

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2011

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7
8 (Submitted: October 21, 2011 Decided: November 23, 2011)

9
10 Docket No. 10-4090

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12 - - - - -x

13
14 UNITED STATES OF AMERICA,

15
16 Appellee,

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18 - v.-

19
20 JAMES LEON,

21
22 Defendant-Appellant.

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24 - - - - -x

25
26 Before: JACOBS, Chief Judge, WESLEY, Circuit
27 Judge, and SULLIVAN, District Judge.*

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29 Defendant appeals from a judgment of the United States
30 District Court for the Southern District of New York
31 following his plea of guilty to a violation of the
32 conditions of his supervised release. Defendant argues that

* The Honorable Richard J. Sullivan, of the United States District Court for the Southern District of New York, sitting by designation.

1 the district court exceeded its authority by imposing a
2 post-revocation term of supervised release that extended
3 beyond the end-date of the originally imposed term of
4 supervision. In the alternative, he argues that the term of
5 supervised release was a substantively unreasonable
6 sentence.

7 STEVEN M. STATSINGER,
8 Federal Defenders of New York,
9 Inc., New York, NY, for
10 Appellant.

11 BRIAN R. BLAIS, JUSTIN S.
12 WEDDLE, *for* PREET BHARARA,
13 United States Attorney,
14 Southern District of New York,
15 New York, NY, for Appellee.

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19 PER CURIAM:

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21 James Leon appeals from a judgment entered in the
22 United States District Court for the Southern District of
23 New York (Kaplan, J.), following his plea of guilty to a
24 violation of the conditions of his supervised release. The
25 initial sentence of supervised release was 60 months; on
26 revocation, he was sentenced to a new 60-month term: one
27 month of the time served in prison pre-sentence, plus 59
28 months of supervised release. Leon argues that the district
29 court exceeded its authority by imposing a post-revocation

1 term of supervised release that extended beyond the end-date
2 of the originally imposed term of supervision. In the
3 alternative, he argues that the 59-month term of supervised
4 release was a substantively unreasonable sentence.

5 Affirmed.

6 **BACKGROUND**

7
8 In 1994, James Leon pled guilty in the District of
9 Minnesota to aiding and abetting the possession of cocaine
10 with the intent to distribute and was sentenced to 192
11 months imprisonment to be followed by 60 months of
12 supervised release. After release from prison in May 2008,
13 Leon's supervision was transferred to the Southern District
14 of New York. The term of supervision was scheduled to
15 expire on May 1, 2013.

16 In early 2010, officers from the New York Police
17 Department went to Leon's apartment to arrest him for
18 possession of stolen goods. Leon fled, and was never
19 ultimately charged by state authorities. Following this
20 incident, however, Leon failed to report for a scheduled
21 office visit with his probation officer on February 16,
22 2010. After several unsuccessful attempts to contact him,

1 Leon was charged with failing to report to the Probation
2 Office as directed, in violation of the conditions of his
3 supervised release, and was arrested on August 24, 2010. He
4 pled guilty to violating the conditions of his supervised
5 release.

6 At Leon's sentencing, he sought leniency as the sole
7 caregiver for an aged mother suffering from various ailments
8 and disabilities. The Government recommended a prison
9 sentence within the applicable Sentencing Guidelines range
10 of 8 to 14 months. After soliciting the parties' views
11 regarding the permissible length of supervised release that
12 Leon could be ordered to serve following any imprisonment,
13 the district court revoked Leon's 60-month term of
14 supervised release and sentenced him to time served
15 (approximately one month) to be followed by a term of
16 supervised release of 59 months, on the same terms and
17 conditions that governed his original term of supervised
18 release. Leon moved for a correction of his sentence, which
19 the district court denied. This appeal followed.

20

21

1 01. On September 13, 1994 (after Leon committed the
2 underlying offense for which he initially received
3 supervised release), Congress amended the supervised release
4 statute to expressly permit courts to impose an additional
5 term of supervised release following the revocation of an
6 original term of supervised release. See 18 U.S.C.
7 § 3583(h).¹ Johnson held that § 3583(h) did not apply
8 retroactively, but that, even prior to its enactment,
9 district courts had the authority to impose an additional
10 term of supervised release to follow any post-revocation
11 imprisonment by virtue of § 3583(e). Johnson, 529 U.S. at
12 713. That section permits a district court to "revoke a
13 term of supervised release, and require the person to serve
14 in prison all or part of the term of supervised release
15 without credit for the time previously served on postrelease
16 supervision, if it finds by a preponderance of the evidence

¹ Under 18 U.S.C. § 3583(h), "The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." Thus, the statute in its current form clearly permits district courts to impose a combination of post-revocation imprisonment and additional supervised release that is equal in duration to the authorized term of supervised release for the original offense.

1 that the person violated a condition of supervised release."
2 Id. at 704 (quoting 18 U.S.C. § 3583(e)(3)).

3 Leon contends that this provision bears only upon the
4 prison component of a post-revocation sentence, allowing the
5 court to deny credit for time already served on supervised
6 release in deciding the length of post-revocation
7 *imprisonment*. Leon's argument on appeal is that any new
8 post-revocation term of supervised release should have
9 reflected a credit for the supervised release time he served
10 under the initial sentence. However, the statute allows a
11 court to sentence a defendant to serve only part of the
12 original term of supervised release in prison and the rest
13 (potentially the greater part of the term) through
14 additional supervised release. The clear import of the
15 statute is to deny credit with respect to the entire term of
16 supervised release regardless of how the court allocates
17 that term between imprisonment and additional supervised
18 release.

19 Leon's approach seems to run counter to one of the
20 purposes of release on supervision. Johnson referenced a
21 Congressional intent "to use the district courts'
22 discretionary judgment to allocate supervision to those

1 releasees who needed it most." Id. at 709. It reasoned
2 that "forbidding the reimposition of supervised release
3 after revocation and reimprisonment would be fundamentally
4 contrary to that scheme" because a defendant's violation of
5 the terms of his supervised release "tends to confirm the
6 judgment that help was necessary, and if any prisoner might
7 profit from the decompression stage of supervised release,
8 no prisoner needs it more than one who has already tried
9 liberty and failed." Id. In view of Johnson's expansive
10 interpretation of district courts' statutory authority to
11 impose additional supervised release following revocation in
12 order to ease reintegration into society for those prisoners
13 that violate the conditions of their release, we fail to see
14 how the decision can be read to impose the limitation which
15 the defendant seeks.

16 We join a number of other Circuits in rejecting the
17 approach urged by Leon. See, e.g., United States v.
18 Gresham, 325 F.3d 1262, 1268 (11th Cir. 2003) (holding that,
19 under § 3583(e)(3), "a defendant is not entitled to credit
20 for pre-revocation time served on supervised release");
21 United States v. Russell, 340 F.3d 450, 454 (7th Cir. 2003)
22 (interpreting Johnson to mean that "a district court may,

1 upon revoking a term of supervised release under
2 § 3583(e)(3), sentence a defendant to serve a combined term
3 of reimprisonment and additional supervised release, so long
4 as that sentence does not exceed the original term of
5 supervised release").

6 II

7
8 Leon also argues that even if the district
9 court possessed the legal authority to impose it, a 59-month
10 period of supervised release was substantively unreasonable.
11 We review a district court's sentence for substantive
12 reasonableness under an abuse of discretion standard. Gall
13 v. United States, 552 U.S. 38, 51 (2007). "[W]hen
14 conducting substantive review, we take into account the
15 totality of the circumstances, giving due deference to the
16 sentencing judge's exercise of discretion, and bearing in
17 mind the institutional advantages of district courts."
18 United States v. Cavera, 550 F.3d 180, 190 (2d Cir. 2008)
19 (in banc). We will "set aside a district court's
20 *substantive* determination only in exceptional cases where
21 the trial court's decision cannot be located within the
22 range of permissible decisions." Id. at 189 (internal

1 quotation marks omitted). Thus, the substantive
2 unreasonableness standard "provide[s] a backstop for those
3 few cases that, although procedurally correct, would
4 nonetheless damage the administration of justice because the
5 sentence imposed was shockingly high, shockingly low, or
6 otherwise unsupportable as a matter of law." United States
7 v. Rigas, 583 F.3d 108, 123 (2d Cir. 2009).

8 According to Leon, the sentence was substantively
9 unreasonable because the district court's record findings do
10 not support the need for a long period of supervised
11 release, and instead operate to justify the imposition of a
12 below-Guidelines term of imprisonment (time served of one
13 month versus the 8-14 month Guidelines recommendation). In
14 explaining its sentence, the court primarily focused on
15 sympathetic factors that counseled in favor of a below-
16 Guidelines term of imprisonment, including the defendant's
17 role as a caregiver for his elderly mother. But the court
18 also signaled distrust of Leon's use of liberty, citing his
19 "idiocy" in severing all contact with the Probation Office
20 after fleeing the NYPD. District courts are permitted thus
21 to "hedge against [a] relatively lenient term of
22 imprisonment" by imposing a longer term of supervised

1 release. See United States v. Rivera, 192 F.3d 81, 87-88
2 (2d Cir. 1999). Leon had only recently begun the process of
3 reintegrating into society after a lengthy prison sentence
4 and had thus far proven incapable of complying with the
5 terms of his supervised release. The district court could
6 therefore reasonably conclude that a relatively long term of
7 supervised release was necessary to prevent recidivism in
8 view of the lenient prison sentence it imposed. The
9 district court's decision to offset a short prison sentence
10 with a long period of supervised release "is a matter of
11 fine-tuning rather than inconsistency." Id. at 88. Because
12 this is not an "exceptional case[] where the trial court's
13 decision cannot be located within the range of permissible
14 decisions," we find the district court did not abuse its
15 discretion in imposing a 59-month term of supervised
16 release. See Cavera, 550 F.3d at 189 (internal quotation
17 marks omitted).

18 CONCLUSION

19
20 For the foregoing reasons, the judgment of the district
21 court is **AFFIRMED**.