FILED
United States Court of Appeals
Tenth Circuit

August 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARINO BERNARD SCOTT,

Defendant - Appellant.

No. 22-1345
(D.C. No. 1:17-CR-00232-REB-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

The district court revoked Marino Bernard Scott's supervised release and sentenced him to prison. Mr. Scott appeals. His appellate counsel has moved to withdraw and filed a brief under *Anders v. California*, 386 U.S. 738 (1967), asserting that this appeal is frivolous. After examining the record, we agree. We therefore grant the motion to withdraw and dismiss this appeal.

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* After examining the *Anders* brief and the appellate record, this panel has determined unanimously that oral argument would not significantly aid its decision. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Background

Mr. Scott pleaded guilty to two counts of possession of a firearm and ammunition by a convicted felon. His sentence included a five-year term of supervised release. About two years into that term, his probation officer petitioned for a warrant, alleging that Mr. Scott had violated the conditions of his supervised release by possessing more than two pounds of marijuana at his home in Colorado.

Mr. Scott admitted the violation. The district court determined that the United States Sentencing Commission's policy statements suggested a range of 21 to 27 months' imprisonment. The probation department and the government recommended a sentence of 24 months, while Mr. Scott asked for another term of supervised release. The district court imposed 21 months' imprisonment with no additional supervised release.

Mr. Scott appeals. After his counsel filed an *Anders* brief and moved to withdraw, we invited Mr. Scott himself to respond. He has not done so.

Discussion

Mr. Scott's counsel has identified three arguments that Mr. Scott wishes to pursue on appeal. *See id.* at 744 (requiring counsel to file "a brief referring to anything in the record that might arguably support the appeal").

First, Mr. Scott believes the district court incorrectly calculated his criminal-history category, an error that would have inflated the suggested sentencing range. In Mr. Scott's view, the district court's calculation included two prior convictions that were too old to count. That view is incorrect. To calculate a

criminal-history category, courts include any "prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense." U.S. Sent'g Guidelines Manual § 4A1.2(e)(1) (U.S. Sent'g Comm'n 2021). Mr. Scott received sentences of more than 13 months for the two convictions he thinks were too old in 2004 and 2008, each within 15 years of his committing the instant offenses in 2017.[1] The district court correctly included both prior sentences in the criminal-history calculation. *See id.* § 4A1.2(e)(1), (k)(2).

Second, Mr. Scott believes his possessing marijuana did not warrant revocation because Colorado allows marijuana possession. But even though possessing smaller amounts of marijuana is legal under Colorado law, possessing two pounds is not. *See* Colo. Rev. Stat. § 18-18-406(4)(b)–(c). In any event, marijuana possession remains illegal under federal law. *See* 21 U.S.C. § 812(c), Schedule I (c)(10); 21 U.S.C. § 844(a).

Third, Mr. Scott faults the district court for imposing a prison term rather than another term of supervised release. But the district court had to revoke supervised release and impose a prison term because Mr. Scott admitted to possessing a controlled substance. *See* 18 U.S.C. § 3583(g)(1). And because the sentence falls within the suggested range, we presume it is reasonable. *See United States v.*

[1] To determine the suggested sentencing range following revocation, courts use the criminal-history category "determined at the time the defendant originally was sentenced to the term of supervision." USSG § 7B1.4 cmt. n.1.

McBride, 633 F.3d 1229, 1233 (10th Cir. 2011). After independently examining the record, we see no way Mr. Scott could overcome that presumption.

Disposition

We grant counsel's motion to withdraw and dismiss this appeal.

Entered for the Court

Harris L Hartz
Circuit Judge