FILED
United States Court of Appeals
Tenth Circuit

October 5, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC EUGENE ROYER,

Defendant - Appellant.

No. 20-5079
(D.C. No. 4:19-CR-00065-JED-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **MCHUGH**, **BALDOCK**, and **BRISCOE**, Circuit Judges.

Defendant-Appellant Eric Royer appeals Standard Condition 12 of his supervised release and asks this court to construe the condition in accordance with Federal Rule of Criminal Procedure 32.1(c). Under this condition, a probation officer may, after getting the district court's approval, direct Royer to notify third parties of risks posed by him. Royer argues that post-sentencing risk notification under Standard Condition 12 would be a modification of his supervised-release conditions and thus would require the district court to hold a hearing under Rule 32.1(c) before approving any risk notification. Under the prudential ripeness

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

doctrine, we decline to reach this argument because it requires factual development. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we therefore DISMISS Royer's challenge as prudentially unripe.

I.

On January 4, 2019, sheriff's deputies from Nowata County, Oklahoma, responded to a call that a man, later identified as Royer, had brandished a handgun and threatened people with it. The deputies located Royer driving his pickup truck in Nowata within the Northern District of Oklahoma. Royer told the deputies he was armed with a handgun, which they recovered. A federal grand jury charged Royer with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

On January 8, 2020, Royer pleaded guilty and requested a sentence at the low end of the applicable sentencing guidelines range, which the Government agreed would be appropriate. Neither party objected to the presentence report, which directed the parties to a listing of the court's standard conditions of supervision and also stated "[a]ll standard conditions of supervision shall be imposed unless suspended by the Court." ROA, Vol. II at 23; ROA, Vol. III at 30–31, 35–36. On July 28, 2020, the district court sentenced Royer to thirty months in prison, followed by two years of supervised release. At sentencing, the district court stated that Royer "must comply with the standard conditions that have been adopted by this court," as well as a few special conditions. ROA, Vol. III at 35–36.

Royer's standard conditions included Standard Condition 12. Standard Condition 12 provides as follows:

> If the probation officer determines that you pose a risk to another person (including an organization), after obtaining Court approval, the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

ROA, Vol. I at 30. Royer did not object to, or request a specific construction of, Standard Condition 12 during sentencing. On July 30, 2020, Royer filed his timely notice of appeal.

II.

On appeal, Royer asks that Standard Condition 12 be construed in accordance with Federal Rule of Criminal Procedure 32.1(c), which requires certain procedures, including a hearing and assistance of counsel, before a condition of supervised release is modified in a manner that is unfavorable to Royer.[1] As Royer points out,

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[1] Rule 32.1(c) reads as follows:

> (c) Modification.
>
> (1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.
>
> (2) Exceptions. A hearing is not required if:
>
> (A) the person waives the hearing; or
>
> (B) the relief sought is favorable to the person and does not extend the term of probation or supervised release; and
>
> (C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

Standard Condition 12 does not answer whether risk notification constitutes a "modification" of supervised-release conditions. If it is a modification, Royer would have a right to a counseled hearing under Rule 32.1(c) before the district court approved any risk notification. Royer does not ask that we invalidate Standard Condition 12 but argues that the issue is ripe for review and that we should interpret the condition as being subject to Rule 32.1(c) and correct it as a preventative measure.

This court reviews the issue of ripeness de novo. *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1231 (10th Cir. 2001). The ripeness doctrine involves both constitutional requirements and prudential concerns. *See United States v. Cabral*, 926 F.3d 687, 693 (10th Cir. 2019); *Tex. Brine Co., LLC v. Occidental Chem. Corp.*, 879 F.3d 1224, 1229 (10th Cir. 2018). The purpose of the ripeness doctrine is "to prevent the premature adjudication of abstract claims." *Tex. Brine*, 879 F.3d at 1229. Constitutional ripeness is based on Article III's requirement that federal courts hear only "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2; *see also Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City*, 861 F.3d 1052, 1059 (10th Cir. 2017). Because federal courts cannot issue advisory opinions, the matter must come to the court in "clean-cut and concrete form." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (quoting *Renne v. Geary*, 501 U.S. 312, 322 (1991)); *see also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

Even when an appeal satisfies Article III's "case or controversy" requirement, a court still may decline to review it under the prudential ripeness doctrine. Application of this doctrine turns on two factors: (1) "the fitness of the issue for judicial review" and (2) "the hardship to the parties from withholding review." *United States v. Bennett*, 823 F.3d 1316, 1326 (10th Cir. 2016); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). As for whether the issue is fit for judicial review, we focus on whether the determination of the merits "turns upon strictly legal issues or requires facts that may not yet be sufficiently developed." *United States v. Ford*, 882 F.3d 1279, 1283 (10th Cir. 2018) (quotation marks omitted). Accordingly, a claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 296 (1998) (quoting *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580–81 (1985)). As for the hardship to the parties from withholding review, we consider whether Royer "face[s] a direct and immediate dilemma" arising from the supervised-release condition he is challenging. *Bennett*, 823 F.3d at 1327 (internal quotation marks omitted); *see also Cabral*, 926 F.3d at 693.

A. Royer's Challenge Is Not Fit for Judicial Review

Royer fails to satisfy the first prong of the prudential ripeness doctrine: fitness for judicial review. Royer argues that the construction of Standard Condition 12 is fit for judicial review because it "poses the purely legal question of whether [construing the condition to allow modification outside of Rule 32.1(c)] is lawful." Aplt. Br. at 7. He asserts that when the district court imposed Standard Condition 12, it in

effect sanctioned the condition's unlawful modification outside of Rule 32.1(c). Royer therefore contends that "[t]he question of the propriety of the condition does not turn on any facts that may play out in the future." *Id.* Royer basically contends the condition as stated is unlawful *now* and we should act to correct it.

Royer's challenge relies heavily on the improper-delegation ripeness analysis in *United States v. Cabral*, 926 F.3d 687 (10th Cir. 2019). In *Cabral*, petitioner Jon Julian Cabral appealed a supervised-release condition that gave his probation officer the sole authority to decide what risks should be disclosed to third parties. *Id.* at 691–92. Cabral challenged the condition on two grounds: (1) the district court had improperly delegated a judicial function by permitting his probation officer to decide what risks required notification and (2) the condition was unconstitutionally vague because it did not provide guidance on what risks should be disclosed. *Id.* at 694–97. On the issue of prudential ripeness, we determined that (1) the improper-delegation challenge was ripe as an "already-realized delegation of judicial power to a probation officer, not merely some hypothetical future violation that delegation might allow" and (2) the vagueness challenge was not ripe because it was grounded in hypotheticals and depended on the probation officer's future actions. *Id.*

Despite Royer's assertions, Royer's challenge is not analogous to *Cabral*'s improper-delegation challenge. The legality of the delegation in *Cabral* was ripe for review because any error in giving authority to the probation officer to act alone arose "at the moment" of delegation. *Id.* at 696. Royer does not raise an improper-delegation challenge, and Standard Condition 12 presents no such delegation issue.

The condition instead provides that risk notification may be required if the probation officer determines that Royer poses a risk to another person *and* "obtain[s] Court approval." ROA, Vol. I at 30. Because risk notification is dependent on the district court's approval, the district court properly retains ultimate authority. *See United States v. Wayne*, 591 F.3d 1326, 1336 (10th Cir. 2010) ("A court may delegate limited authority to a probation officer as long as the court retains and exercises ultimate authority . . . over all of the supervised conditions.").

Further, Royer's requested construction of Standard Condition 12 is a challenge to a condition that might never be applied. In this way, Royer's challenge is much more analogous to *Cabral*'s unripe vagueness challenge because it is grounded in hypotheticals and potential scenarios. Royer's argument that Rule 32.1(c) may be violated is dependent upon the future actions of both the probation officer and the district court, including whether the probation officer determines that risk notification is necessary, whether the district court approves the probation officer's request, and whether the district court gives its approval without holding a Rule 32.1(c) hearing. As this court explained in *Cabral*, "[w]hen a condition of supervised release is, by its own terms, contingent on the decision of a different actor, that condition is not ripe for immediate review." 926 F.3d at 695 (quoting *Ford*, 882 F.3d at 1286). Therefore, even if the construction of Standard Condition 12 poses the purely legal question of whether the condition is lawful, this court's precedent "strongly disfavors deciding challenges to supervised-release conditions that might never be applied." *Id.* at 694.

B. Royer Fails to Show Hardship from Withholding Review

Royer also fails to satisfy the second prong of the prudential ripeness doctrine: hardship from withholding review. Royer does not articulate any harm or error resulting from Standard Condition 12 at sentencing, where Royer was represented by counsel and did not object to Standard Condition 12. ROA, Vol. III at 30–36. Nor does he show that he will suffer hardship if we decline to decide the merits of his argument now. *Cf. Wayne*, 591 F.3d at 1329 n.1 (appellant met hardship burden by showing she faced a "meaningful possibility of re-incarceration" if claims were not resolved); *United States v. White*, 244 F.3d 1199, 1202–05 (10th Cir. 2001) (appellant met hardship burden by showing violation of challenged condition would likely result in immediate reincarceration). In Royer's case, any harm that may occur when Standard Condition 12 is enforced is speculative and does not meet the requirements for prudential ripeness.

We therefore conclude that Royer has failed to satisfy the prudential ripeness doctrine for this claim and decline to reach its merits.

III.

Accordingly, Royer's challenge to Standard Condition 12 is DISMISSED as prudentially unripe.

Entered for the Court

Mary Beck Briscoe
Circuit Judge