NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 14, 2023
Decided February 16, 2023

Before

DIANE P. WOOD, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-2009

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDRE G. SIMMONS,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 09-cr-122-jdp-1

James D. Peterson,
Chief Judge.

O R D E R

The district court revoked Andre Simmons's supervised release after several conditions-of-release violations, including a conviction for disorderly conduct. Simmons appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. See *Anders v. California*, 386 U.S. 738 (1967). We grant counsel's motion and dismiss Simmons's appeal.[1]

[1] Simmons previously identified by she/her pronouns, but counsel states that Simmons now uses he/him pronouns; we follow Simmons's practice.

Although a defendant has no absolute right to counsel in revocation proceedings, see *Gagnon v. Scarpelli*, 411 U.S. 778, 789–90 (1973), it is our practice to follow the *Anders* framework in this context. See *United States v. Brown*, 823 F.3d 392, 394 (7th Cir. 2016). Simmons did not respond to counsel's motion, see CIR. R. 51(b), but counsel addresses two arguments that she says Simmons wishes to make. Because counsel's brief explains the nature of the case, addresses the potential issues that an appeal of this kind might be expected to involve, and the analysis appears thorough, we focus our review on the subjects she discusses. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Simmons's violations occurred a decade after his 2010 conviction on five counts of distributing crack cocaine. 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2. He received a sentence of 20 years in prison, followed by 6 years of supervised release. Simmons successfully moved for a sentence reduction in 2021 and was released on May 20. The court left intact the six-year supervised release term and ordered Simmons to spend the first 180 days after release at a residential reentry center in Wisconsin. He did not report to the center until over three days after release, having traveled to Minnesota without permission from, or reporting to, his probation officer. Then, six months later, Simmons brandished at a bar what appeared to be a firearm, but was actually an airsoft gun (which projects only non-metallic objects). He was charged in state court and pleaded guilty to misdemeanor disorderly conduct.

Simmons's probation officers successfully petitioned for revocation of release. The officer alleged that Simmons violated several conditions of release, including: committing a crime (disorderly conduct), not reporting to probation within 72 hours of release, leaving the judicial district without permission, lying to his probation officer during the unauthorized visit to Minnesota, and not completing required monthly supervision reports. At the hearing on the petition, the court ruled that one of Simmons's probation officers could attend by phone because the officer had a contagious illness and Simmons had questioned him at the preliminary detention hearing. Next, the court confirmed that Simmons was stipulating to having violated his supervision conditions by committing a new crime, failing to report to probation within 72 hours of release, leaving the state without permission and lying about it, and not filing monthly reports (all Grade C violations). See U.S.S.G. § 7B1.1(a)(3). The court ultimately sentenced Simmons to a year and a day in prison—within the advisory range that was based on Simmons's criminal history category of VI and Grade C violations, see U.S.S.G. §§ 7B1.4(a), 7B1.3(a)(2)—followed by four years of supervised release.

Before we move to counsel's analysis, we pause to consider mootness. Simmons has completed his prison term. This does not moot the appeal, however, because he is still in custody based on his term of supervised release until November 2026. See *Pope v. Perdue*, 889 F.3d 410, 414–15 (7th Cir. 2018). Were he to succeed on his appeal, Simmons could still benefit; a ruling that the district court wrongly revoked his supervision or that the reimprisonment term was too long could carry "great weight" in a motion under 18 U.S.C. § 3583(e)(1) to reduce his current supervised-release term. See *United States v. Sutton*, 962 F.3d 979, 982 (7th Cir. 2020) (quoting *Pope*, 889 F.3d at 415).

Counsel first considers whether Simmons has a non-frivolous challenge to the revocation. It is unclear whether counsel confirmed, as she should have, that Simmons wants to challenge the revocation and if so, whether he wants to argue that his admissions were not knowing and voluntary. See *United States v. Wheeler*, 814 F.3d 856, 857 (7th Cir. 2016); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002). Regardless, we agree with her that Simmons lacks a plausible argument against the revocation. To revoke his supervised release, the court had to find by a preponderance of the evidence that Simmons violated a condition of his release. See 18 U.S.C. § 3583(e)(3). Here, Simmons stipulated that he violated multiple conditions of his release. Moreover, before the revocation hearing, the government provided evidence of the bar incident and Minnesota trip. And Simmons testified that he traveled to Minnesota knowing that the travel was unauthorized and that he brought the airsoft gun to the bar. Nothing in the record suggests that Simmons's stipulations or testimony were involuntary or factually unsupported. Finally, counsel rightly concludes that it would be frivolous for Simmons to argue that the court lacked authority to revoke here, as his term did not expire until May 2027.

Counsel next concludes that it would be frivolous for Simmons to argue that the revocation hearing did not comply with Federal Rule of Criminal Procedure 32.1. It was undisputed at the hearing that Simmons had received a copy of the petition and summary of the evidence against him, and he was present, gave evidence, and had counsel. See FED. R. CRIM. P. 32.1. Although a probation officer attended by phone, the court permissibly found that, in light of that officer's illness and Simmons's previous chance to question him, the "interest of justice" did not require the officer's physical presence. See *id.* 32.1(b)(2)(C); *United States v. Jordan*, 765 F.3d 785, 787 (7th Cir. 2014).

Counsel also considers whether Simmons has a non-frivolous challenge to his sentence and correctly concludes he does not. Simmons's prison term did not exceed the statutory maximum: because his underlying drug offenses were Class B felonies,

see 18 U.S.C. § 3559(a)(2), the term could not—and did not—exceed three years. 18 U.S.C. § 3583(e)(3). The year-and-a-day prison term was within the range recommended by the Chapter 7 policy statements, and so we would presume it is reasonable. See *United States v. Yankey*, 56 F.4th 554, 560 (7th Cir. 2023). And nothing in the record would disturb that presumption. Following 18 U.S.C. § 3583(e), the court assessed the relevant statutory factors under 18 U.S.C. § 3553(a), including the nature of Simmons's violations and his characteristics, giving "a concise explanation on the record that reflects that it considered the proper factors." See *United States v. Hollins*, 847 F.3d 535, 541 (7th Cir. 2017). It acknowledged Simmons's progress toward rehabilitation, but in light of his "risky conduct," dishonesty, and failure to follow supervision rules, it concluded that revocation, a prison term of 12 months, and more supervision were appropriate. Although counsel does not address Simmons's new four-year term of supervised release, this omission does not impede our analysis because the term is within the recommended range, see 18 U.S.C. § 3583(h); U.S.S.G. § 7B1.3(g)(2), and the court explained why it thought additional supervised release was necessary.

Finally, counsel tells us that Simmons wishes to argue that the district court relied on two inaccuracies at sentencing—that he had committed misdemeanor disorderly conduct and "could have been charged with escape" for failing to report to the reentry center. Although a court's reliance on inaccurate information could invalidate a sentence, see *United States v. Spivey*, 926 F.3d 382, 385 (7th Cir. 2019), counsel rightly concludes that Simmons cannot plausibly raise this argument.

Regarding the disorderly-conduct conviction, counsel notes that Simmons stipulated to it and presented a document showing that he pleaded guilty to a charge of disorderly conduct. He may not now argue that the information he supplied entitles him to relief. See *United States v. Grisanti*, 943 F.3d 1044, 1052 (7th Cir. 2019). Even were we to review for plain error, nothing in the record suggests this information is incorrect.

As to Simmons's attack on the judge's statement that he could have been charged with escape, counsel notes the problem of waiver. When the judge said that the failure to report "[c]ould have been an escape charge," defense counsel agreed with the court and responded: "Yeah." But even if we were to decide that Simmons merely forfeited this attack and give it plain-error review, see *United States v. Oliver*, 873 F.3d 601, 607 (7th Cir. 2017), Simmons could not reasonably argue that the statement was plainly wrong. Although we have not held that disobeying a condition of release to report to a reentry center is an escape, case law from other circuits (with which we have not disagreed) suggests that is. See, e.g., *United States v. Edelman*, 726 F.3d 305, 309 (2d Cir.

2013) (leaving halfway house is escape). But see *United States v. Burke*, 694 F.3d 1062, 1065 (9th Cir. 2012) (leaving halfway house is not escape). The court's statement was thus not plain error.

We therefore GRANT counsel's motion to withdraw and DISMISS the appeal.