

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 16, 2019

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ASHTIN ABRAHAM NEESE,

Defendant - Appellant.

No. 19-7004
(D.C. No. 6:15-CR-00009-RAW-1)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON, McKAY, and BACHARACH**, Circuit Judges.

Ashtin Abraham Neese stipulated to the factual allegations in a petition for revocation charging four violations of the conditions of his supervised release. The district court revoked his supervised release and sentenced him to 18 months in prison. He argues here, for the first time, that his stipulation supported that he committed only three of the alleged violations but not the fourth. To succeed on appeal, Mr. Neese must

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

establish plain error. He fails to do so. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

When he was on supervised release for a previous federal offense, Mr. Neese was charged with and pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He was sentenced to 21 months in prison followed by three years of supervised release. His supervised release for his prior offense was revoked.

The conditions of his supervised release for his felon-in-possession offense included that he (1) “shall not commit another federal, state or local crime”; (2) “shall refrain from any unlawful use of a controlled substance”; (3) “shall notify the probation officer within [72] hours of being arrested or questioned by a law enforcement officer”; and (4) “shall participate in a program approved by the United States Probation Office for the treatment of narcotic addiction, drug dependency, or alcohol dependency, which will include testing to determine if he has reverted to the use of drugs or alcohol, and may include outpatient treatment.” ROA, Vol. I at 10-11.

Mr. Neese’s supervised release began on April 6, 2018. On October 4, 2018, after Mr. Neese admitted to using methamphetamine, the district court revised the fourth condition as follows:

The defendant shall participate in a program approved by the United States Probation Office for the treatment of narcotic addiction, drug dependency, or alcohol dependency, which will include testing to determine if he has reverted to the use of drugs or alcohol. If it is determined by the Probation Officer that the defendant is in need of a residential drug/alcohol treatment program, he shall participate in such

treatment as directed by the Probation Officer and remain in the treatment facility until discharged.

Id. at 14.

On November 29, 2018 the U.S. Probation Office petitioned to revoke Mr. Neese's supervised release. The Government alleged that Mr. Neese (1) had been arrested for and charged in state court with possessing a controlled dangerous substance; (2) failed drug tests and admitted to using marijuana and methamphetamine; (3) had been arrested by local police for an outstanding traffic warrant and failed to notify the Probation Office; and (4) "[o]n October 29, 2018, . . . was unsuccessfully discharged from The Oaks Rehabilitative Service Center, for non-compliance to include profanity, possessing contraband (cigarettes) and fraternization with female residents." *Id.* at 18-19. The Government contended this conduct violated the conditions of Mr. Neese's supervised release, including the revised condition that he remain in a drug treatment facility until discharged. *Id.*

At a revocation hearing, Mr. Neese stipulated to the allegations. The district court noted that the United States Sentencing Commission Guidelines ("Guidelines" or "U.S.S.G.") specified a sentencing range of 6 to 12 months and that 18 U.S.C. § 3583(e)(3) provided for a maximum sentence of 24 months. The court then found by a preponderance of the evidence that Mr. Neese had violated the conditions of his supervised release as charged.

Before the court sentenced Mr. Neese, the Government stated that Mr. Neese's

Felon in Possession charge was picked up while Mr. Neese was on supervised release for the 2009 charge of Possession

of a Stolen Firearm. And so the -- out of the guideline range of 6 to 12 months, the government requests that this Court impose a sentence that is in between the 12 months and not to exceed the 24 months in light of Mr. Neese's history and his failure to comply with the terms and conditions of his supervised release not only in the current matter in front of the Court, but also when he was on supervised release for a prior charge.

ROA, Vol. II at 12-13. Mr. Neese's counsel responded by urging a sentence within the Guidelines range. *Id.* at 13.

The court sentenced Mr. Neese to an above-Guidelines range term of 18 months in prison, stating:

In imposing this sentence, the Court has considered the violation policy statements in Chapter 7 of the [Guidelines] now in effect and view[s] those policies as advisory in nature for the purpose of these proceedings.

I have considered the nature and circumstances of the violations conduct and the history and characteristics of the offender. *The defendant has shown little regard for the rules and conditions of supervised release.*

Id. at 14 (emphasis added).

II. DISCUSSION

Mr. Neese argues the district court erred when it found he had violated the special condition of supervised release regarding his discharge from residential drug treatment. He asks for remand to the district court to amend the revocation judgment and resentence him. Applying plain error review, we reject this argument. Even if the district court erred and the error was plain, Mr. Neese has failed to show a reasonable probability that his sentence would be different.

A. Plain Error Review

“If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited.” *Puckett v. United States*, 556 U.S. 129, 134 (2009). Nonetheless, “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” *Id.* at 135 (quotations omitted) (citing Fed. R. Crim. P. 52(b)). “Our plain error standard is satisfied 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.” *United States v. Uscanga-Mora*, 562 F.3d 1289, 1295 (10th Cir. 2009) (quotations omitted). “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it.” *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). Mr. Neese acknowledges that “[p]lain error review standards apply.” *Aplt. Br.* at 5.

Mr. Neese’s argument fails at least the third prong of the plain error test, which requires him to show “a reasonable probability sufficient to undermine confidence in the outcome at [his] sentencing.” *United States v. Yurek*, 925 F.3d 423, 446 (10th Cir. 2019).

B. Revocation of Supervised Release

When a district court revokes a term of supervised release, 18 U.S.C. § 3583(e) directs it to consider certain of the § 3553(a) factors in determining the sentence. The four most relevant here are:

- (1) “[T]he nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1);

(2) The need for the sentence imposed “to afford adequate deterrence to criminal conduct,” *id.* § 3553(a)(2)(B);

(3) The need for the sentence imposed “to protect the public from further crimes of the defendant,” *id.* § 3553(a)(2)(C); and

(4) The Guidelines sentencing ranges and policy statements, *id.* § 3553(a)(4)-(5).¹

Guideline § 7B1.4 sets forth a table of sentencing ranges that vary by the grade of the defendant’s violation of the conditions of supervised release and the defendant’s criminal history category determined when the defendant was originally sentenced to the term of supervised release. The application notes to the Guideline provide that “[d]eparture from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in § 4A1.3.” U.S.S.G. § 7B1.4, cmt. 2. Guideline § 4A1.3 provides, “If reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the

¹ The remaining factors are: (1) “the kinds of sentences available,” 18 U.S.C. § 3553(a)(3); (2) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” *id.* § 3553(a)(6); (3) “the need to provide restitution to any victims of the offense,” *id.* § 3553(a)(7); (4) the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,” *id.* § 3553(a)(2)(A); and (5) the need for the sentence imposed “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner,” *id.* § 3553(a)(2)(D).

defendant will commit other crimes, an upward departure may be warranted.” U.S.S.G. § 4A1.3(a)(1).²

We have upheld an above-Guidelines sentence for violation of the conditions of supervised release where the defendant had committed a violation once before. *See United States v. Steele*, 603 F.3d 803, 805 (10th Cir. 2010). We explained that “[u]nder the [G]uidelines, recidivism is generally a reason for increased sentencing severity.” *Id.* at 809.

C. *Analysis*

The district court explained Mr. Neese’s above-Guidelines sentence by saying, “The defendant has shown little regard for the rules and conditions of supervised release.” ROA, Vol. II at 14. Mr. Neese argues that, with this statement, the court “took all of the violations [of his supervised release conditions] into account” and that the violation of the treatment condition was “the most serious.” *Aplt. Br.* at 11. He urges that had the court not considered the treatment violation in sentencing, “there is a reasonable probability that the court would not have viewed the remaining violations as aggravated.” *Id.* at 12. We disagree.

At sentencing for the supervised release violations, the Government explained that Mr. Neese had committed his underlying crime while on supervised release for a prior conviction. The Government requested an above-Guidelines sentence “in light of Mr. Neese’s history and his failure to comply with the terms and conditions of his supervised

² The Guidelines account for whether an offense was committed “while under any criminal justice sentence, including . . . supervised release.” U.S.S.G. § 4A1.1(d).

release *not only in the current matter in front of the Court, but also when he was on supervised release for a prior charge.*” ROA, Vol. II at 12-13 (emphasis added). The district court sentenced in the middle of the range the Government requested.

Although the district court’s explanation for the 18-month sentence could have been more precise, the record supports the court’s conclusion that Mr. Neese’s supervised release violation and revocation warranted an increased sentence. *See Steele*, 603 F.3d at 809 (affirming an above-Guidelines sentence based on this consideration).

Mr. Neese’s arguments to the contrary are not persuasive. He contends “the 18 month sentence certainly resulted from the court’s view that the overall extent of the violations was aggravated in comparison to the norm.” *Aplt. Br.* at 11. In his view, violations of drug law “are typical violations and unlikely to inspire a court to drastically increase the severity of imprisonment,” *id.* at 12, but violation of a drug-treatment provision does warrant a longer sentence. We find nothing in the record to suggest that the district court held—much less articulated—this view. Mr. Neese has failed to show “a reasonable probability” that his sentence would have been different had the court not found that he violated the fourth condition of his supervised release requiring drug treatment. *See Yurek*, 925 F.3d at 446.

III. CONCLUSION

Because Mr. Neese has failed to satisfy the third prong of plain error review—that his substantial rights were affected—we need not consider whether the district court erred, whether any error was plain, or whether any error seriously affected the fairness, integrity, or public reputation of judicial proceedings. We affirm.

ENTERED FOR THE COURT,

Scott M. Matheson, Jr.
Circuit Judge