FILED
United States Court of Appeals
Tenth Circuit

April 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUSTIN BLAKE WAFFLE,

Defendant - Appellant.

No. 22-5084
(D.C. No. 4:19-CR-00071-GKF-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

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

Defendant Justin Blake Waffle appeals the district court's imposition of a ten-month revocation sentence following Waffle's violation of several conditions of his supervised release. At issue is whether the district court's reference to all of the factors found in 18 U.S.C. § 3553(a), instead of the factors found only in 18 U.S.C. § 3583(e), is reversible error. Specifically, Waffle argues that the district court plainly erred by considering the need to promote respect for the law and to provide

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

just punishment for his violations of supervised release when it imposed his revocation sentence. We conclude that Waffle has not shown a reasonable probability that his revocation sentence would have been shorter had the district court not considered the two challenged and impermissible sentencing factors. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we AFFIRM Waffle's ten-month revocation sentence.

I. BACKGROUND

In 2019, Waffle pleaded guilty to counterfeiting three $100 bills, in violation of 18 U.S.C. § 471. At sentencing, the district court imposed a downward-variance sentence of six months' imprisonment, to be followed by a term of two years' supervised release.

Since beginning his term of supervision, Waffle has been subject to three revocation proceedings. This appeal concerns his most recent revocation. While on his third term of supervision, Waffle continued to struggle with drug use. The district court modified his conditions of release to require residence in a Residential Reentry Center. But, after Waffle failed to report as directed, his probation officer lodged a petition for his arrest, alleging that Waffle had violated multiple release conditions, including using drugs and failing to participate in drug treatment, testing, and counseling. The advisory Guidelines range for all of the violations amounted to five to eleven months' imprisonment.

At the combined revocation and sentencing hearing, Waffle did not contest the violations. Defense counsel sought a sentence of time served, with no supervision to follow. The government requested a Guidelines sentence.

Ultimately, the district court sentenced Waffle to ten months' imprisonment. The district court "note[d] that [Waffle] ha[d] filed a sentencing memorandum . . . requesting that he be sentenced to time served with no supervised release . . . . [and] suggest[ing] that no further resources from the probation office should be expended on [him] as he has not been successful on supervision and his violations have been due to the use of drugs." ROA Vol. II at 117. The district court found, however, "no factors present that separate [Waffle] from the mine run of similarly-situated defendants to a degree that warrant[s] a sentence below the advisory guideline range." *Id.* The district court denied Waffle's request for a sentence of time served. *Id.*

The district court then explained that it "considered the guidelines, along with all of the factors set forth in Title 18 United States Code Section 3553(a), to reach an appropriate and reasonable sentence in this case." *Id.* Specifically, the district court noted that Waffle had exhibited a pattern of noncompliance over the years (this being his third revocation). The district court stated that a ten-month sentence would comport with the aims and concerns of the sentencing factors in § 3553(a), namely that the sentence

1. addressed "the nature and circumstances of the violations and [Waffle]'s history and characteristics," *see* 18 U.S.C. § 3553(a)(1);

2. "serve[d] as an adequate deterrent to [Waffle]," *see id.* § 3553(a)(2)(B);
3. "promote[d] respect for the law [and] provide[d] just punishment for the offense," *see id.* § 3553(a)(2)(A); and
4. "provide[d] protection for the public," *see id.* § 3553(a)(2)(C).

ROA Vol. III at 118. The district court did not impose any further period of supervision.

Waffle timely appealed. He challenges the district court's consideration of the factors in § 3553(a)(2)(A), i.e., the need for the revocation sentence to promote respect for the law and to provide just punishment.

II. STANDARD OF REVIEW

At his revocation and sentencing hearing, Waffle did not object to the district court's consideration of the need for the revocation sentence to promote respect for the law and to provide just punishment. However, on Waffle's request, we may review this unpreserved issue for plain error. *United States v. Chavez*, 723 F.3d 1226, 1232 (10th Cir. 2013). Plain error review requires a defendant to show "(1) there is error; (2) that is plain; (3) that affects substantial rights, or in other words, affects the outcome of the proceeding; and (4) substantially affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

III. DISCUSSION

When a district court revokes a defendant's term of supervised release, 18 U.S.C. § 3583(e) requires that it "consider[] the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." *See*

18 U.S.C. § 3583(e). Of note, this list does not include the retributive factors listed in § 3553(a)(2)(A), namely, "the need for the sentence imposed . . . to promote respect for the law, and to provide just punishment for the offense." *See id.* § 3553(a)(2)(A).

After Waffle appealed his sentence, and while the parties briefed the appeal, we issued our decision in *United States v. Booker*, No. 22-7000, 2023 WL 2657004 (10th Cir. Mar. 28, 2023). Therein, we determined that a district court plainly erred in considering the § 3553(a)(2)(A) factors during a revocation sentencing. We discussed that "[t]he omission of § 3553(a)(2)(A) from the list of sentencing factors enumerated in § 3583(e) means that a district court may not consider [the factors listed therein]." *Id.* at *5. We reached this decision "even though the bulk of the sentencing colloquy was focused on permissible considerations." *Id.* at *5. Nevertheless, we concluded that the district court's error did not affect the defendant's substantial rights because the defendant made no showing that "the district court would have imposed a lower sentence had it not quoted from § 3553(a)(2)(A)." *Id.* at *7.

In the present case, we ordered supplemental briefing in light of *Booker*, and the government now concedes that the district court plainly erred in considering the § 3553(a)(2)(A) factors during Waffle's revocation sentencing hearing. Thus, the parties' focus is on whether Waffle can satisfy the third and fourth prongs of plain-error review. Just as in *Booker*, we conclude that Waffle has not shown that there is a reasonable probability that he "would have received a lower sentence had the district court not quoted from § 3553(a)(2)(A)." *Id.* at *6. Accordingly, Waffle

has not shown that the district court's error affected his substantial rights, and we affirm the sentence imposed by the district court.

"An error seriously affects the defendant's substantial rights . . . when the defendant demonstrates that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *Id.* (quoting *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014)) (internal quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v. Wolfname*, 835 F.3d 1214, 1222 (10th Cir. 2016)). Importantly, "a formulaic recitation of [a] statutorily enumerated sentencing factor[] supplies little indication that a court lengthened a sentence for [retributive] purposes." *Id.* (quoting *United States v. Collins*, 461 F. App'x 807, 810 (10th Cir. 2012)) (alterations added in original).

In *Booker*, we concluded that the defendant had not met his burden under the third prong because "the district court . . . did not emphasize its reliance on an impermissible factor when sentencing Mr. Booker." *Id.* at *7. Instead, the district court "made a single impermissible reference to § 3553(a)(2)(A) at the end of a lengthy and specific discussion of the appropriate reasons why a statutory-maximum sentence was necessary given Mr. Booker's numerous supervised release violations and the fact that he clearly needed help to comply with the law in the future." *Id.* We disagreed with the defendant's attempts to "cast[] the tenor of the district court's sentencing remarks as retributive." *Id.*

Here too, "the bulk of the sentencing colloquy was focused on permissible considerations," most notably, Waffle's drug addiction and the need to deter his future drug use. *Id.* at *5; *see* 18 U.S.C. § 3553(a)(1), (a)(2)(B) (allowing consideration of the "characteristics of the defendant" and the need to "afford adequate deterrence to criminal conduct"). The district court rejected what it observed as Waffle's request for it to "throw up [its] hands," impose a time-served sentence, and allow Waffle to "go forth and use meth" all because past attempts to stop him had failed. ROA Vol. II at 112. The district court stated, "I can't reward you here today" with leniency just because "supervised release has obviously not been successful" in the past. *Id.* at 120. Leniency would have undermined the goal of deterring Waffle from continued methamphetamine abuse in violation of the terms of his supervised release. *See, e.g.*, *id.* at 114 ("It harkens back to the opium dens of London; right?"), 120 ("[T]his label of being a meth head, you know, you [Waffle] need to erase that from your mind."), 120–21 ("[Y]ou've got to just decide for yourself that you've had enough of this.").

Waffle's attempt to characterize the district court's reasoning as retributive, such that it can be reasonably assumed to have resulted in lengthening his sentence, is unavailing. Certainly, the district court stated that the sentence it was imposing was "punitive." *Id.* at 120. But, contrary to Waffle's characterization, the district court was not emphasizing the need for retribution; it was attempting to reassure Waffle when it spoke to him directly. Context is key: "I know [the sentence is] punitive. But the truth is, everybody in this courtroom . . . wants the best for you." *Id.*

The district court's use of the word "punitive" is more akin to "harsh" than it is to "retributive." Again, most of the district court's considerations concerned the need to deter Waffle's future drug use by way of a sentence within the Guidelines, especially considering Waffle's struggles with addiction. In the final minutes of the hearing, the district court implored Waffle "to get that monkey off your back . . . [and] just decide for yourself that you're going to do everything in your power to rid yourself of that addiction." *Id.* at 120–21. Thus, the district court, rather than indicating that its sentence was necessary to punish Waffle, was communicating, "I've been trying to help you." *Id.* at 120. The district court did not base its sentencing decision on the need for retribution to the extent that there is a reasonable probability that it would have imposed a shorter sentence had it not listed that sentencing factor.

IV. CONCLUSION

Because Waffle has not shown a reasonable probability that he would have received a shorter revocation sentence had the district court not discussed the need for his sentence to promote respect for the law and to provide just punishment for the offense, his appeal fails on the third prong of plain-error review. We **AFFIRM** the revocation sentence imposed by the district court.

Entered for the Court

Mary Beck Briscoe
Circuit Judge