FILED
United States Court of Appeals
Tenth Circuit

June 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT RAYMOND MARTINEZ,

Defendant - Appellant.

No. 22-1395
(D.C. No. 1:16-CR-00346-RM-1)
(D. Colo.)

ORDER AND JUDGMENT[*]

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

In this appeal, Robert Raymond Martinez challenges his sentence, imposed by the district court for violating the conditions of his supervised release. Also before us is his counsel's motion to withdraw from the case under *Anders v. California*, 386 U.S. 738 (1967), asserting there are no non-frivolous grounds for appeal. Upon independent review of the record, we conclude there are no grounds for appeal that

---

[*] 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

are not “wholly frivolous.” Accordingly, we grant counsel’s motion to withdraw, and we dismiss the appeal.

I. BACKGROUND

In 2017, Mr. Martinez pleaded guilty to one count of possession of a firearm and ammunition by a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). He was sentenced to 41 months’ imprisonment, followed by three years of supervised release. Upon his release from prison in July 2020, Mr. Martinez began his first term of supervised release. Some time thereafter, Mr. Martinez was found to have violated his conditions of supervised release and was sentenced to 24 months’ imprisonment, followed by one year of supervised release. Mr. Martinez began his second term of supervised release in March 2022.

In July 2022, the probation office filed a petition for a warrant detailing Mr. Martinez’s alleged violations of multiple conditions of his supervised release: eight violations for possession and use of a controlled substance, one for failure to participate in substance abuse testing as directed by the probation officer, one for excessive use of alcohol, and one for failure to follow instructions of the probation officer. The court issued a warrant, and Mr. Martinez was arrested in September. In October 2022, the probation office filed a report similarly detailing Mr. Martinez’s alleged violations of the conditions of his supervised release and recommending a revocation sentence of 12 months’ imprisonment with no additional term of supervised release.

At Mr. Martinez's initial appearance in September 2022, the court advised Mr. Martinez of his right to counsel, appointed counsel to represent him, and ordered that Mr. Martinez be kept in temporary custody pending a detention hearing. At the ensuing hearing, the district court ordered that Mr. Martinez be detained until his final revocation hearing to assure his appearance and the safety of the community. The court also informed Mr. Martinez of the allegations in the violation report and advised him of his right to a preliminary hearing. Mr. Martinez, represented by counsel, waived his preliminary hearing.

In October 2022, the district court conducted a hearing on the revocation of Mr. Martinez's supervised release. At the outset of the hearing, the court dismissed two of the alleged violations for possession and use of a controlled substance, which listed cannabis use as the standalone violation. After placing Mr. Martinez under oath, the court confirmed that he had an opportunity to review the report detailing his alleged violations and to discuss it with his counsel. The court further advised Mr. Martinez of his right to insist on a hearing at which the Government would be required to prove his alleged supervised release violations by a preponderance of the evidence; his right to appear, present evidence, and question witnesses at such a hearing; his right to counsel at such a hearing; and his right to testify on his own behalf or to remain silent at such a hearing. Having confirmed he understood his rights and the alleged supervised release violations, Mr. Martinez admitted to the remaining nine alleged violations of his conditions of supervised release. The district court accepted Mr. Martinez's admissions, and neither party presented any other

evidence. Prior to sentencing, the court advised Mr. Martinez of his right to make a statement to the court. Mr. Martinez declined to make any statement in mitigation other than that he "accept[ed] responsibility for the allegations." ROA Vol. III at 14.

The district court determined Mr. Martinez's highest violation was a Grade B violation and his recommended revocation sentence range under the applicable policy statement and statutory maximum was 21 to 24 months. However, the court noted its general practice of treating drug use that did not involve distribution or similar conduct as a Grade C violation, which would place the recommended policy statement range at 8 to 14 months. That practice aside, the court acknowledged the parties had agreed that a 12-month sentence, with no additional supervised release, was appropriate.

Ultimately, the court found Mr. Martinez had violated his conditions of release and sentenced him to 12 months' imprisonment, with no additional term of supervised release to follow. Exercising its independent judgment—and in view of the nature of the violations, the history of the case, and the prior revocation of Mr. Martinez's supervised release—the court agreed with the parties that such a sentence was appropriate. Neither Mr. Martinez nor the Government raised any objection at sentencing.

Mr. Martinez's counsel filed a timely notice of appeal of the revocation sentence. Mr. Martinez's counsel now moves to withdraw, claiming there are no non-frivolous grounds for appeal.

II. DISCUSSION

In *Anders*, the Supreme Court held that counsel may "request permission to withdraw where counsel conscientiously examines a case and determines that any appeal would be wholly frivolous." *United States v. Calderon*, 428 F.3d 928, 930 (10th Cir. 2005) (citing *Anders*, 386 U.S. at 744). "[C]ounsel must submit a brief to the client and the appellate court indicating any potential appealable issues based on the record." *Id.* Then, in his own submission to the court, the client may also raise any points he chooses. *Anders*, 386 U.S. at 744. We must then independently examine the record to determine whether appeal would be "wholly frivolous." *Id.* If we conclude there are no non-frivolous grounds for appeal, we may grant counsel's request to withdraw and dismiss the appeal. *Id.*

Counsel's *Anders* brief identifies four potential bases for appeal: that Mr. Martinez's revocation hearing was procedurally insufficient, that Mr. Martinez's revocation sentence was procedurally and substantively unreasonable, that the court should have credited Mr. Martinez's prior revocation sentence when imposing his new one, and that Mr. Martinez received ineffective assistance of counsel.[1] We consider each of these potential issues in turn.

[1] Although apprised of the opportunity to do so, Mr. Martinez has not made his own submission to this court.

A. Revocation Hearing

Mr. Martinez raised no objection to the procedure of his revocation hearing before the district court. Thus, we review the procedural soundness of the court's revocation hearing for plain error. *See United States v. Lopez-Flores*, 444 F.3d 1218, 1221 (10th Cir. 2006) ("Ordinarily, when a claim of error was not raised below, we review only for plain error."). "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." *Id.* at 1222.

The district court may revoke a term of supervised release if it "finds by a preponderance of the evidence that the defendant violated a condition of supervised release[.]" 18 U.S.C. § 3583(e)(3). Revocation of supervised release is presumed mandatory when a defendant is found to have possessed a controlled substance in violation of the conditions of release. *Id.* § 3583(g)(1). Procedurally, a court's determination of whether to revoke a term of supervised release is governed by Federal Rule of Criminal Procedure 32.1.

The district court properly adhered to the procedural mandates of Rule 32.1 throughout Mr. Martinez's initial appearance and revocation hearing. The court found Mr. Martinez violated the conditions of his release, relying on Mr. Martinez's own admissions. Based on our independent review of the record, we conclude any argument that the district court erred in its revocation hearing procedures, or in its decision to revoke Mr. Martinez's supervised release, would be wholly frivolous. We now consider the revocation sentence itself.

B. Revocation Sentence

Again, Mr. Martinez raised no objection to the procedure or substance of his revocation sentence. We therefore review the procedural soundness of the court's revocation sentencing for plain error. *See United Lopez-Flores*, 444 F.3d at 1221. However, we do not require a defendant to object to preserve the issue of whether his revocation sentence was substantively reasonable. *See United States v. Torres-Duenas*, 461 F.3d 1178, 1183 (10th Cir. 2006). Thus, we review the substance of the district court's revocation sentence for abuse of discretion. *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1214 (10th Cir. 2008). A district court exceeds its discretion "when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Haley*, 529 F.3d 1308, 1311 (10th Cir. 2008) (quotation marks omitted).

1. Procedural Reasonableness

Procedural review looks to "whether the sentencing court committed any error in calculating or explaining the sentence." *Alapizco-Valenzuela*, 546 F.3d at 1214. Such errors may include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007).

On review of the record, we conclude the district court correctly calculated the revocation sentence range recommended by the U.S. Sentencing Commission

Guidelines based on Mr. Martinez's original offense, criminal history, and violation grade. *See* 18 U.S.C. § 3583(e)(3); United States Sentencing Commission, *Guidelines Manual*, §7B1.4(a)–(b), p.s. (Nov. 2021).[2] The district court imposed a revocation sentence below the recommended range and provided a satisfactory explanation to establish the procedural reasonableness of its sentence. *See United States v. McBride*, 633 F.3d 1229, 1234 (10th Cir. 2011) (discussing rationale for a court needing only to "provide a general statement of the reasons for its imposition of the particular sentence" when imposing a within-Guidelines sentence after conviction or revocation of supervised release (internal quotation marks omitted)). Nothing in the record suggests the court treated the Guidelines as mandatory rather than advisory or that the court relied on clearly erroneous findings of fact. Based on our independent review of the record, nothing supports a meritorious argument that the district court's revocation sentence was procedurally unreasonable.

---

[2] Mr. Martinez's original offense, possession of a firearm and ammunition by a previously convicted felon, was a Class C Felony. His criminal history category at the time of sentencing for his original offense was category VI, and the most serious violation of his conditions of supervised release was a Grade B violation. Based on Mr. Martinez's criminal history category and violation grade, the Guidelines advise a revocation sentence of 21 to 27 months. *See* United States Sentencing Commission, *Guidelines Manual*, §7B1.4(a)–(b), p.s. (Nov. 2021). But because Mr. Martinez's original offense was a Class C Felony, that range is statutorily lowered to a maximum term of 24 months' imprisonment. *See id.* §7B1.4(b); 18 U.S.C. § 3583(e)(3).

The probation office's violation report does not identify which edition of the Guidelines Manual it used in its calculation—the 2016 edition in effect at the time of Mr. Martinez's original sentencing, or the 2021 edition in effect at the time of his revocation hearing. However, because the relevant portion of the Guidelines has not changed since 2010, whether the probation office and the court used the 2016 or 2021 edition of the Guidelines cannot have prejudiced Mr. Martinez.

2. Substantive Reasonableness

Substantive review looks to "whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." *Alapizco-Valenzuela*, 546 F.3d at 1214. A revocation sentence that falls within a properly calculated Guidelines range may be presumed reasonable. *McBride*, 633 F.3d at 1233.

Based on Mr. Martinez's original offense, criminal history, and violation grade, the Guidelines advise a revocation sentence of 21 to 24 months. *See supra* n.2. The district court explained that it generally treats supervised release violations involving the possession or use of a controlled substance, but not its distribution, as Grade C rather than Grade B violations. Under this practice, the Guidelines suggest a revocation sentence of 8 to 14 months. USSG §7B1.4(a)–(b), p.s. The district court's 12-month revocation sentence falls within the Guidelines' recommended range using the district court's practice of down-grading standalone possession or use violations, and below the usual recommended range. Therefore, the court's sentence is presumed reasonable. *See McBride*, 633 F.3d at 1233 (applying rebuttable presumption of reasonableness to revocation-of-supervised-release sentences within the Guideline range); *United States v. Balbin-Mesa*, 643 F.3d 783, 788 (10th Cir. 2011) (extending rebuttable presumption of reasonableness to "below-guideline sentence[s] challenged by the defendant as unreasonably harsh").

Nothing in the record rebuts this presumption. In selecting the revocation sentence, the district court considered the nature and circumstances of the violations

and Mr. Martinez's history. *See* 18 U.S.C. § 3553(a)(1). While the district court did not expressly identify the factors enumerated in 18 U.S.C. § 3553(a), "it is enough if the district court considers § 3553(a) en masse and states its reasons for imposing a given sentence." *United States v. Kelley*, 359 F.3d 1302, 1305 (10th Cir. 2004). The district court did just that.

On our independent review of the record, we conclude the district court's revocation sentence is reasonable and plainly within "the bounds of permissible choice" given the facts and circumstances of the case and the factors set forth in 18 U.S.C. § 3553(a). *United States v. Chavez*, 723 F.3d 1226, 1233 (10th Cir. 2013) (quotation marks omitted). We perceive no non-frivolous argument that the sentence imposed was not substantively reasonable.

C. Aggregation

Pursuant to 18 U.S.C. § 3583(e)(3), in effect at the time of Mr. Martinez's revocation sentencing, courts 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 without credit for time previously served on postrelease supervision*, if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve *on any such revocation* more than . . . 2 years in prison if such offense is a class C or D felony[.]

18 U.S.C. § 3583(e)(3) (2016) (emphasis added). This court has previously held that § 3583(e)(3) does not require district courts to aggregate, or credit a defendant, for previous prison time served on revocations of supervised release when imposing a

new revocation sentence, and it does not limit the total aggregate prison time for revocation sentences to the period of supervised release authorized by statute for the underlying offense. *See United States v. Hernandez*, 655 F.3d 1193, 1196 (10th Cir. 2011) (discussing statutory history surrounding "on any such revocation" language and holding § 3583(e)(3) does not require aggregation of revocation sentences); *United States v. Hunt*, 673 F.3d 1289, 1293 (10th Cir. 2012) (holding language preceding § 3583(e)(3)'s "except that" clause "does not require courts to aggregate prior revocation imprisonment sentences when calculating a new sentence for a violation of supervised release conditions"). Rather, "[f]or every revocation, a judge may impose a new term of imprisonment up to the maximum listed in subsection (e)(3); [the court] need not subtract from the maximum any time already served." *United States v. Porter*, 905 F.3d 1175, 1182 (10th Cir. 2018).

This caselaw leaves no room for Mr. Martinez to argue "that the district court should have aggregated the sentences imposed for his successive violations of supervised release." Anders Br. at 11. The district court's 12-month revocation sentence was well within the two-year statutory maximum applicable for revocation sentences based on an underlying Class C Felony offense. *See* 18 U.S.C. § 3583(e)(3)

(setting statutory maximum). There is no non-frivolous argument that the district court exceeded the statutory maximum imposed by 18 U.S.C. § 3583(e)(3).[3]

D. Ineffective assistance of counsel

Lastly, this court has instructed that "[i]neffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed." *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995). The district court is ordinarily the best forum to hear ineffective assistance of counsel claims in the first instance because it is "best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Massaro v. United States*, 538 U.S. 500, 505 (2003). Mr. Martinez may pursue such claims in collateral proceedings before the district court. *Cf. United States v. Boigegrain*, 155 F.3d 1181, 1186 (10th Cir. 1998) (explaining a "very rare instance" when a criminal defendant cannot assert ineffective assistance of counsel claims by way of collateral proceedings pursuant to 28 U.S.C. § 2255 because he was not "a prisoner in custody

[3] 18 U.S.C. § 3583(h) does include an aggregation requirement that a term of supervised release following revocation "shall not exceed the term of supervised release authorized by statute" for the underlying offense, "less any term of imprisonment that was imposed upon revocation of supervised release." 18 U.S.C. § 3583(h). But this subsection applies only to new terms of supervised release imposed as part of a revocation sentence. *See United States v. Porter*, 905 F.3d 1175, 1182 n.5 (10th Cir. 2018). Because the judge did not impose a new term of supervised release upon Mr. Martinez's latest revocation sentence, this subsection is inapplicable to the present appeal. *See id.*; *see also* ROA Vol. III at 15 (imposing 12-month revocation sentence with no additional term of supervised release to follow).

under sentence" but was "[a] defendant temporarily committed"). Those claims, however, do not provide a basis for Mr. Martinez to challenge his revocation sentence in this appeal.

III. CONCLUSION

Mr. Martinez lacks any non-frivolous grounds for reversal. We therefore GRANT counsel's request to withdraw, and we DISMISS the appeal.

Entered for the Court

Carolyn B. McHugh
Circuit Judge