FILED
United States Court of Appeals
Tenth Circuit

August 22, 2023

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEVIN RAY KELBCH,

Defendant - Appellant.

No. 22-5117
(D.C. No. 4:22-CR-00258-JFH-1)
(N.D. Okla.)

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**ORDER AND JUDGMENT**

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Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

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The district court revoked Devin Ray Kelbch's supervised release and sentenced him to 24 months in prison. Mr. Kelbch appeals. His appointed counsel submitted an *Anders* brief stating the appeal presents no non-frivolous grounds for reversal. After careful review of the record, we agree. Exercising jurisdiction under 28 U.S.C. § 1291, we grant counsel's motion to withdraw, and we dismiss the appeal.

## I. BACKGROUND

### A. *Supervised Release Violations*

On February 26, 2018, Mr. Kelbch pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § § 922(g)(1) and 924(a)(2). The district court sentenced him to 63 months in prison and three years of supervised release. The supervised release was set to run from April 15, 2022 to April 14, 2025.

On August 11, 2022, the United States Probation Office filed a petition alleging Mr. Kelbch had violated the terms of his supervised release by failing to (1) participate in an outpatient substance abuse program, (2) participate in a cognitive behavioral treatment program, (3) maintain an approved residence, and (4) allow visits from a probation officer.

On November 17, 2022, the Probation Office filed a superseding petition additionally alleging that Mr. Kelbch had associated with a convicted felon and committed two Oklahoma state offenses: uttering a forged instrument and identity theft. The superseding petition included two affidavits by Tulsa Police Detective Robert Shaw regarding Mr. Kelbch's alleged new state offenses. Detective Shaw alleged that (1) on August 12, 2022, Mr. Kelbch purchased a vehicle using a check that had been unlawfully altered, and (2) officers later located personal identification documents in Mr. Kelbch's possession that appeared to be fraudulent.

### B. ***Revocation Hearing***

At the revocation hearing, the district court described the alleged supervised release violations. Mr. Kelbch stipulated to the alleged violations. The court then found that Mr. Kelbch had violated the terms of his release, entered judgment revoking his supervised release, and sentenced him to 24 months in prison.

### C. ***Appeal and* Anders *Brief***

Mr. Kelbch's counsel filed a timely notice of appeal, and he submitted an opening brief invoking *Anders v. California*, 386 U.S. 738 (1967), which "authorizes counsel to request permission to withdraw where counsel conscientiously examines a

case and determines that any appeal would be wholly frivolous." *United States v. Calderon*, 428 F.3d 928, 930 (10th Cir. 2005).

In the *Anders* brief, counsel notes that Mr. Kelbch "identified the following issues that he wishes to pursue": (1) whether the district court "erred in finding Mr. Kelbch guilty of a new law violation when Mr. Kelbch had never been arraigned or otherwise appeared on formal charges in connection with a new violation of the law," (2) whether the "imposition of 24-months imprisonment was unreasonable," and (3) whether the district court "should hear further evidence and impose a different sentence upon Mr. Kelbch." Aplt. Br. at 1-2. Counsel concludes all three issues are frivolous.

Counsel served a copy of the *Anders* brief on Mr. Kelbch by mail. *See* Aplt. Br. at 21 (certificate of service). In addition, the Clerk's Office sent the *Anders* brief to Mr. Kelbch by mail and invited him to respond. Doc. 10994524, 11006722. Mr. Kelbch has not responded.

## II. **DISCUSSION**

### A. ***Standard of Review and Legal Background***

We review sentences imposed for violating supervised release under a "plainly unreasonable" standard. *United States v. Kelley*, 359 F.3d 1302, 1304 (10th Cir. 2004). Under this standard, we will not reverse a revocation sentence "if it can be determined from the record to have been reasoned and reasonable." *United States v. Contreras-Martinez*, 409 F.3d 1236, 1241 (10th Cir. 2005) (quotations omitted). In conducting this analysis, we review the district court's findings of fact for clear error

and its legal interpretations of the United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines") de novo. *United States v. Burdex*, 100 F.3d 882, 884 (10th Cir. 1996).

*Anders* provides:

> [I]f counsel finds [the defendant's] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. . . . [T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal . . . .

386 U.S. at 744. When counsel submits an *Anders* brief, we review the record de novo. *United States v. Kurtz*, 819 F.3d 1230, 1233 (10th Cir. 2016).

### B. ***Analysis***

Based on our independent review of the record, we conclude that none of the three issues addressed in the *Anders* brief is non-frivolous. We have not detected any other colorable issue.

#### 1. **Consideration of State Offenses**

Mr. Kelbch has no non-frivolous argument that the district court erred in considering his state offenses. Detective Shaw's affidavit detailed the evidence supporting probable cause that Mr. Kelbch had committed two state crimes while on supervised release. At his revocation hearing, Mr. Kelbch stipulated to the supervised release violations alleged in the superseding petition.

Although Mr. Kelbch had not been arraigned or found guilty for the state offenses, the district court needed only to find by a preponderance of the evidence that he violated a condition of his supervised release. *See* 18 U.S.C. § 3583(e)(3). Under the Guidelines, a supervised release violation "may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct." U.S.S.G. § 7B1.1 cmt.1. Thus, the district court may consider evidence of criminal conduct that violates a defendant's supervised release regardless of whether the defendant has been separately prosecuted. *See United States v. Hall*, 984 F.2d 387, 391 (10th Cir. 1993) (upholding the district court's finding of sufficient evidence to support a supervised release violation based on testimony about illegal activity that was not prosecuted).

Here, the district court did not err when it considered the state offenses, even though Mr. Kelbch had not been prosecuted for them. *See United States v. Saavedra-Villasenor*, 554 F. App'x 767, 772 (10th Cir. 2014) (unpublished) ("[T]he fact that a defendant may never be prosecuted for committing a new crime in no way lessens his culpability for breaking the conditions of supervised release.") (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1).

2. **Reasonableness of the Sentence**

Mr. Kelbch has no non-frivolous argument that his sentence was either substantively or procedurally unreasonable, or that new evidence may be submitted for resentencing.

First, an argument that his sentence was substantively unreasonable because other individuals have been released to supervision following similar violations lacks merit. *See* Aplt. Br. at 13-14.

The district court sentenced Mr. Kelbch to 24 months in prison followed by 12 months of supervision. Two years is the statutory maximum sentence under 18 U.S.C. § 3583(e)(3) and falls within the range of 21 to 27 months stated in the policy provisions of U.S.S.G. § 7B1.4(a). *See* 18 U.S.C. § 3553(a)(4)(B) (in sentencing for a supervised release violation, the court must consider "the applicable guidelines or policy statements issued by the Sentencing Commission").

Mr. Kelbch stipulated to "Grade B [supervised release] violations" under U.S.S.G. § 7B1.1. ROA, Vol. II at 5-8; *see* U.S.S.G. § 7B1.1.[1] The Guidelines recommend revocation of supervised release and a sentence of imprisonment "[u]pon a finding of a Grade . . . B violation." U.S.S.G. § 7B1.3.

Moreover, Mr. Kelbch's within-Guidelines sentence is subject to a "presumption of reasonableness," which the defendant has the burden to rebut. *United States v. McBride*, 633 F.3d 1229, 1232 (10th Cir. 2011). We see no pathway for Mr. Kelbch to meet that burden.

Second, an argument that the district court was procedurally unreasonable in failing to consider his allegedly excessive underlying sentence of 63 months is

[1] The Guidelines define "Grade B Violations" of supervised release as "conduct constituting [a] federal state or local offense punishable by a term of imprisonment exceeding one year." U.S.S.G. § 7B1.1(a)(2).

frivolous. As his counsel states, "The only way in which Mr. Kelbch's underlying sentence could be relevant to his revocation sentence of imprisonment and cognizable on appeal, would be as a factor relevant to Mr. Kelbch's 'history and characteristics' under 18 U.S.C. § 3553(a)." Aplt. Br. at 15. The district court considered Mr. Kelbch's "history and characteristics" under 18 U.S.C. § 3553(a)(1), stating that the court "considered the nature and circumstances of the violation conduct, and the history and characteristics of this Defendant." ROA, Vol. II at 15.

Third, a request to present further mitigating evidence for resentencing is frivolous. Mr. Kelbch informed counsel he wishes to reopen sentencing to submit new evidence regarding (1) sentencing of others similarly situated to him who received a second chance to comply with the conditions of their supervised release; (2) testimony from his co-defendant in Tulsa County, which he claims would exonerate him;[2] and (3) testimony of his good work from people associated with the welding school he previously attended. But as his counsel acknowledges, this evidence "was not presented to the District Court at the revocation hearing." Aplt. Br. at 17. "[N]ew evidence not submitted to the district court is not properly part of the record on appeal," and we cannot consider it. *Utah v. United States DOI*,

[2] It is not clear from the record or the *Anders* brief whether Mr. Kelbch believes this evidence would exonerate him of his underlying offense or of the supervised release violations. Regardless, any such evidence was not presented to the district court and cannot be considered on appeal.

535 F.3d 1184, 1195 n.7 (10th Cir. 2008). Mr. Kelbch thus has no non-frivolous argument to make with respect to presenting new evidence for resentencing.

## III. **CONCLUSION**

Our independent review of the record and the issues raised in the *Anders* brief found no non-frivolous ground for reversal. We grant counsel's motion to withdraw and dismiss the appeal.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge