FILED
United States Court of Appeals
Tenth Circuit

September 11, 2019

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ASHTON B. MALONE,

Defendant - Appellant.

No. 18-3213

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:17-CR-10154-JWB-1)

Dean Sanderford, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

James A. Brown, Assistant United States Attorney (Stephen R. McAllister, United States Attorney, with him on the brief), Topeka Kansas, for Plaintiff-Appellee.

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

SEYMOUR, Circuit Judge.

Ashton B. Malone was convicted on two counts of distributing methamphetamine on July 12, 2018 and was sentenced to 151 months' custody followed by five years of supervised release. At sentencing, the district court imposed all the various conditions of supervised release set forth in the Presentence Investigation Report ("PSR"), including a

special condition requiring Mr. Malone to undergo mental health treatment. Contained within this special condition was the mandate for Mr. Malone to "take prescribed medication as directed" by mental health staff or a treating physician, the requirement that is the subject of this appeal. Rec., vol. III at 28. Mr. Malone did not object to this proposed condition in either his written objections to the PSR or at sentencing. He argues on appeal that the district court's failure to make particularized findings to support this condition was plain error compelling reversal. We agree and accordingly reverse.

I.

On July 12, 2018, Mr. Malone was convicted after a jury trial on two counts of distributing methamphetamine. The PSR prepared by the United States Probation Office set forth various sentencing recommendations. Among these was a special condition of supervised release requiring Mr. Malone to undergo mental health treatment and, correspondingly, to "take prescribed medication as directed."

At sentencing, the district court announced its intention "to impose the mandatory and special conditions of supervision set forth" in the PSR, rec., vol. II at 335, which included the aforementioned condition concerning medication. Although the court stated that the "[n]ature of the offense and history outlined in the presentence report warrant the conditions for participation in the cognitive behavioral programs; participation in substance abuse and mental health counseling; and allowing searches of defendant's person and property," *id.*, it made no findings to support either the imposition of the mental health condition or its embedded medication directive.

Defense counsel did not object to either the condition or the court's failure to make supporting findings, responding in the negative when the court asked if there were any objections. Mr. Malone now contends that the court's failure to make particularized findings was plain error requiring reversal. The government counters that Mr. Malone is not entitled to appellate review because he waived this issue in the district court and, alternatively, that the condition can be construed narrowly to avoid reversal under plain error review.

II.

There is no question that Mr. Malone did not make a timely objection. Ordinarily, when an error claimed on appeal was not presented below, we apply plain error review and will reverse "only if 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. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006) (citation and quotation mark omitted). However, "not every unpreserved claim of error is entitled to plain error review." *Id*. "[A] party that has *forfeited* a right by failing to make a proper objection may obtain relief for plain error; but a party that has *waived* a right is *not* entitled to appellate relief." *United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009) (emphasis in original) (citation omitted). Waiver occurs when a party deliberately considers an issue and makes an intentional decision to forgo it. While forfeiture comes about through neglect, waiver is accomplished by intent. *Id*. Thus, the applicable standard of review here turns on whether Mr. Malone affirmatively waived

review of this issue or merely forfeited it.

The government argues that Mr. Malone's situation was "tantamount to the classic waiver situation where a party actually identified the issue, deliberately considered it, and then affirmatively acted in a manner that abandoned any claim on the issue." Aple. Br. at 10 (quoting *Cruz-Rodriguez*, 570 F.3d at 1185); *see also United States v. Carrasco-Salazar*, 494 F.3d 1270, 1273 (10th Cir. 2007) ("There can be no clearer intentional relinquishment or abandonment of a known right, than when the court brings the defendant's prior objection to his attention, asks whether it has been resolved, and the defendant affirmatively indicates that it has.") (internal citations and quotation marks omitted). But Mr. Malone correctly counters that the present case can be more closely analogized to our decision in *United States v. Figueroa-Labrada*, 720 F.3d 1258 (10th Cir. 2013). As in *Figueroa-Labrada*, defense counsel here did not object to the PSR even when explicitly given the opportunity to do so. But he did nothing to indicate that he affirmatively wished to waive the district court's requirement to make particularized findings. That failure to preserve the issue "more closely resembles inadvertent neglect than an intentional decision to abandon a claim." *Id*. at 1264. This constituted forfeiture rather than waiver, and we therefore review for plain error.

III.

After dispensing with the question of waiver, our review in this case is exceedingly narrow. Both parties acknowledge that our precedents "unambiguously require supporting findings when courts impose special conditions of supervised release,"

United States v. Dunn, 777 F.3d 1171, 1178 (10th Cir. 2015), and that "when a court imposes a special condition that invades a fundamental right or liberty interest, the court must justify the condition with compelling circumstances," *United States v. Burns*, 775 F.3d 1221, 1223 (10th Cir. 2014); *see also United States v. Pacheco-Donelson*, 893 F.3d 757, 760 (10th Cir. 2018); Aplt. Br. at 4–5; Aple. Br. at 12–13. The parties likewise agree that a defendant on supervised release has "a significant interest in avoiding the involuntary administration of psychotropic drugs." *United States v. Mike*, 632 F.3d 686, 699 (10th Cir. 2011); *see also* Aplt. Br. at 4; Aple. Br. at 11. In oral argument, the government further conceded that imposing a condition of supervised release that would infringe upon a significant liberty interest at some indeterminate time in the future would probably not meet constitutional standards. Oral Arg. 17:03–42.

But the government urges us to follow our approach in *United States v. Bear*, 769 F.3d 1221 (10th Cir. 2014). We determined in *Bear* that "where a broad condition of supervised release is ambiguous and could be read as restricting a significant liberty interest, we construe the condition narrowly so as to avoid affecting that significant liberty interest." C*f. United States v. Cope*, 527 F.3d 944, 955 (9th Cir. 2008). Notwithstanding our prior decisions choosing to narrowly construe conditions relating to mental health treatment, we agree with Mr. Malone that while the provision here is broad, there is nothing ambiguous in the phrase "take prescribed medication as directed". We further agree that a narrowing interpretation by this court will not provide the clearest form of guidance to the relevant probation officers when Mr. Malone finally begins his term of supervised release, over twelve years from now if he serves his sentence in full.

Finally, we believe that clear guidance in this context is particularly critical. We conclude that imposing the condition here was error that was plain, that affected Mr. Malone's substantial rights, and that seriously affected the fairness and integrity of the judicial proceedings. The only remaining issue is the appropriate remedy.

We have several options for proceeding. We could remand for the district court to make the requisite findings to support imposition of this special condition, but neither party has requested such a solution. We could remand with a narrow mandate for a clerical amendment to the judgment striking out the medication provision, and neither party would object to this solution. In oral argument, however, both parties recognized that this condition is currently being broadly imposed as a "stock" special condition. Oral Arg. 13:44–14:25 (government), 26:04–36 (Mr. Malone). We consequently take this opportunity to make it clear that this condition, on its face, is an impermissible infringement into a defendant's significant liberty interests without the justifying support of particularized findings.

In the present case, the PSR outlines Mr. Malone's history of substance abuse. He also reported suffering from anxiety and depression but nevertheless explained that he is hesitant to take any medication to help his anxiety, as he does not want to feel tranquilized during the day. Rec, vol. III at 22. In addition, his mother mentioned that a teacher once recommended placing Mr. Malone on Ritalin to help him control his behavior at school. *Id*. at 20. This is the full extent of the PSR's discussion of Mr. Malone's mental health concerns. Based on these paltry details alone, the district court vaguely explained the "[n]ature of the offense and history outlined in the presentence

report warrant the conditions for . . . participation in substance abuse and mental health counseling" and, without further ado, imposed the special condition of supervised release requiring Mr. Malone to "take prescribed medication as directed." Rec., vol. II at 335.

It is highly questionable whether the district court could have found compelling circumstances on this record to justify the imposition of the special condition on Mr. Malone, even had it properly embarked on such an inquiry. "Conditions that touch on significant liberty interests are qualitatively different from those that do not," and their heightened requirement of particularized findings and compelling circumstances is well established in our precedents. *Bear*, 769 F.3d at 1230. When "stock" special conditions are proposed and the defendant does not object, it is easy to overlook the constitutional implications at stake. But even when the defendant does not object, the district court must ensure that its conditions conform to the Constitution.

In sum, in declining to narrowly construe the special condition at issue in this case, we have determined that imposing a blanket medication requirement without particularized supportive findings is plain error affecting Mr. Malone's substantial rights and the fairness, integrity, and public reputation of judicial proceedings. *See, e.g., Dunn*, 777 F.3d at 1178–79. Probation offices and courts in this circuit must be precise and discerning in their imposition of such conditions and may only include a broad mandate to "take prescribed medication as directed" when it is accompanied by particularized findings that justify it. Our remand for clerical amendment of the judgment in this case is limited to that task alone and should not be deemed an invitation for further consideration of this or any other issues. Accordingly, the offending language must be struck from the

written judgment and no resentencing may take place.

We REMAND for further proceedings consistent with this opinion.