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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MALACHI BRULEY,

Defendant - Appellant.

No. 20-6078

**Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:14-CR-00081-R-1)**

David McCrary, Assistant United States Attorney (Robert J. Troester, Acting United States Attorney, with him on the brief) Oklahoma City, Oklahoma for Plaintiff-Appellee.

Kathleen Shen, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs) Denver, Colorado for Defendant-Appellant.

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

BALDOCK, Circuit Judge.

Defendant timely appeals the district court's order revoking his term of supervised release and sentencing him to 48 months' imprisonment and two years of supervised release. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm.

I.

On June 4, 2014, Defendant pleaded guilty to one count of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1), which carries a statutory maximum sentence of 60 months and a lifetime of supervised release. *Id.* § 841(b)(1)(D). He also pleaded guilty to one count of being a drug user in possession of a firearm in violation of 18 U.S.C. § 922(g)(3), which is punishable by up to 120 months' imprisonment and three years of supervised release. *Id.* §§ 924(a)(2), 3583(b). The district court sentenced Defendant to 42 months' imprisonment on each count, to run concurrently. In addition, the district court imposed three years of supervised release on each count, to run concurrently.

Since his release from prison, Defendant's supervised release has been revoked twice. On the first occasion, the district court sentenced Defendant to 10 months' imprisonment on both counts, to run concurrently. The district court also imposed 18 months of supervised release on both counts, to run concurrently. On the second occasion, the one at issue on appeal here, the district court sentenced Defendant to 48 months' imprisonment—24 months on each count, to run consecutively. The district court also imposed two years of supervised release but did not specify to which count it applied.

Prior to the revocation proceedings in the district court, the United States Probation Office proposed a set of special conditions for the court to impose as part of Defendant's supervised release. These included a search condition and substance abuse treatment condition—both of which were imposed during Defendant's two

previous terms of supervised release. At the revocation hearing, the district court announced two of the four special conditions recommended by the United States Probation Office but did not announce the search condition or substance abuse treatment condition. The district court reminded Defendant that it was imposing special conditions and that Defendant "need[ed] to familiarize [him]self with all the special terms" to be set forth in the judgment. Following the revocation hearing, the district court issued a written judgment which imposed the unannounced search condition and substance abuse treatment condition.

Defendant makes three arguments on appeal. First, he argues that his 24-month prison sentence for the possession of marijuana charge is illegal because—when combined with his previous 42-month and 10-month prison terms—it exceeds the 60-month statutory maximum for his crime of conviction. Second, he argues the district court erred by imposing two years of supervised release without specifying which conviction was the basis for supervision. Third, he argues that certain special conditions included in the written judgment, but not orally announced at sentencing, are invalid. For the reasons stated below, we reject these arguments and affirm the district court.

II.

Defendant first argues that his 24-month prison sentence for the possession of marijuana charge is illegal because—when combined with his previous 42-month and 10-month prison terms—it exceeds the 60-month statutory maximum for his crime of conviction. *See* 21 U.S.C. § 841(b)(1)(D). Because this argument was not raised below,

we review only for plain error. Fed. R. Crim. P. 52(b). "Plain error occurs when 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. Harris*, 695 F.3d 1125, 1130 (10th Cir. 2012) (quoting *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (en banc)). An error is "some sort of '[d]eviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 732–33 (1993)).

We rejected Defendant's argument in *United States v. Robinson*, 62 F.3d 1282 (10th Cir. 1995). In *Robinson*, we held that 18 U.S.C. § 3583(e)(3) "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." *Id.* at 1285 (quoting *United States v. Purvis*, 940 F.2d 1276, 1279 (9th Cir. 1991)). Section 3583(e)(3) states, after finding a defendant has violated the terms of supervised release, a court may "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release." 18 U.S.C. § 3583(e)(3).

Defendant argues the Supreme Court's decisions in *Johnson v. United States*, 529 U.S. 694 (2000), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Haymond*, 139 S. Ct. 2369 (2019) have invalidated our reasoning in *Robinson*. Earlier

this year, we rejected this exact claim in *United States v. Salazar*, 987 F.3d 1248 (10th Cir. 2021). In *Salazar*, the defendant pleaded guilty to being a felon in possession of a firearm, which carries a statutory maximum sentence of 120 months' imprisonment. *Id.* at 1251. The defendant was originally sentenced to 115 months' imprisonment, and later, after being found to have violated the conditions of his supervised release, was sentenced to an additional 10 months' imprisonment. *Id.* The defendant argued this aggregate 125-month sentence was illegal because it exceeded the 120-month statutory maximum for his crime of conviction. *Id.* Recognizing *Robinson* foreclosed relief, the defendant claimed *Johnson*, *Apprendi*, and *Haymond* invalidated *Robinson*'s reasoning. *Id.* at 1254. After careful analysis of these cases, we concluded "*Robinson* remains controlling precedent," therefore, the "district court did not err in imposing a ten-month prison sentence after revoking Salazar's term of supervised release, even though his aggregate time in prison—125 months—exceeded the 120-month statutory maximum for his original crime of conviction." *Id.* at 1261.

To avoid the inescapable conclusion that *Salazar* forecloses his argument, Defendant attempts to distinguish *Salazar* by pointing out differences in the statutory maximum of supervised release. In *Salazar*, the defendant's statutory maximum of supervised release was three years, 18 U.S.C. § 3583(b)(2), whereas here, the possession with intent to distribute marijuana conviction carries a lifetime statutory maximum for supervised release. 21 U.S.C. § 841(b)(1)(D). According to Defendant, this makes a difference because 18 U.S.C. § 3583(h) limits the amount of supervised release that can be imposed based on a revocation of supervised release. Specifically, "[t]he length of

such a term of supervised release shall not exceed the term of supervised release authorized by 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.* § 3583(h). These statutory limitations mean that, "as a defendant serves more and more time in prison for each revocation, a district court can impose less and less time on supervised release." *United States v. Hernandez*, 655 F.3d 1193, 1198 (10th Cir. 2011). But, so the argument goes, when the statute authorizes a lifetime of supervised release, the defendant can be sentenced to something approaching a lifetime of incarceration, served in cycles of successive revocations. This potentially endless cycle of incarceration and supervised release is, according to Defendant, illegal based on Justice Breyer's concurrence in *Haymond*.

We previously recognized Justice Breyer's concurrence in *Haymond* as the holding of the Court. *Salazar*, 987 F.3d at 1259; *see Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotation omitted)). But nothing in Justice Breyer's concurrence suggests Defendant's sentence is illegal. Justice Breyer declared unconstitutional 18 U.S.C. § 3583(k), a provision of the revocation statute that required judges to impose mandatory sentences when they found the defendant committed one of several enumerated offenses. *Haymond*, 139 S. Ct. at 2385–86. Differentiating between "ordinary revocation" under § 3583(e), where the severity of the original conviction

limits the consequences for violation of conditions of supervised release, and § 3583(k), where the consequences for violation of conditions of supervised release depend on "the conduct that results in revocation," Justice Breyer concluded § 3583(k) is "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach." *Id.* at 2386.

Here, Defendant's sentence is constitutional because it is an "ordinary revocation." After finding violations of the conditions of supervised release, the district court, following the mandate of § 3583(e), turned to the underlying conviction to determine the maximum amount of imprisonment allowed for revocation. The conviction for possession with intent to distribute was a class D felony, so the district court was authorized to impose up to 24 months' imprisonment. *See* § 3583(e)(3). This process of determining revocation consequences by looking to the underlying conviction is the exact process Justice Breyer approved of and termed "ordinary revocation." The risk Defendant faces of a never-ending cycle of successive revocation arises, not because of some "new offense," but because of the legislature's decision to authorize a lifetime of supervised release for his underlying drug possession charge. It is the legislature's prerogative to decide whether some convictions should carry the potential of a lifetime of supervised release, even though habitual violators of supervised release could be stuck in a cycle of successive revocations.[1]

[1] Defendant cites one of our previous opinions, *Hernandez*, to suggest the risk of a never-ending cycle of successive revocations is more analogous to punishment for a new criminal offense than traditional parole. We explained above why Defendant is wrong, but it is worth noting *Hernandez* contains strong language

III.

Defendant's next argument is the district court plainly erred in imposing a 24-month term of supervised release without specifying to which conviction supervision applies. Because this argument was not raised below, we review only for plain error. Fed. R. Crim. P. 52(b).

In the revocation proceedings below, the district court imposed a 24-month term of supervised release without specifying to which conviction supervision applies. Defendant argues this failure to specify violates the well-settled legal principle requiring "criminal sentences . . . be reasonably certain, definite and free from ambiguity." *Ward v. United States*, 256 F.2d 179, 180 (10th Cir. 1958). This error, according to Defendant, affects his substantial rights because it exposes him to the possibility of serving an illegal sentence because he could only be sentenced to, at most, two months of supervised release on the firearm charge.

Defendant's argument fails for one simple reason: his argument relies on inferring ambiguity in a sentence where only one legally permissible reading of the sentence exists. At the time of revocation, Defendant could legally be given 24 months of supervised release on the possession with intent to distribute charge, but only up to two months of supervised release on the possession of a firearm charge. *See* 18 U.S.C. § 3583(h);

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suggesting a "cycle of revocation and release . . . must . . . come to an end." 655 F.3d at 1198. We are not bound by this language because it is dicta. "Dicta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand." *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 1129 (10th Cir. 2009) (quotation omitted).

Hernandez, 655 F.3d at 1198. "It is well settled that criminal sentences must be reasonably certain, definite and free from ambiguity, but the elimination of every conceivable or possible doubt is not required." *Ward*, 256 F.2d at 180. As the Supreme Court has stated: "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded." *United States v. Daugherty*, 269 U.S. 360, 363 (1926). We find no ambiguity in the district court's sentence where only one legally permissible reading of the sentence exists. The 24-month term of supervised release must attach solely to the possession with intent to distribute charge or else the district court imposed an illegal sentence. Defendant's sentence is reasonably certain, definite, and free from ambiguity even though it is possible, but not probable, for someone to conclude the district court imposed an illegal sentence. A sentence can be free from ambiguity without eliminating "every conceivable or possible doubt." *Ward*, 256 F.2d at 180.[2]

Even if we assumed error when the district court failed to state it was not imposing an illegal sentence, Defendant has failed to show this error affected his substantial rights—the third prong of the plain-error analysis. *See Gonzalez-Huerta*, 403 F.3d at 732. Defendant has the burden to show that the error affected his substantial rights. *Id.* at 733. To make this showing, the "error must have affected the outcome of the district court proceedings." *Id.* at 732 (quoting *United States v. Cotton*, 535 U.S. 625, 632

[2] Despite holding no error based on the facts of this case, we would prefer district courts avoid this potential ambiguity by declaring sentences that eliminate any doubt they were illegally imposed.

(2002)). The district court's plain intent—both during the sentencing hearing and in its judgment—was to impose 24 months of supervised release, a perfectly appropriate sentence under the possession with intent to distribute conviction. Nothing in the record suggests that if Defendant had pointed out the sentencing ambiguity to the district court, the district court would have imposed a different term of supervised release.

IV.

Defendant's final argument is that two special conditions contained in the written judgment—a search condition and a substance abuse treatment condition—must be struck from the judgment because they were not orally announced at sentencing.

Some dispute exists regarding the standard of review on this issue. Defendant argues we should review for an abuse of discretion while the Government argues for plain-error review. Defendant's failure to lodge an objection to the special conditions would normally require us to review the decision for plain error. *See* Fed. R. Crim. P. 52(b). But conditions of supervised release are reviewed for an abuse of discretion when the defendant had no adequate opportunity to object at the sentencing hearing. *See United States v. Bartsma*, 198 F.3d 1191, 1197–99 (10th Cir. 1999), *abrogated on other grounds by United States v. Atencio*, 476 F.3d 1099 (10th Cir. 2007). Because we find the district court did not commit plain error or abuse its discretion, we give Defendant the benefit of the doubt and assume, for the purposes of this appeal, that the less deferential abuse of discretion standard applies.

Defendant argues the challenged conditions should be struck from the written judgment because they conflict with the sentence pronounced from the bench. "It is a

firmly established and settled principle of federal criminal law that an orally pronounced sentence controls over a judgment and commitment order when the two conflict." *United States v. Villano*, 816 F.2d 1448, 1450 (10th Cir. 1987) (en banc). When "an orally pronounced sentence is ambiguous, . . . the judgment and commitment order is evidence which may be used to determine the intended sentence." *Id.* at 1451 (citing *Baca v. United States*, 383 F.2d 154, 157 (10th Cir. 1967)). Thus, our initial inquiry is whether the oral judgment is ambiguous or whether it conflicts with the written judgment, a legal question on which we undertake plenary review. *See United States v. Wolfe*, 435 F.3d 1289, 1297–98 (10th Cir. 2006) (discussing plenary review and review for abuse of discretion as applied to separate issues).

Prior to sentencing, the United States Probation Office presented Defendant with a series of proposed special conditions to apply during supervised release. The proposed special conditions included the search condition and the substance abuse treatment condition. At the revocation hearing, the district court made the following statement:

> Upon release, you should be placed on supervised release for a term of 24 months and shall comply with the standard conditions of supervision and the following special conditions, which will include 90 days of remote monitoring, and I'll set forth that in the judgment, and you'll need to familiarize yourself with all the special terms, including participation in mental health aftercare.

Consistent with this pronouncement, the district court issued a written judgment that included the two special conditions mentioned at the revocation hearing, as well as the contested search condition and substance abuse treatment condition.

On two prior occasions, we addressed whether a district court's sentence is ambiguous or conflicting when the district court fails to orally announce special conditions contained in the written judgment. In *United States v. Raymond*, 149 F. App'x 728 (10th Cir. 2005) (unpublished), the district court did not orally announce a consent to search special condition which was contained in the judgment and commitment order. Unlike here, the consent to search condition was never previously imposed on the defendant. *See id.* at 729. With little analysis, we decided there was "obviously a conflict between the oral sentence and the written judgment and commitment order," so we struck the special condition because the "oral sentence controls." *Id.* at 730 (quotations omitted).

In *United States v. Chalupa*, 210 F. App'x 796 (10th Cir. 2006) (unpublished), with additional facts and analysis, we concluded the failure to orally announce a condition at the sentencing hearing created an ambiguity which the written judgment clarified. The district court in *Chalupa* did not orally announce a condition requiring the defendant to bear the cost of substance abuse testing, but the condition was included in the written judgment. *Id.* at 799. The district court did, however, state its inclination to continue supervision with the conditions recommended in the presentence report. *Id.* at 800. The presentence report recommended that the defendant "be ordered to *recommence* supervised release." *Id.* Because the defendant's prior supervised release required him to contribute to the cost of substance abuse testing, we concluded: "Chalupa was aware of his previous requirement to contribute to costs. Thus, at most, the differences between the district court's oral and written pronouncements create an

ambiguity clarified by the written judgment." *Id.* We therefore allowed the special condition to stand.

We find this case to be closer to *Chalupa* and conclude the differences between the district court's oral and written pronouncements create an ambiguity that the written judgment clarifies. When the district court announced the special conditions at the revocation hearing, the district court provided an inexhaustive list of special conditions and told Defendant "you'll need to familiarize yourself with all the special terms, including participation in mental health aftercare." The district court's statement emphasized that additional special conditions were going to be included in, and incorporated through, the written judgment. Like *Chalupa*, these additional special conditions should have come as no surprise to Defendant, because they were proposed by the United States Probation Office and were imposed during Defendant's two previous terms of supervised release. We have recognized that "reimposition of a special condition of release is different than imposing one in the first instance." *United States v. Henry*, 979 F.3d 1265, 1270 (10th Cir. 2020). This principle may explain the difference between *Raymond* striking the special condition that would have been imposed for the first time and *Chalupa* allowing the special condition to stand when it was previously imposed on the defendant. Regardless, this case is closer to *Chalupa* than to *Raymond*.

At most, the differences in the district court's oral sentence and written judgment create an ambiguity clarified in the written judgment. Therefore, we conclude the two special conditions contained solely in the written judgment—the search condition and substance abuse treatment conditions—are valid.

* * *

For the reasons provided herein, we AFFIRM Defendant's sentence.