FILED
United States Court of Appeals
Tenth Circuit

August 11, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WINTER ROSE OLD ROCK,

Defendant - Appellant.

No. 22-4047

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:21-CR-00184-HCN-1)

Submitted on the briefs:*

Scott K. Wilson, Federal Public Defender, and Nathan K. Phelps, Assistant Federal Public Defender, District of Utah, Salt Lake City, Utah, on the briefs for Defendant – Appellant.

Trina A. Higgins, United States Attorney, Nathan H. Jack, Assistant United States Attorney, District of Utah, Salt Lake City, Utah, on the brief for Plaintiff – Appellee.

Before **PHILLIPS**, **MURPHY**, and **ROSSMAN**, Circuit Judges.

MURPHY, Circuit Judge.

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* After examining the briefs and appellate record, this panel 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). Accordingly, on March 3, 2023, this court entered an order submitting the appeal without oral argument.

I. Introduction

In 2017, Winter Rose Old Rock pleaded guilty to voluntary manslaughter. *See* 18 U.S.C. § 1112, 1153(a). After completing her prison sentence, she began serving a three-year term of supervised release. Fourteen months later, she committed several violations of the terms of her release. Pursuant to 18 U.S.C. § 3583(e)(3) and (h), the district court revoked her supervision and sentenced her to time served and thirty-one months of post-release supervision. Relying on the Supreme Court's decision in *Apprendi v. New Jersey*, Old Rock objected to the new term of supervised release. 530 U.S. 466, 490 (2000). She asserted the term unconstitutionally exceeded the thirty-six-month maximum set out in § 3583 when combined with the post-release supervision she already served. The district court rejected this argument, citing a lack of precedent supporting the application of *Apprendi* to standard supervised release revocations. This court agrees. Our caselaw illustrates that § 3583 authorizes terms of supervision upon revocation that cumulatively surpass the statutory maximum when combined with the defendant's prior time served on supervision. *See United States v. Robinson*, 62 F.3d 1282, 1285 (10th Cir. 1995). Exercising jurisdiction pursuant to 28 U.S.C. § 1291, therefore, we **affirm** the district court's judgment. This court also determines that despite Old Rock's failure to timely file a notice of appeal, the government forfeited its request for dismissal by not complying with 10th Cir. R. 27.3.

II. Background

On February 1, 2016, Old Rock killed her physically abusive husband during an altercation. A year and a half later, she pleaded guilty to voluntary manslaughter and was sentenced to four years' imprisonment and three years' supervised release. After completing her prison sentence, Old Rock successfully served the first fourteen months of her supervised release. Nevertheless, she admitted violating the terms of her post-release supervision between October 2021 and February 2022 on five occasions by: (a) failing a drug test; (b) not completing her assigned substance abuse treatment; (c) absconding from a residential treatment program; (d) committing retail theft; and (e) giving a false name. These violations resulted in Old Rock's detention by the U.S. Marshals Service from October 26 to December 8, 2021, and again from February 18, 2022, until May 18, 2022, one day after her revocation judgment was entered.

On April 5, 2022, the district court elected to continue Old Rock's first supervised release hearing to give her counsel time to identify available housing upon her release. By her second hearing on May 17, a spot at a local treatment center had been secured. Accordingly, the district court revoked Old Rock's supervised release and sentenced her to approximately five months' time served and a new term of supervised release of thirty-one months. *See* 18 U.S.C. § 3583(e)(3), (h). Old Rock objected to this sentence, citing *Apprendi* and its progeny. She reasoned due process and the Sixth Amendment limit the total amount of supervised release a defendant can serve to the amount set out in 18 U.S.C. §3583(b). She asserted her involuntary

manslaughter conviction was a Class C felony and the maximum allowable aggregate term of supervised release was, therefore, thirty-six months. The district court did not accept this argument. It determined neither *Apprendi* nor Tenth Circuit precedent prevented the sentence from cumulatively surpassing the initial maximum term set out in §3583(b). Pursuant to Fed. R. App. P. (4)(b)(1)(A), Old Rock had fourteen days from the entry of judgment to file a notice of appeal. She filed her notice on June 2, 2022, fifteen days after the judgment entered. The government did not submit a motion to dismiss the untimely appeal. Rather, it raised dismissal for the first time in its appellate briefing.

III. Analysis

a. 10th Cir. R. 27.3

As relevant here, Fed. R. App. P. 4(b)(1)(A) requires a criminal defendant's notice of appeal be filed within fourteen days of entry of judgment. This court has classified Rule 4(b)(1)(A) as a "non-jurisdictional claim-processing rule." *United States v. Garduño*, 506 F.3d 1287, 1290 (10th Cir. 2007). Such rules "may be forfeited if not properly raised by the government." *Id.* at 1291. Nevertheless, "[t]he timeliness requirements of Rule[] 4(b)(1)(A) . . . remain inflexible and 'thus assure relief to a party properly raising them.'" *Id*. (quoting *Eberhart v. United States*, 546 U.S. 12, 19 (2005)). There is no provision in the Federal Rules of Criminal Procedure or Appellate Procedure requiring that a challenge be raised for not complying with Rule 4(b)(1)(A) prior to a party's appellate briefing. *Id*. at 1292. The Tenth Circuit,

however, has its own rule governing when a request to dismiss for untimely notice of appeal must be made. *See* 10th Cir. R. 27.3.[1]

The predecessor to Rule 27.3 allowed parties to file "a motion to dismiss the entire case for lack of appellate jurisdiction or for any other reason a dismissal is permitted by statute, the Federal Rules of Appellate Procedure or these rules," but a "[f]ailure to file a motion does not foreclose a party from raising the issue in a merits brief." 10th Cir. R. 27.2 (A)(1)–(3) (2007 Edition); *see also United States v. Clayton*, 416 F.3d 1236, 1238 (10th Cir. 2005) ("Nothing in Rule 27.2 provides that a contention that *can* be raised by motion *must* be raised by motion, on pain of forfeiture."); *Garduño*, 506 F.3d at 1292 n.7 ("Failure to invoke Rule 27.2(A)(1)(a), however, does not constitute a forfeiture where, as here, the appellee seeks dismissal for failure to timely appeal in its response brief."). In 2008, this court implemented changes to the Rule. The current version provides that "[a] motion [to dismiss or affirm] should be filed within 14 days after the notice of appeal is filed, unless good cause is shown,"[2] but "[f]ailure to file a timely motion to enforce an *appeal waiver* does not preclude a party from raising the issue in a merits brief." 10th Cir. R. 27.3(A)(3)(a)–(c) (2023 Edition) (emphasis added). Critically, the current Rule permits raising appeal waivers for the first time in appellate briefing, but all other

[1] Prior to 2016, 10th Cir. R. 27.3 was enumerated as 10th Cir. R. 27.2.

[2] This opinion applies the current version of 10th Cir. R. 27.3 which postdates *Garduño*, but otherwise does not affect that decision.

motions to dismiss or affirm should be brought within fourteen days after filing of the notice of appeal, unless good cause is shown.[3]

Rule 27.3(A) exists as means to improve judicial economy and "moot issues that would otherwise need to be briefed." *Clayton*, 416 F.3d at 1238. Although Old Rock filed her notice of appeal late, the government did not file a motion to dismiss the untimely appeal pursuant to Rule 27.3(A). Instead, it raised the issue for the first time in its response brief. Contrary to the Rule, the government offered no good cause for its failure to file a motion. Rather, it summarily characterized its challenge as timely, and therefore dismissal as mandatory. By not complying with the Rule, the government impeded the efficient resolution of this matter. Accordingly, it forfeited its untimely notice of appeal argument.[4]

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[3] Nothing in Rule 27.3(A) prevents this court from addressing issues of jurisdiction at any time. *See, e.g.*, *United States v. Bustillos*, 31 F.3d 931, 933 (10th Cir. 1994); *see also Clayton*, 416 F.3d at 1238; ("Certainly, failure to file a motion under Rule 27.2(A)(1)(a) to dismiss for lack of appellate jurisdiction does not foreclose raising the issue in a brief, or even at oral argument, because lack of jurisdiction can be raised at any time in the proceedings."); *United States v. Springer*, 875 F.3d 968, 971 n.2 (10th Cir. 2017) (motion to dismiss was late under 10th Cir. R. 27.3(A)(3)(a), but it raised "jurisdictional issues that we would examine in any event"). Our interpretation that Rule 27.3(A) requires a timely motion or a showing of good cause, therefore, does not apply to jurisdictional challenges.

[4] This court recognizes it may suspend any part of its own rules with or without party motion when it deems necessary. *See* 10th Cir. R. 2.1; *Sinclair Wyo. Ref. Co. v. U.S. Env't Prot. Agency*, 887 F.3d 986, 988 (10th Cir. 2017); *United States v. Blanton*, 736 F. App'x 213, 214 (10th Cir. 2018) (unpublished disposition cited solely for its persuasive value) (applying 10th Cir. R. 2.1 to a 27.3(A) motion to dismiss filed one day late). The government in this case, however, has not requested we suspend our rules, nor do we choose to do so sua sponte.

b. *Apprendi* Objection

When considering a sentence imposed after revocation of supervised release, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Handley*, 678 F.3d 1185, 1188 (10th Cir. 2012). An initial supervised release penalty is statutorily limited to a maximum term based on the underlying offense and may be revoked if a defendant violates the terms of their release. 18 U.S.C. § 3583(b), (e)(3). If supervised release is revoked and a defendant is ordered to serve an additional term of imprisonment, the district court may place the defendant on another term of post-release supervision after the completion of her prison sentence. *Id*. § 3583(h). "The length of such a term of supervised release shall not exceed the term of supervised release authorized by the statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." *Id*.

In *Apprendi*, the Supreme Court concluded principles of due process and the Sixth Amendment require "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." 530 U.S. at 490; *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013) (holding any fact that increases the mandatory minimum sentence for a crime must be submitted to a jury). More recently, the Supreme Court applied these principles to a provision of § 3583 that mandated an additional prison term "without regard to the length of the prison term authorized for the defendant's initial crime of conviction." *United States v. Haymond*, 139 S. Ct. 2369, 2374 (2019). In *Haymond*, a plurality determined § 3583(k) violated

Apprendi and *Alleyne* by increasing punishment without jury input based on a finding of fact. *Id*. Nonetheless, Justice Breyer's concurrence, which represented the narrowest ground supporting the judgment, declined to "transplant the *Apprendi* line of cases to the supervised-release context." *Id*. at 2385 (Breyer, J. concurring in the judgment). On the narrow facts presented, Justice Breyer distinguished § 3583(k) as "more closely resembl[ing] the punishment of new criminal offenses" rather than a typical revocation provision which is understood as "part of the penalty for the initial offense." *Id*. at 2385–86 (Breyer, J. concurring in the judgment) (citations omitted).[5] *But cf. United States v. Shakespeare*, 32 F.4th 1228, 1237 (10th Cir. 2022) (holding Justice Breyer's concurrence answers an as-applied challenge and, therefore, did not

[5] Old Rock argues Justice Breyer's concurrence is the only opinion in *Haymond* which expressly declines to extend *Apprendi* to supervised release proceedings. Thus, she asserts *Haymond* presents no majority holding preventing the application of *Apprendi* to supervised release sentences issued under § 3583(h). Old Rock's arguments in this regard are inconsistent with Justice Breyer's *Haymond* concurrence and the four-justice dissent. 139 S. Ct. at 2385 (Breyer, J., concurring in the judgment) ("I agree with much of the dissent, in particular that the role of the judge in a supervised-release proceeding is consistent with traditional parole. *See post*, at 2390 – 2391 (opinion of ALITO, J.). As 18 U.S.C. § 3583 makes clear, Congress did not intend the system of supervised release to differ from parole in this respect. And in light of the potentially destabilizing consequences, I would not transplant the *Apprendi* line of cases to the supervised-release context. *See post*, at 2388 – 2389 . . . ."). In any event, this court has previously rejected this characterization, concluding Justice Breyer's concurrence represents the Supreme Court's holding in *Haymond*, at least as to the applicability of *Apprendi*, and applies to typical revocation sentences like Old Rock's. *United States v. Salazar*, 987 F.3d 1248, 1259 (10th Cir. 2021) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

apply when "a defendant has pleaded guilty[] or been found guilty by a jury beyond a reasonable doubt").

This court's interpretation of defendants' rights in standard revocation proceedings aligns with Justice Breyer's reasoning in *Haymond*. Prior to *Apprendi*, *Alleyne*, and *Haymond*, we determined "§ 3583 authorizes the revocation of supervised release even where the resulting incarceration, when combined with the period of time the defendant has already served for his substantive offense, will exceed the maximum incarceration permissible under the substantive statute." *Robinson*, 62 F.3d at 1285 (quotation omitted). Following *Apprendi*, we concluded "[i]t is well-settled that supervised release is part of the penalty for the initial offense, and that once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence have not been subject to Sixth Amendment protections." *United States v. Cordova*, 461 F.3d 1184, 1186 (10th Cir. 2006) (citation and quotation omitted). This court has expressly refused to interpret *Apprendi* and *Haymond* as intervening authority that undermines this conceptualization of § 3583. *Salazar*, 987 F.3d at 1261. In typical revocation proceedings, therefore, § 3583 penalties which exceed the relevant statutory maximum when combined with the defendant's prior time served do not offend *Apprendi*. *Id*.

Old Rock argues this court should consider § 3583(h), which governs post-release supervision upon revocation, as distinct from these prior interpretations of *Apprendi*'s applicability. She asserts § 3583(h) indefinitely and especially fixes the

amount of time a defendant can be placed on supervised release. It is true that § 3583(h) is distinguishable from § 3583(e)(3) because it requires courts to "credit defendants for prior revocation sentences when imposing *new* periods of *supervised release*." *United States v. Hunt*, 673 F.3d 1289, 1293 (10th Cir. 2012). This aggregation requirement creates a system in which a district court must impose less supervised release "as a defendant serves more and more time in prison for each revocation." *United States v. Hernandez*, 655 F.3d 1193, 1198 (10th Cir. 2011). In turn, § 3583(h) eliminates the risk of a defendant being subject to "an endless cycle of consecutive terms of imprisonment and supervised release" because eventually she will no longer be eligible for supervised release. *Hunt*, 673 F.3d at 1293. This aggregation requirement, however, only applies to "any term of *imprisonment* that was imposed *upon revocation* of supervised release." 18 U.S.C. § 3583(h) (emphasis added). Here, Old Rock argues she should be credited not with imprisonment imposed after revocation, but with the time she served on supervised release prior to revocation. Her request, therefore, is outside the scope of § 3583(h)'s aggregation requirement. Indeed, the district court credited Old Rock with five months' time served upon revocation, lowering her post-release supervision from the statutory maximum of thirty-six months to thirty-one months.

Accounting for this aggregation distinction, nothing in the nature or application of § 3583(h) renders it distinguishable from our precedent that *Apprendi* does not apply to typical revocation sentences. Section 3583(h) is part of "ordinary revocation" proceedings and does not impose a new penalty like the provision

contemplated in *Haymond*. *United States v. Bruley*, 15 F.4th 1279, 1284 (10th Cir. 2021). Similar to § 3583(e)(3), § 3583(h) ties the revocation penalty to the underlying crime of conviction. *See Salazar*, 987 F.3d at 1261. As is the case with any standard revocation proceeding, sentences utilizing § 3583(h) remain "part of the final sentence for the crime" and the associated findings are "fixed by the jury's initial determination." *Id*. Accordingly, § 3583(h) does "not increase the penalty for a crime beyond the prescribed statutory maximum." *Id*. (quotations omitted). Old Rock was issued a statutorily compliant term of supervised release during an ordinary revocation proceeding. No aspect of Old Rock's revocation sentence, therefore, violates *Apprendi*.

IV. Conclusion

The judgment entered by the United States District Court for the District of Utah is hereby **affirmed**.