FILED
United States Court of Appeals
Tenth Circuit

August 28, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

COTY DALE WALLACE,

Defendant - Appellant.

No. 18-6209
(D.C. No. 5:14-CR-00263-D-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

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

Coty Wallace appeals the sentence the district court imposed after he admitted to violating the conditions of his supervised release. 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.

In January 2015, Mr. Wallace was sentenced to 24 months' imprisonment to be followed by 3 years of supervised release for his conviction of being a felon in possession of a firearm. In October 2017, supervised release was revoked, and

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Mr. Wallace was sentenced to another 8 months' imprisonment to be followed by another 2 years of supervised release. In October 2018, Mr. Wallace's probation officer petitioned the court to again revoke supervised release.

The petition stated that Mr. Wallace had violated three conditions of supervision by being arrested for DUI (thereby committing a crime and consuming alcohol) and by being "unsuccessfully discharged" from counseling (thereby failing to participate in a mental health aftercare program). (R. Vol. I at 19.) Subsequently, Mr. Wallace's probation officer added a fourth violation on the basis that Mr. Wallace had "submitted a urine specimen with abnormal creatinine levels (diluted)." (*Id.* at 24.)

The violation report Mr. Wallace's probation officer submitted to the court stated that Mr. Wallace had several times refused to comply with the requirements of his supervision, although he had ultimately assented each time. His probation officer accordingly recommended that he be sentenced to 10 months' imprisonment to be followed by 18 months of supervised release.

At a hearing, Mr. Wallace stipulated that the government could prove the four violations by a preponderance of the evidence. His attorney argued for leniency, admitting that Mr. Wallace "has an attitude" problem but attempting to demonstrate "how far he's come." (R. Vol. III at 10.) Before announcing the sentence, the district court judge told Mr. Wallace that "[t]he conditions of supervision that were put in place at the time of [his] sentencing were a part of [that] sentence," and

therefore any refusal to comply with them was not merely a dispute with the probation office but rather a dispute with the court. (*Id.* at 12.)

Initially, the district court sentenced Mr. Wallace to 6 months' imprisonment to be followed by 22 months of supervised release. However, when the judge expressed hopefulness for Mr. Wallace's future and stated, "I'm looking forward to when you get out because I want to see what you do," Mr. Wallace interrupted him and said, "There ain't going to be much I can do when I get out." (*Id.* at 17.) The judge attempted to continue speaking, but Mr. Wallace kept interrupting him, stating, "You're setting me up for failure with this sentence." (*Id.*) The judge then stated, "We can revisit this proceeding and we can revisit my sentence," to which Mr. Wallace replied, "Let's revisit it." (*Id.* at 18.)

At that point, the court took a 10-minute recess and then rescinded the earlier sentence and instead sentenced Mr. Wallace to 10 months' imprisonment to be followed by 18 months of supervised release. While the judge was outlining the conditions of supervision, Mr. Wallace again interrupted, repeatedly asking the judge to send him to prison for 24 months and not impose any supervised release. The judge stated that he was "going to proceed in contempt" and then directed the U.S. Attorney's Office to review Mr. Wallace's conduct during the hearing to determine whether it warranted "separate criminal proceedings as opposed to contempt proceedings." (*Id.* at 21–22.) Mr. Wallace appealed.

On appeal, Mr. Wallace's attorney filed a motion to withdraw as counsel and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that he "ha[d] not

identified a non-frivolous issue on appeal." (Appellant's Br. at 8.) "Under *Anders*, counsel must submit a brief to the client and the appellate court indicating any potential appealable issues based on the record. The client may then choose to submit arguments to the court." *United States v. Calderon*, 428 F.3d 928, 930 (10th Cir. 2005) (internal citation omitted). At that point, we "must . . . conduct a full examination of the record to determine whether [the] defendant's claims are wholly frivolous." *Id.* "If [we] conclude[] after such an examination that the appeal is frivolous, [we] may grant counsel's motion to withdraw and may dismiss the appeal." *Id.*

In this case, Mr. Wallace has not filed his own brief on appeal. His attorney's *Anders* brief identified two potential issues for appeal: whether the district court had jurisdiction to modify the sentence it first pronounced and whether a 10-month period of incarceration was substantively unreasonable. We have conducted a full examination of the record and now address the two issues Mr. Wallace's attorney has identified.

A district court is limited in its ability to modify a term of imprisonment once sentencing has occurred, *see, e.g.*, 18 U.S.C. § 3582(c), and Federal Rule of Criminal Procedure 35(c) defines "sentencing" as "the oral announcement of the sentence." In *United States v. Luna-Acosta*, 715 F.3d 860, 865 (10th Cir. 2013), however, this court stated that "nothing in the rule requires or suggests that whatever term or terms of imprisonment the district court first utters during a hearing is to be treated as the sentence for purposes of the rule." The court also concluded that the Fifth Circuit

had "reasonabl[y]" decided in *United States v. Meza*, 620 F.3d 505 (5th Cir. 2010), "that the district court's change of a sentence immediately after it first announced a sentence was not a modification" but rather was better understood under "'the totality of the events as one sentence.'" *Luna-Acosta*, 715 F.3d at 865 (quoting *Meza*, 620 F.3d at 508). Significantly, in *Luna-Acosta*, the final sentence was given almost a month after "the district court [had] continued the first hearing . . . without finalizing all of the terms of the sentence." *Id.* at 866 (emphasis omitted).

Here, all that separated the district court's initial announcement of the sentence and its revision were several interruptions by Mr. Wallace and a 10-minute recess. The district court did not lose its jurisdiction over the sentence within that time. Mr. Wallace does not have a non-frivolous ground for challenging his sentence on this basis.

As for the substantive reasonableness of the 10-month sentence, "we may apply a [rebuttable] presumption of reasonableness to a sentence properly calculated under the Guidelines." *United States v. Thompson*, 518 F.3d 832, 869 (10th Cir. 2008). Based on Mr. Wallace's Grade C supervised release violation and his criminal history category of II, the advisory guidelines range for sentencing was 4–10 months' imprisonment. *See* U.S.S.G. § 7B1.4(a). The 10-month sentence was thus within the guidelines range, albeit at the top of the range.

Although the district court was initially willing to impose a more lenient sentence based on the progress Mr. Wallace had made, the judge also expressed his concerns about Mr. Wallace's attitude toward supervised release and toward the court

itself. After Mr. Wallace repeatedly interrupted the initial sentencing, the judge stated, "in light of the display that [Mr. Wallace had] put on for the Court in connection with sentencing, clearly my initial thoughts about disposition in this case were imprudent." (R. Vol. III at 19.) At that point, the judge imposed the sentence Mr. Wallace's probation officer had recommended, rather than a more lenient sentence at the urging of defense counsel. We see no reason to interpret the within-guidelines sentence as a punishment for interrupting instead of a reasonable sentence in line with the government's recommendation. (Indeed, the court later determined that separate contempt or possibly criminal proceedings should be held for Mr. Wallace's behavior at the hearing.) The district court did not abuse its discretion in imposing the 10-month, within-guidelines prison sentence. *See Thompson*, 518 F.3d at 869.

Having found no non-frivolous grounds for challenging the revocation of supervised release and imposition of a 10-month term of imprisonment, we **DISMISS** Mr. Wallace's appeal and **GRANT** appellate counsel's motion to withdraw.

Entered for the Court

Monroe G. McKay
Circuit Judge