FILED
United States Court of Appeals
Tenth Circuit

September 5, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL EUGENE WRIGHT,

Defendant - Appellant.

No. 19-6065
(D.C. No. 5:18-CR-00228-R-1)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Daniel Eugene Wright appeals the revocation of the terms of his supervised release, arguing the district court's revocation was improper because the probation officer's petition for revocation alleged violations of conditions that Mr. Wright asserts had never been imposed on him. Because the alleged violations correspond to the conditions of Mr. Wright's supervised release, we affirm.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I. BACKGROUND

In 2004, Mr. Wright pleaded guilty to one count of conspiracy to manufacture, possess, and distribute methamphetamine and one count of being a felon in possession of firearms. In 2005, he was sentenced to a term of 188 months' imprisonment, to be followed by a term of five years' supervised release. The district court imposed sixteen standard conditions for supervised release along with three "additional conditions" which required Mr. Wright to "participate in a program of mental health treatment (to include inpatient) as directed by the Probation Officer," to abide by search and seizure conditions, and to abide by special financial conditions. ROA, vol. I, at 23. The standard conditions, in relevant part, stated:

> You will not frequent places where controlled substances are illegally sold, or administered; you shall refrain from excessive use of alcohol and will not purchase, possess, use, or distribute or administer any controlled substance or paraphernalia related to such substances, except as prescribed by a physician.
>
> You will submit to urinalysis or other forms of testing to determine illicit drug use as directed by the probation officer; if directed by the probation officer, you will successfully participate in a program of testing and treatment (to include inpatient) for substance abuse until released from the program by the probation officer.

Id. (Standard Conditions 8 & 9).

Mr. Wright began his supervised release on August 18, 2017. On September 4, 2018, for reasons not clear from the record, the Northern District of Oklahoma

transferred jurisdiction over Mr. Wright to the Western District of Oklahoma.[1] On March 14, 2019, after Mr. Wright's probation officer filed a report alleging drug violations, the district court ordered Mr. Wright to enter a halfway house and wait for an available bed at a residential treatment center, where he would "begin treatment for up to 90 days." *Id.* at 25. Then, on April 1, 2019, the probation officer filed a petition recommending revocation of Mr. Wright's terms of supervised release. The probation officer alleged Mr. Wright had "submitted sixteen positive urine specimens, four diluted [specimens], and failed to submit a specimen as directed on twelve occasions." *Id.*, vol. II, at 35. Furthermore, the probation officer alleged that Mr. Wright had failed to complete the residential treatment program as ordered:

> On April 1, 2019, Mr. Wright was unsuccessfully discharged from Community House due to not being amenable to treatment. According to Community House, Mr. Wright was disruptive, argumentative, defiant, and defensive. Mr. Wright refused to admit that he has a substance abuse problem, and spent a lot of time arguing with the counselor. They reported he had a very negative impact on the therapeutic environment at the facility and that he was not amenable to treatment at this time. As a result of his continued non-compliance, Mr. Wright was removed from the CARE Court Program on April 1, 2019.

Id. In his "Petition for Warrant or Summons for Offender Under Supervision," the probation officer alleged that Mr. Wright's behavior violated the following two "special conditions":

> Violation of Special Condition: The defendant shall participate in a program of substance abuse aftercare at the direction of the probation

[1] "A court, after imposing a sentence, may transfer jurisdiction over . . . a person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his . . . release." 18 U.S.C. § 3605.

> officer. The defendant shall totally abstain from the use of alcohol and other intoxicants both during and after the completion of any treatment program. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The defendant may be required to contribute to the cost of services rendered (copayment) in an amount to be determined by the probation office based on his ability to pay.
>
> . . .
>
> Violation of Special Condition: The defendant shall successfully complete a program of residential substance abuse treatment.

Id., vol. I, at 27.[2]

In his revocation hearing, Mr. Wright stipulated to the alleged violations. The district court sentenced Mr. Wright to eight months' imprisonment, followed by two years of supervised release. Mr. Wright timely appealed.

II. ANALYSIS

Mr. Wright argues on appeal that the conditions of supervised release he allegedly violated had never been imposed. Where, as here, a defendant raises an objection to his revocation proceedings for the first time on appeal, we review the claim for plain error. *United States v. Fay*, 547 F.3d 1231, 1234 (10th Cir. 2008). "Under plain error review, the defendant must demonstrate (1) there is error, (2) that is plain, (3) which affects substantial rights, and (4) which seriously affects the

[2] It is not entirely clear why the petition's language did not quote the actual language of Mr. Wright's supervised-release conditions. The Government speculates that the "mismatch appears to be the result of [Mr. Wright's] transfer of supervision from the Northern District of Oklahoma to the Western District of Oklahoma, with the petition quoting language usually used in the Western District of Oklahoma." Appellee's Br. at 11 n.5.

fairness, integrity, or public reputation of judicial proceedings." *United States v. Ruby*, 706 F.3d 1221, 1226 (10th Cir. 2013).

Mr. Wright correctly identifies discrepancies between the verbiage of the supervised-release conditions in his 2005 sentence and the "special conditions" the probation officer quoted in his petition for revocation. Neither party cites helpful case law—nor did our research reveal any—on whether such a discrepancy in language constitutes error, let alone plain error.[3] But even assuming the district court erred by relying on a petition quoting language different from the language of Mr. Wright's supervised-release conditions, Mr. Wright's argument fails on the third prong of the plain-error test.

To satisfy the third prong of the plain-error test, Mr. Wright must show that the alleged error "affects substantial rights"—that is, that "there is a reasonable probability that, but for the error claimed, the result of the proceeding would have

[3] We emphasize that we do not decide those questions here. To be sure, a mismatch between the language of a supervised-release condition and the language describing an alleged violation could create a notice problem. Federal Rule of Criminal Procedure 32.1(b)(2) entitles a person facing revocation, in relevant part, to "written notice of the alleged violation." Fed. R. Crim. P. 32.1(b)(2)(A).

But as the Government observes, Mr. Wright has forfeited any argument based on the procedural safeguards of Fed. R. Crim. P. 32.1 and 18 U.S.C. § 3583(e)(3) by failing to invoke those provisions during his revocation proceedings. *See United States v. Ruby*, 706 F.3d 1221, 1226 (10th Cir. 2013) (holding that a defendant forfeits objections based on Rule 32.1(b) by failing to invoke them during revocation proceedings); *United States v. Fay*, 547 F.3d 1231, 1234 (10th Cir. 2008) ("A full revocation hearing is not necessary where the defendant admits he has violated the terms of his supervised release."). Moreover, Mr. Wright almost certainly had sufficient notice of the alleged violation here. *See United States v. Sistrunk*, 612 F.3d 988, 992 (8th Cir. 2010) ("For notice to be effective, it need only assure that the defendant understands the nature of the alleged violation.").

been different." *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (quotation marks omitted). During the revocation hearing, the probation officer alleged (and Mr. Wright admitted) that Mr. Wright failed over thirty urine tests and failed to complete an inpatient substance abuse program. The failed drug tests indicate Mr. Wright repeatedly violated the requirements, pursuant to his own 2004 sentence, that he "submit to urinalysis" and "refrain from excessive use of alcohol and will not purchase, possess, use, or distribute or administer any controlled substance or paraphernalia related to such substances, except as prescribed by a physician." ROA, vol. I, at 23. Similarly, Mr. Wright's failure to complete an inpatient substance abuse program violated Standard Condition 9's requirement that, "if directed by the probation officer, [he] successfully participate in a program of testing and treatment (to include inpatient) for substance abuse." *Id.* Moreover, as the Government observes, the district court is required to revoke a defendant's supervised release when, as here, the defendant "tests positive for illegal controlled substances more than 3 times over the course of 1 year." 18 U.S.C. § 3583(g)(4). Thus, even if the revocation petition had quoted the language from Mr. Wright's supervised-release conditions, the district court would have been required to revoke supervised release just the same.

Mr. Wright argues the above analysis would require us to "find in the first instance that Mr. Wright violated conditions of supervised release that were not considered by the district court," thus "short-circuit[ing] the established legal procedure which provides for allegedly violated conditions to be provided to a

defendant in writing, a revocation hearing with rights to appear, present evidence, and allocate, and a finding of a preponderance of evidence that the alleged conditions were violated." Reply Br. at 4–5. Mr. Wright is correct that "[t]his court should not . . . perform the fact-finding function reserved for the district courts." *Davis v. United States*, 192 F.3d 951, 961 (10th Cir. 1999). But because Mr. Wright raises his argument for the first time on appeal, we must determine, as we routinely do in such cases, whether he satisfies the requirements of plain error. Particularly where the record includes undisputed evidence that Mr. Wright engaged in conduct that plainly violated his supervised-release conditions, engaging in this routine inquiry does not require impermissible fact-finding on appeal.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's revocation of Mr. Wright's term of supervised release.

Entered for the Court

Carolyn B. McHugh
Circuit Judge