

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAUNA GUTIERREZ,

Defendant - Appellant.

No. 23-2028
(D.C. No. 2:15-CR-04268-JB-30)
(D.N.M.)

ORDER AND JUDGMENT*

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

In this appeal, Shauna Gutierrez challenges her sentence, imposed by the district court for violating the conditions of her supervised release. Also before us is the Government's motion to dismiss, asserting that Ms. Gutierrez's appeal was rendered moot by her release from custody with no additional period of supervision. Upon review of the record and the parties' briefing, we conclude Ms. Gutierrez's

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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

appeal is moot. Accordingly, we grant the Government's motion to dismiss the appeal.

I. BACKGROUND

In 2019, Ms. Gutierrez pleaded guilty to two counts of violent crimes in aid of racketeering and one count of witness tampering; she was sentenced to 36 months' incarceration and three years' supervised release. During her supervised release, the probation office filed three petitions to revoke her supervised release. A fourth petition, filed in November 2022, stated Ms. Gutierrez had violated multiple conditions of her supervised release, including failing: to follow the rules and regulations of her residential reentry center, to notify her probation officer of a change in residence, to follow her probation officer's instructions relating to the conditions of her supervision, and to refrain from unlawful use of a controlled substance. The court issued a warrant for Ms. Gutierrez's arrest. Because each of Ms. Gutierrez's violations were Grade C violations and her criminal history category was category I, the United States Sentencing Commission Guidelines recommended a revocation sentence of between 3 and 9 months' incarceration.

During her revocation of supervised release hearing, Ms. Gutierrez admitted to the violations set forth in the petition and requested a 5-month time-served sentence. Prior to sentencing, the district court conferred with Ms. Gutierrez's probation officer, off the record. The court then sentenced Ms. Gutierrez to 9 months'

incarceration, with no additional period of supervision, based on the factors set forth in 18 U.S.C. § 3553(a).¹

Ms. Gutierrez filed a timely Notice of Appeal, seeking to challenge her revocation sentence. On June 6, 2023, while this appeal was pending, Ms. Gutierrez was released from custody, and she is not subject to any additional period of supervised release. The same day as Ms. Gutierrez’s release, the Government filed a motion to dismiss the appeal;² Ms. Gutierrez’s counsel responded, agreeing the issue is moot and moving to withdraw.

II. DISCUSSION

Before reviewing the merits of Ms. Gutierrez’s appeal, we must first determine whether we have jurisdiction. *United States v. Meyers*, 200 F. 3d 715, 718 (10th Cir. 2000). Article III of the United States Constitution limits federal courts’ jurisdiction, throughout all stages of judicial proceedings, to cases or controversies. U.S. CONST.

¹ During its discussion of the § 3553(a) factors, the court referenced Ms. Gutierrez’s boyfriend, stating: “This boyfriend is just not—he’s not good for you. . . . And he’s just going to get you in trouble again, and you’re going back. And you haven’t been real honest about what you’re doing.” ROA Vol. II at 22. Ms. Gutierrez claims on appeal that the court received this information in its off-record conversation with her parole officer and improperly relied on this information during sentencing. However, we lack jurisdiction to reach the merits of Ms. Gutierrez’s argument.

² Under Tenth Circuit Rule 27.3(A)(3)(a), a motion to dismiss “should be filed within 14 days after the notice of appeal is filed, unless good cause is shown.” Although the Government filed its motion to dismiss more than fourteen days after Ms. Gutierrez’s Notice of Appeal, the Government has demonstrated good cause because the appeal became moot only upon Ms. Gutierrez’s release on June 6, 2023.

art. III, § 2, cl. 1; *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). “An appellant seeking relief ‘must have suffered, or be threatened with, an actual injury traceable to the [appellee] and likely to be redressed by a favorable judicial decision [by the appeals court].’” *Meyers*, 200 F. 3d at 718 (alteration in original) (quoting *Lewis*, 494 U.S. at 477). Thus, when the claimed injury “disappears or is resolved extrajudicially prior to the appellate court’s decision, the appellant can no longer satisfy the Article III case or controversy jurisdictional requirement and the appeal is moot.” *Id.* (citing *Burke v. Barnes*, 479 U.S. 361, 363 (1987)).

Article III is satisfied when a defendant is subject to ongoing incarceration, or when a defendant has completed her sentence but demonstrates that “sufficient collateral consequences flow from the underlying judgement and the completed sentence.” *Id.* A “concrete and continuing injury[,] other than the now-ended incarceration or [supervised release,]” is a “collateral consequence” of the conviction. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). We presume sufficient collateral consequences exist when a defendant, who has completed her sentence, “appeals the propriety of h[er] initial conviction.” *Meyers*, 200 F. 3d at 718. However, such presumption does not extend to challenges to sentences for supervised release revocation. *Id.* Thus, “when a defendant challenges a [supervised release] revocation but has completed the sentence imposed upon revocation, the defendant bears the burden of demonstrating the existence of actual collateral consequences resulting from the revocation.” *Id.* at 719. Claims of collateral consequences that rely on future

law-breaking to create a cognizable injury are insufficient to defeat mootness.³

Spencer, 523 U.S. at 14–15.

Ms. Gutierrez’s appeal is moot and thus fails to satisfy the case or controversy requirement of Article III. Ms. Gutierrez’s injury from her 9-month revocation sentence “disappear[ed] . . . prior to the appellate court’s decision,” when she completed her sentence and was released with no further period of supervision. *Meyers*, 200 F. 3d at 718. Because Ms. Gutierrez appeals her revocation sentence, not the “propriety of [her] initial conviction[,]” we do not presume the existence of collateral consequences to satisfy Article III. *Id.* Instead, Ms. Gutierrez is required to demonstrate actual collateral consequences. *See Spencer*, 523 U.S. at 14; *Meyers*, 200 F.3d at 719.

Ms. Gutierrez’s counsel does not claim any “concrete or continuing injury other than the now-ended incarceration,” *Spencer*, 523 U.S. at 7, nor has Ms. Gutierrez attempted to do so by filing a pro se response to the motion to dismiss. Because Ms. Gutierrez has not met her burden of clearly alleging facts that “demonstrat[e] the existence of actual collateral consequences resulting from [her]

³ Claims that the supervised release revocation could detrimentally affect a future supervised release proceeding, or lead to increased sentencing in a future proceeding, are “contingent upon [a defendant] violating the law, getting caught, and being convicted[,]” and thus fail to defeat mootness. *Spencer v. Kemna*, 523 U.S. 1, 15–16 (1998). Likewise, claims that the supervised release revocation could impeach a defendant’s testimony, or be used against a defendant directly, in future proceedings are “purely a matter of speculation whether such an appearance will ever occur[,]” and thus fail to defeat mootness. *Id.*

revocation,” her appeal is moot. *Meyers*, 200 F. 3d at 718; *see also Spencer*, 523 U.S. at 14.

III. CONCLUSION

Because Ms. Gutierrez has not demonstrated sufficient collateral consequences flowing from her completed revocation sentence, her appeal is moot. We therefore lack jurisdiction to entertain the merits of the instant appeal. Accordingly, we GRANT the Government’s motion to dismiss this appeal.

Entered for the Court

Carolyn B. McHugh
Circuit Judge