

UNITED STATES COURT OF APPEALS

September 10, 2019

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FABIAN DUNBAR,

Defendant - Appellant.

No. 19-3086
(D.C. No. 2:10-CR-20076-KHV-13)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES, MURPHY, and CARSON**, Circuit Judges.**

Defendant Fabian Dunbar violated the conditions of his supervised release. The district court sentenced him to 18 months' imprisonment. On appeal, Defendant's counsel filed an Anders brief and moved to withdraw as counsel. See Anders v. California, 386 U.S. 738 (1967). Defendant filed a response.¹ The government did not

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Because Defendant is unable to effectively write on his own behalf, his counsel submitted a letter to us conveying Defendant's contentions.

file a response. For the reasons set forth below, we discern no meritorious issues for appeal. We therefore grant the motion to withdraw and dismiss the appeal.

I.

Defendant distributed and possessed with intent to distribute cocaine base, a Class B felony. In December 2011, the district court sentenced Defendant to forty-eight months' imprisonment followed by six years' supervised release. Upon release from prison, Defendant violated the terms of his supervised release. The district court imposed six months' imprisonment and a new four-year term of supervised release. After serving this term of imprisonment, Defendant violated the terms of his supervised release for a second time. The government alleged four violations: (1) that Defendant had possessed a firearm and drugs when law enforcement arrested him with his cousin Edwin Carvin; (2) that Defendant had associated with a known felon, Carvin; (3) that Defendant had unlawfully possessed controlled substances based on positive drug tests; and (4) that Defendant had not refrained from using controlled substances.

Defendant, through counsel, stipulated to the fact of the positive urinalysis, but not to the other allegations. The district court heard evidence from two law enforcement officers about Defendant's arrest with his cousin. Defendant told the district court that he took responsibility for his drug use and for being with his cousin.

The district court did not make findings on the allegations related to the handgun or drugs at the time of the arrest. It did, however, conclude that Defendant had violated the terms of his supervised release by associating with his cousin, who Defendant knew was a felon. The district court further concluded that Defendant had unlawfully

possessed and used controlled substances based on the stipulations and evidence presented. Specifically, the district court found three violations: (1) association with a felon; (2) possession of a controlled substance; and (3) failure to refrain from unlawful use of a controlled substance. The district court classified the first violation as a Grade C violation and the second and third violations as Grade B violations. Because Defendant's most serious violation of his supervised release was a Grade B violation, and because his criminal history category was IV, his advisory United States Sentencing Guideline range was 12 to 18 months' imprisonment. The district court revoked Defendant's supervised release and sentenced him to 18 months' imprisonment with no supervised release to follow.

II.

Anders allows court-appointed defense counsel to "request permission to withdraw [from an appeal] 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). Pursuant to this process, the defendant's counsel submits a brief to the client and the court indicating any potential appealable issues based on the record. Id. At that point, the defendant may choose to submit arguments to the court. Id. We must then conduct a full examination of the record, making our own determination whether Defendant's claims are wholly frivolous. Id. After examining the record, if we determine the appeal is frivolous, we may grant counsel's motion to withdraw and dismiss the appeal. Id.

In the Anders brief, Defendant's counsel notes that although the district court's sentence was presumptively reasonable, the district court: (1) may have erred by classifying a Grade C violation as a Grade B violation, which corresponded to a higher Guideline range; (2) may have erred in revoking Defendant's supervised release based on the evidence presented and his own admissions; and (3) may have erred in imposing the eighteen month sentence. In his response to the Anders brief, Defendant raises four more points. First, he argues he did not stipulate to any of the alleged violations or authorize his counsel to do so. He contends the district court should not have considered counsel's offer to stipulate and the district court should not have put him in a position where he had to respond to his own lawyer's concessions. Second, he asserts that his counsel did not take time to review the petition or violation report with him before commencing the hearing or request a continuance so that he could do so. Third, Defendant objects to the district court considering a prior revocation from another case in deciding to revoke the supervised release in the instant case. Fourth, Defendant claims he did not understand the consequences of admitting that he was in the presence of his cousin and that he did not understand that the rule against being in the presence of felons applied to family. After conducting a full examination of the record, we conclude that no basis in law or fact exists for these arguments.

Defendant first argues that the district court erred by classifying a Grade C violation as a Grade B violation, which corresponded to a higher Guideline range. Defendant's conditions of release required him to refrain from any unlawful use of a controlled substance. He violated this condition by testing positive for controlled

substances. The violation report characterized this as a Grade B violation, and the district court agreed. Defendant argues the district court should have classified it as a Grade C violation. But he failed to raise this argument to the district court. “Ordinarily, when a defendant forfeits a claim by failing to raise it before the district court, we apply plain-error review.” United States v. Battles, 745 F.3d 436, 445 n.9 (10th Cir. 2014). Our plain error review standard requires Defendant to show that the error affected his substantial rights, i.e., the error disturbed the outcome of the proceedings. Id. at 453. This he cannot do even if we assume that the district court erred. The district court found another, independent Grade B violation: possession of controlled substances. Accordingly, even assuming and correcting the plain error, Defendant’s Guideline range would remain the same.

Next, Defendant argues the district court erred in revoking his supervised release based on the evidence presented and his own admissions. In his response, he also asserts that he did not admit to any violations. A district court may revoke a term of supervised release where it finds by a preponderance of the evidence that the defendant violated a condition of supervised release. 18 U.S.C. § 3583(e)(3). At the hearing, Defendant admitted to associating with his cousin, a felon. The district court also heard testimony from two witnesses that Defendant associated with a known felon. The district court additionally heard testimony about Defendant’s use of—and, by implication, possession of—controlled substances. Indeed, in this Circuit, use equates to possession in the context of 18 U.S.C. § 3583. United States v. Hammonds, 370 F.3d 1032, 1037 (10th

Cir. 2004). We conclude ample evidence exists in the record for the district court to have found that Defendant violated his supervised release.

Defendant asserts the district court's sentence violated the law or was procedurally or substantively unreasonable. The factors set forth in 18 U.S.C. § 3553(a) and enumerated in 18 U.S.C. § 3583(d) guide the discretion afforded to a district court when it revokes a defendant's supervised release and imposes a sentence. United States v. White, 244 F.3d 1199, 1204 (10th Cir. 2001). Although the district court did not explicitly reference the § 3553(a) factors, it referenced the Chapter 7 policy statements and stated that a sentence of eighteen months would be sufficient but not greater than necessary to address all of the relevant sentencing factors. "[W]e do not demand that the district court recite any magic words to show us that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider." United States v. Rodriguez-Quintanilla, 442 F.3d 1254, 1258–59 (10th Cir. 2006) (internal quotation marks omitted). The district court provided an adequate explanation for the sentence it imposed. Defendant takes issue with the district court's conclusion that he was not amenable to further supervision after considering his prior revocation and violations. We disagree. The sentence was correctly calculated and within the statutory and Guideline limits. "We have applied a presumption of reasonableness in reviewing within-guidelines sentences imposed upon conviction." United States v. McBride, 633 F.3d 1229, 1232–33 (10th Cir. 2011). Defendant cannot rebut the presumption of reasonableness of his sentence. We, like counsel, discern no reason to believe that the district court abused its discretion by declining to render a shorter sentence.

Finally, in his response to the Anders brief, Defendant asserts that his counsel did not take time to review the petition or violation report with him before commencing the hearing or request a continuance so that he could do so and that he did not understand the consequences of admitting that he was in the presence of his cousin and that he did not understand that the rule against being in the presence of felons applied to family. We decline to review his ineffective assistance of counsel claims here. Defendant must raise any such claim in a separate petition filed under 28 U.S.C. § 2255.

Accordingly, we GRANT counsel's motion to withdraw and DISMISS the appeal.

Entered for the Court

Joel M. Carson III
Circuit Judge