NONPRECEDENTIAL DISPOSITION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 March 28, 2023
Decided March 29, 2023

Before

DIANE S. SYKES, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-2266

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEMARIO DUNAE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-CR-00311(1)

Jorge L. Alonso,
Judge.

O R D E R

Demario Dunae appeals the 18-month prison sentence imposed following the revocation of his supervised release. His attorney, however, asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). We grant the motion and dismiss the appeal.

Dunae pleaded guilty in July 2018 to manufacturing counterfeit United States currency, 18 U.S.C. § 471, and was sentenced to 36 months' imprisonment and two years' supervised release. In May 2020, about three weeks after his release from prison, Dunae was arrested for driving with a suspended license. An inventory search of his car yielded fraudulent United States currency and approximately 206 grams of heroin. Multiple state charges followed; Dunae later pleaded guilty to the Illinois offense of possession with intent to distribute heroin, 720 ILCS 570/401, and received a ten-year prison sentence.

In the meantime, Dunae's federal probation officer had filed a Special Report about the state charges and recommended that the district judge revoke his supervised release. Because of logistical challenges posed by the COVID-19 pandemic, Dunae did not appear for a revocation hearing until July 2022. There, Dunae admitted to committing two Grade A violations of his mandatory conditions of supervised release: "you shall not commit another Federal, State, or local crime," and "you shall not unlawfully possess a controlled substance." The judge accepted his waiver of a contested hearing and revoked his supervised release, as was required given the nature of the violations. *See* U.S.S.G. § 7B1.3(a)(1). The judge noted that the applicable range under the policy statements in Chapter Seven of the Sentencing Guidelines, 33 to 41 months, was supplanted by the statutory maximum of 24 months. The judge then sentenced Dunae to 18 months' reimprisonment, consecutive to the ten-year state sentence. This appeal followed.

Although Dunae does not have an unqualified constitutional right to counsel in revocation proceedings, including any appeal, s*ee Gagnon v. Scarpelli*, 411 U.S. 778, 789–91 (1973), we apply the *Anders* safeguards when appointed counsel moves to withdraw, so that all potential issues receive consideration. *See United States v. Brown*, 823 F.3d 392, 394 (7th Cir. 2016). Counsel's brief explains the nature of the case and addresses the potential issues that an appeal like this might be expected to involve. Because the analysis in the brief appears thorough, we limit our review to the subjects that counsel discusses, plus the additional issues that Dunae raises in his response to counsel's motion. *See* CIR. R. 51(b); *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Counsel considers only issues related to the sentence. Before omitting discussion of a challenge to the revocation, however, counsel is obligated to consult with his client and state whether the defendant wishes to withdraw the admissions on which the mandatory revocation was based. *See United States v. Konczak*, 683 F.3d 348, 349 (7th Cir.

2012); *United States v. Wheaton*, 610 F.3d 389, 390 (7th Cir. 2010). Dunae's Rule 51(b) response suggests the required consultation might not have happened here.

Nevertheless, it appears from Dunae's response that he wishes to raise issues only "within the sentence." And even if he wanted to appeal the revocation, such a challenge would be frivolous. *See Konczak*, 683 F.3d at 349. He did not seek to withdraw his admissions in the district court, so we would review for plain error only. *United States v. Nelson*, 931 F.3d 588, 590–92 (7th Cir. 2019). The transcript of the revocation hearing shows that Dunae understood the alleged violations and possible penalties and was satisfied with his legal representation before he voluntarily waived his right to contest the allegations and admitted that he violated the conditions of his release. *See* FED. R. CRIM. P. 32.1(b)(2); *United States v. Jones*, 774 F.3d 399, 403 (7th Cir. 2014).

Counsel considers whether Dunae could challenge the judge's power to revoke his supervised release because the revocation hearing occurred more than two years after his two-year term of supervision began. Counsel concludes that there is no appellate issue here because, long before the hearing, the judge issued a warrant based on Dunae's violations that extended the revocation power. *See* 18 U.S.C. § 3583(i). Challenging the judge's revocation power would indeed be frivolous, but for a different reason; Dunae's term of supervised release was tolled when he was arrested and held in state custody pending trial, so no extension "beyond the expiration of the term" was needed. *See id.*; 18 U.S.C. § 3624(e); *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019).

Counsel next considers whether Dunae could plausibly challenge his term of reimprisonment and rightly rejects any argument as frivolous. First, he spots no procedural issues in the application of the Guidelines' policy statements. Dunae's controlled-substance offense was a Grade A violation of his supervised-release conditions. *See* U.S.S.G. § 7B1.1(a)(1). Based on that, Dunae's original criminal history category of VI, and the underlying conviction for a Class C felony (manufacturing counterfeit currency), the judge noted that the range of reimprisonment was 33 to 41 months. *See id.* § 7B1.4(a). But under 18 U.S.C. § 3583(e)(3), Duane could not be sentenced to more than 24 months—the duration of the term of supervised release being revoked. Dunae affirmatively agreed with these calculations at his hearing, and his 18-month prison sentence is consistent with the statute and policy statements.

We also agree with counsel that challenging Dunae's sentence as substantively unreasonable would be frivolous. We would presume the prison sentence to be reasonable because it is below the policy-statement range. *See United States v. Dewitt*,

943 F.3d 1092, 1098 (7th Cir. 2019). Nothing in the record could rebut that presumption. The judge appropriately considered the "serious" nature of Dunae's offense, as well as the mitigating effect of the "very serious sentence of ten years" already imposed by the state court. *See* 18 U.S.C. § 3553(a). And Dunae cannot argue that it was an abuse of discretion for the judge to impose the federal sentence consecutive to his undischarged state sentence, because in this context, the two terms are presumed to run consecutively. *See* 18 U.S.C. § 3584(a); U.S.S.G. § 7B1.3(f).

For his part, Dunae would like to argue that counsel rendered ineffective assistance in violation of the Sixth Amendment. But it would not behoove Dunae to raise this argument in a direct appeal. Such a claim is best reserved for collateral review, when a more complete record can be developed. *See Massaro v. United States*, 538 U.S. 500, 504–05 (2003); *United States v. Cates*, 950 F.3d 453, 457 (7th Cir. 2020) ("By raising an ineffective-assistance claim prematurely, on direct appeal, a defendant can easily throw away any chance he has at success because the claim may not be presented a second time on collateral attack under 28 U.S.C. § 2255.… [W]e have repeatedly warned defendants against bringing ineffective-assistance claims on direct appeal.").

Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeal.