FILED
United States Court of Appeals
Tenth Circuit

June 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAGE BREEZE MARTIN,

Defendant - Appellant.

No. 22-3157
(D.C. No. 6:16-CR-10085-JWB-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.**

Defendant-Appellant Sage Martin appeals from the district court's revocation of his supervised release and imposition of a sentence of 27 months' imprisonment. Mr. Martin's counsel has moved to withdraw and submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), stating there is no basis for a non-frivolous appeal. We grant the motion and dismiss the appeal.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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.

Background

On February 11, 2022, Mr. Martin's federal probation officer filed an amended petition alleging Mr. Martin had violated the terms of his supervised release in five ways: (1) unlawful possession of controlled substances; (2) unlawful usage of controlled substances; (3) failing to submit to substance abuse testing; (4) failing to notify his probation officer of his change in residence[1]; and (5) committing another crime — a misdemeanor charge of interfering with law enforcement in Kansas. I R. 88–91. The probation officer recommended revocation of supervised release. I R. 91. At his revocation hearing, Mr. Martin admitted all violations and the hearing was continued. III R. 136–142, 149.

Upon reconvening, the district court offered to delay disposition on revocation for an additional six months but warned Mr. Martin "if you mess up, we're starting at the top of the guideline band" and may go up depending on future violations. III R. 20. Mr. Martin agreed, and the district court additionally required Mr. Martin to maintain employment and reside at the Oxford House reentry facility. I R. 92.

A few months later, Mr. Martin's probation officer filed a second amended petition alleging new violations in addition to his original violations. I R. 93–97. These violations included Mr. Martin having a bottle of alcohol in his refrigerator, spending time with a woman who actively used methamphetamine in his presence, being unemployed, residing in an unapproved shed, and failing to reside at Oxford

[1] Mr. Martin's probation officer was told Mr. Martin would be residing at a reentry facility, Oxford House in Winfield, Kansas. I R. 90.

House as he was evicted. I R. 95–97. The district court held a final revocation hearing. After hearing testimony from the probation officer and Mr. Martin, the court concluded Mr. Martin had committed the above violations except being unemployed. III R. 65–68.

Next, the district court determined the highest-grade violation was a Grade B violation. Given a criminal history category of V, the court calculated Mr. Martin's advisory guidelines range as 18–24 months' imprisonment. III R. 68. Acknowledging that the court erred when it previously stated it would start at the high end of the range should there be new violations when it continued disposition for six months — a "sentence-in-advance" approach disapproved of by this circuit in United States v. Moore, 30 F.4th 1021, 1024–27 (10th Cir. 2022) — the court made clear it was sentencing Mr. Martin based on the facts as presented today. III R. 70. The court ultimately sentenced Mr. Martin to 27 months' imprisonment. III R. 97. Mr. Martin's counsel objected to the above-guideline sentence and the objection was summarily overruled. III R. 98.

Discussion

On appeal, counsel for Mr. Martin submitted an Anders brief to this court and her client which identified two potentially appealable issues: (1) the district court's revocation of supervised release; and (2) the procedural and substantive reasonableness of the above-guideline revocation sentence. See United States v. Calderon, 428 F.3d 928, 930 (10th Cir. 2005). Mr. Martin did not file a response to counsel's Anders brief nor did the government. Having conducted our own

independent examination of the record, United States v. Kurtz, 819 F.3d 1230, 1233 (10th Cir. 2016), we discern no non-frivolous basis for an appeal.

A. Revocation of supervised release

The revocation of supervised released went unchallenged so our review of the district court's revocation would be for plain error. United States v. Shakespeare, 32 F.4th 1228, 1232 (10th Cir. 2022) (indicating a preserved challenge to revocation is reviewed for abuse of discretion). There is no error, let alone plain error. Mr. Martin admitted to five violations of the conditions of his supervised release, see United States v. Fay, 547 F.3d 1231, 1234–35 (10th Cir. 2008), and the court properly found four more violations based on a preponderance of evidence after hearing testimony from Mr. Martin and his probation officer. See 18 U.S.C. § 3583(e)(3).

Moreover, the district court did not commit an abuse of discretion in not explicitly stating why the exception — 18 U.S.C. § 3583(d) — to mandatory revocation — § 3583(g) — did not apply in Mr. Martin's case. While a district court must consider whether to grant an exception to mandatory revocation in the form of "ordering the defendant to undergo or continue substance abuse treatment instead of revoking his term of supervised release," no magic words are required. See United States v. Hammonds, 370 F.3d 1032, 1038–39 (10th Cir. 2004). So long as there is an indication the district court was aware that it had the discretion to grant the exception, there is no abuse of discretion. Id. Here, the district court previously had postponed sentencing no doubt recognizing that the original violations were addiction

driven and ordered Mr. Martin to live at a reentry facility and abide by conditions to avoid a lengthy jail sentence. III R. 20–21. Thus, there is no abuse of discretion.

B. Procedural reasonableness of Mr. Martin's above-guideline sentence

Mr. Martin did not object to the procedural reasonableness of his sentence and as such we would review this question for plain error. United States v. Gantt, 679 F.3d 1240, 1246 (10th Cir. 2012).

As for procedural reasonableness, counsel's Anders brief identifies two possible appealable issues: (1) a possible guidelines error and (2) the district court's acknowledgement concerning his past use of a "sentence-in-advance" approach. With respect to the first issue, counsel points out that the district court's finding that Mr. Martin's highest-grade violation was a Grade B violation might have been error. Anders Br. at 19–21. This finding was based on Mr. Martin's admission that he possessed methamphetamine for personal use in Kansas and Oklahoma. Such a violation can be classified as Grade B should it constitute "any other federal, state, or local offense punishable by a term of imprisonment exceeding one year." U.S.S.G. § 7B1.1(a)(2). Possession of methamphetamine for personal use is not an offense punishable by a term of imprisonment exceeding one year under federal law given he has no prior drug convictions, see 21 U.S.C. § 844(a), nor under Oklahoma law, see Okla. Stat. tit. 63, § 2-402 (eff. July 1, 2017). Whether it is under Kansas law is not entirely clear because Mr. Martin may have qualified for a mandatory non-prison sanction of enrollment in a drug treatment program under Kan. Stat. Ann. § 21-6824. Anders Br. at 20–21. However, whether he may have qualified is, as counsel

recognizes, pure speculation. His eligibility for such a program turns on a drug-abuse assessment and a criminal risk-need assessment. Kan. Stat. Ann. § 21-6824(b)–(c). Defense counsel provided no information on these assessments to the district court to show Mr. Martin would have qualified for mandatory probation, nor did counsel object to the Grade B classification. As such, Mr. Martin cannot establish plain error. See United States v. Cristerna-Gonzalez, 962 F.3d 1253, 1262 (10th Cir. 2020) (finding plain error will be uncommon based on speculation of the facts).

As for the second issue, the district court was aware of our decision in Moore, see III R. 68–70, which prohibited the use of a "sentence-in-advance" approach because it is procedurally unreasonable. 30 F.4th at 1024–26. The district court complied with Moore and followed the "required order of operations in federal sentencings." Id. at 1025; III R. 70–71. As such, there is no error.

C. Substantive reasonableness of Mr. Martin's above guideline sentence

Mr. Martin did preserve a challenge to the substantive reasonableness of his sentence by objecting to the above-guideline nature of his sentence. See Holguin-Hernandez v. United States, 140 S. Ct. 762, 767 (2020). Thus, we would review the substantive reasonableness of the sentence imposed for abuse of discretion and "reverse only if the sentence imposed was 'arbitrary, capricious, whimsical, or manifestly unreasonable.'" United States v. Barnes, 890 F.3d 910, 915 (10th Cir. 2018) (quoting United States v. DeRusse, 859 F.3d 1232, 1236 (10th Cir. 2017)). "We do not reweigh the [§ 3553] sentencing factors but instead ask whether the

sentence fell within the range of 'rationally available choices that facts and the law at issue can fairly support.'" United States v. Blair, 933 F.3d 1271, 1274 (10th Cir. 2019) (quoting United States v. Martinez, 610 F.3d 1216, 1227 (10th Cir. 2010)).

Here, the district court properly based its sentence on the seriousness of Mr. Martin's violations, his breach of the court's trust, and squandering his opportunity to better himself when given a chance. III R. 93–96. These are proper bases as this court has stated that "while the sentencing court at revocation takes into account the seriousness of the underlying crime, it is primarily the breach of trust that is sanctioned." United States v. Contreras-Martinez, 409 F.3d 1236, 1241 (10th Cir. 2005). The court also credited Mr. Martin for his lack of positive drug tests and acceptance of responsibility. III R. 95–97. We discern no non-frivolous argument that the district court's imposition of 27 months' imprisonment — 3 months above the Grade B 18–24 month guideline range — is outside the realm of permissible sentencing choices.

APPEAL DISMISSED. Counsel's motion to withdraw is GRANTED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge