extended that deadline to October 31, 2022. Mr. Samuel did not—and has not—submitted a response to his counsel's brief. On December 5, 2022, the government notified this court it would not file a response.

III. DISCUSSION

In his *Anders* brief, Mr. Samuel's counsel identifies five potential bases for appeal: (1) the timing of Mr. Samuel's revocation hearing, (2) the probation officer's submission of a superseding revocation petition, (3) the district court's revocation of Mr. Samuel's supervised release, (4) the year-and-a-day sentence imposed by the district court, and (5) the district court's imposition of certain terms of supervised release.

A. The Timing Of The Revocation Hearing And The Submission Of A Superseding Revocation Petition

Mr. Samuel's counsel first posits a possible challenge to the timing of his client's apparently delayed revocation hearing. Rule 32.1 of the Federal Rules of Criminal Procedure requires preliminary hearings on violations of

supervised release conditions to be held "promptly" and requires that *final* revocation hearings occur "within a reasonable time." Fed. R. Crim. P. 32.1(b)(1)-(2). Mr. Samuel's counsel also identifies a potential argument that his client's probation officer improperly submitted a late, superseding revocation report in advance of the final revocation hearing. Mr. Samuel's counsel then says these arguments are frivolous under *Anders* because "events or matters that might otherwise constitute an error of law . . . but that are antecedent to a guilty plea or admission, may not be raised on appeal." *Anders* Br. at 9.

We agree with counsel's assessment. In *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), the Supreme Court held:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.[7]

Applying *Tollett*, we have explained "[a] guilty plea waives all defenses except those that go to the court's subject-matter jurisdiction and the narrow class of constitutional claims involving the right not to be haled into court." *United*

[7] The *Tollett* Court confirmed, though, a defendant may always "attack the voluntary and intelligent character of the guilty plea." 411 U.S. at 267. The record before us would not support such an argument, and we do not understand Mr. Samuel to make one.

States v. *Avila*, 733 F.3d 1258, 1261 (10th Cir. 2013) (quoting *United States* v. *De Vaughn*, 694 F.3d 1141, 1158 (10th Cir. 2012)). Here, Mr. Samuel admitted to the Grade C violation notwithstanding his concerns about the timeliness of his revocation hearings and the probation officer's report.[8] Under these circumstances, we consider these first two issues—alleged reversible error based on the timing of the revocation hearing and the probation officer's submission of a superseding revocation petition—waived.

B. The Revocation Of Supervised Release

Mr. Samuel's counsel next identifies a possible claim that the district court erred in revoking Mr. Samuel's supervised release. *Anders* Br. at 10. But counsel insists this argument "cannot be maintained for the simple reason that [Mr. Samuel] admitted to the violations that formed the basis of the revocation and accepted that the Court could sentence him for his violations." *Id.* at 11.

Ordinarily, we review a "district court's decision to revoke supervised release for abuse of discretion." *United States* v. *Shakespeare*, 32 F.4th 1228, 1232 (10th Cir. 2022) (quoting *United States* v. *LeCompte*, 800 F.3d 1209, 1215 (10th Cir. 2015)). Here, however, Mr. Samuel never argued revocation was inappropriate or impermissible before the district court. Accordingly, we

[8] Mr. Samuel wrote to the district court in December 2021, expressing an understandable frustration, given his detention since August of that year, with the timing and revisions made in the government's second superseding petition for revocation.

review the district court's revocation decision for plain error. *United States* v. *Bruley*, 15 F.4th 1279, 1282 (10th Cir. 2021) ("Because this argument was not raised below, we review only for plain error." (citing Fed. R. Crim. P. 52(b))). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United States* v. *Harris*, 695 F.3d 1125, 1130 (10th Cir. 2012)).

Having reviewed the record, we agree with Mr. Samuel's counsel. Federal law permits the revocation of "supervised release . . . if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. § 3583(e)(3). And the advisory Sentencing Guidelines permitted the district court to "(A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision." U.S.S.G. § 7B1.3(a)(2). At the revocation hearing, the district court asked Mr. Samuel, "do you understand . . . the allegation, and do you admit or deny it?" RIV.14. Mr. Samuel replied, "I admit." *Id.* Because Mr. Samuel admitted to violating the conditions of his supervised release, we cannot conclude the district court

erroneously revoked his supervised release where it had the authority to do so.[9]

C. The Sentence Of Incarceration

The next issue identified is a possible challenge to Mr. Samuel's prison sentence of a year-and-a-day. While Mr. Samuel's counsel does not elaborate on the contours of this claim, we will understand the argument to be a broad challenge to the procedural and substantive reasonableness of the sentence imposed. Our review therefore "includes both a procedural component, encompassing the method by which a sentence was calculated, as well as a substantive component, which relates to the length of the resulting sentence," *United States* v. *Smart*, 518 F.3d 800, 803 (10th Cir. 2008) (citation omitted), and whether it "fairly reflect[s] the relevant sentencing factors or circumstances of the defendant," *United States* v. *Maldonado-Passage*, 56 F.4th 830, 842 (10th Cir. 2022) (citing *United States* v. *Gross*, 44 F.4th 1298, 1303 (10th Cir. 2022)).

Normally, we review the procedural reasonableness of the imposed sentence for an abuse of discretion, assessing the district court's legal conclusions *de novo* and its factual findings for clear error. *United States* v. *Ortiz-Lazaro*, 884 F.3d 1259, 1262, 1265 (10th Cir. 2018). Here, though, absent

[9] Because we identify no predicate "error," we need not proceed through the other prongs of the plain error analysis.

any objection to procedural reasonableness before the district court, we review that challenge for plain error on appeal. *United States* v. *Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012). Our review requires analyzing "the method of sentence calculation, including whether the advisory Guidelines range was proper, whether § 3553(a) sentencing factors were correctly considered, and whether the sentencing decision relied on clearly erroneous facts." *Maldonado-Passage*, 56 F.4th at 842 (citing *Gall* v. *United States*, 552 U.S. 38, 51 (2007)).

Reviewing the record, we see no procedural error. The bank robbery offenses for which Mr. Samuel was serving his term of supervised release are Class B felonies, so the district court had the statutory authority to sentence Mr. Samuel to up to three years in prison upon revocation. 18 U.S.C. § 3583(e)(3). The applicable Sentencing Guidelines range suggested a sentence of seven to thirteen months' imprisonment based on the Grade C failure-to-report violation and Mr. Samuel's criminal history category of V. *See* U.S.S.G. § 7B1.4. And on the record before us, we cannot say the district court failed to fulfill its basic obligation to "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c); *see Ortiz-Lazaro*, 884 F.3d at 1262 ("The court must . . . 'explain its reasons for imposing a sentence.'" (quoting *United States* v. *Martinez-Barragan*, 545 F.3d 894, 902-03 (10th Cir. 2008))).

Turning to substantive reasonableness, Mr. Samuel fares no better.[10] We review the substantive reasonableness of his sentence for an abuse of discretion. *United States* v. *Peña*, 963 F.3d 1016, 1024 (10th Cir. 2020). This review still demands "'substantial deference' to the district court"; we "will only overturn a sentence that is 'arbitrary, capricious, whimsical, or manifestly unreasonable.'" *Id.* (quoting *United States* v. *Sayad*, 589 F.3d 1110, 1116 (10th Cir. 2009)).

Substantive reasonableness review asks whether "the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *United States* v. *Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007) (citation omitted). "Before deciding whether to revoke a term of supervised release and determining the sentence imposed after revocation, the district court must consider the factors set out in 18 U.S.C. §[§] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." *United States* v. *McBride*, 633 F.3d 1229, 1231 (10th Cir. 2011) (citation omitted).

[10] Mr. Samuel received a longer sentence upon revocation than the one he requested. When the district court asked Mr. Samuel what he thought the sentence should be, Mr. Samuel replied, "Well, Your Honor, you know what I'm going to say. I'm going to say it should be seven months, but if you don't feel that's adequate or you don't feel like my actions show that, then it's completely up to you." RIV.20.

Here, the year-and-a-day sentence fell within the advisory Guidelines range of seven to thirteen months and therefore is "entitled to a presumption of reasonableness." *Maldonado-Passage*, 56 F.4th at 842 (citing *United States* v. *Woody*, 45 F.4th 1166, 1180 (10th Cir. 2022)). After reviewing the record, we see no way Mr. Samuel could overcome that presumption.

D. The Special Conditions

The last issue identified is a possible challenge to the district court's imposition of the eleven special conditions to Mr. Samuel's supervised release. Because Mr. Samuel did not object to the district court's imposition of these special conditions,[11] we review that decision for plain error. *Bruley*, 15 F.4th at 1286.

While a district court has "broad discretion to prescribe special conditions of release," *United States* v. *Mike*, 632 F.3d 686, 692 (10th Cir. 2011), the conditions imposed "must satisfy the three statutory requirements laid out in 18 U.S.C. § 3583(d)," *id.* (quoting *United States* v. *Hahn*, 551 F.3d 977, 983 (10th Cir. 2008)). Under § 3583(d), the conditions must first be "reasonably related to at least one of the following: the nature and circumstances of the offense, the defendant's history and characteristics, the deterrence of criminal conduct, the protection of the

[11] Nor did Mr. Samuel object to the district court's imposition of standard conditions of supervised release.

public from further crimes of the defendant, and the defendant's education, vocational, medical, or other correctional needs." *Id.* (citing 18 U.S.C. § 3583(d)(1); *Hahn*, 551 F.3d at 983-84). Second, the conditions may not "involve . . . greater deprivation of liberty than is reasonably necessary to achieve the purpose of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation." *Id.* (citing 18 U.S.C. § 3583(d)(2)). Finally, the conditions imposed must be "consistent with any pertinent policy statements issued by the Sentencing Commission." *Id.* (citing 18 U.S.C. § 3583(d)(3)).

"Although we generally are 'not hypertechnical in requiring the court to explain why it imposed a special condition of release—a statement of generalized reasons suffices—the explanation must be sufficient for this court to conduct a proper review.'" *United States* v. *Englehart*, 22 F.4th 1197, 1207 (10th Cir. 2022) (quoting *United States* v. *Koch*, 978 F.3d 719, 725 (10th Cir. 2020)).

Here, the special conditions imposed either related directly to ensuring Mr. Samuel complied with his existing restitution obligations, *see* RIV.25-26, or to the district court's assessment of Mr. Samuel's rehabilitative needs, *see* RIV.26-27. The district court explained its special conditions were "reasonably related to the factors that are enumerated" in 18 U.S.C. § 3583(d) and that, "based upon the nature and circumstance of

the offense and the history and characteristics of Mr. Samuel, the [special] conditions do not constitute a greater deprivation of liberty than reasonably necessary to accomplish the goals of sentencing." RIV.24-25. We discern no error in the district court's imposition of these special conditions.

IV. CONCLUSION

We conclude Mr. Samuel's counsel has fulfilled his requirements under *Anders* by investigating the record and identifying any possibly availing issues on appeal. We, too, have independently reviewed the record and likewise cannot discern any non-frivolous issues Mr. Samuel might advance.

We **GRANT** counsel's motion to withdraw and **DISMISS** this appeal.

ENTERED FOR THE COURT

Veronica S. Rossman
Circuit Judge