

United States of America
First Circuit Court of Appeals

NO. 22-1693

UNITED STATES OF AMERICA

Appellee,

v.

GEORGE WASHINGTON

Defendant/Appellant.

APPEAL FROM MASSACHUSETTS FEDERAL DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT,
GEORGE WASHINGTON

April 20, 2023

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STATEMENT OF JURISDICTION

On August 29, 2022, the United States District Court for the District of Massachusetts (*F. Dennis Saylor, J.*) revoked the supervised release of George Washington, after it found him in violation of conditions of supervised release, pursuant to 18 U.S.C. § 3583(e)(3). On the same date, the court sentenced Mr. Washington to 3 months imprisonment and 24 months supervised release, with specific conditions. Mr. Washington filed a notice of appeal on September 9, 2022.

The First Circuit Court of Appeals has jurisdiction over this matter pursuant to 18 U.S.C. § 3145(c) and 28 U.S.C. § 1291.

STATEMENT OF ISSUES

- I. Did the court err in unreasonably revoking supervised release?
- II. Did the court err by not taking into account factors that would have suggested that home confinement was not an effective rehabilitative measure for Mr. Washington?
- III. Did the court err by imposing supervised release when lesser conditions would have been sufficient?
- IV. Did the court err by not specifying the time period of home confinement in the judgment?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Underlying Conviction, Sentences, and Revocations

In 2003, George Washington was convicted by a jury of two counts of distributing cocaine base. In 2004, he was sentenced to 360 months imprisonment plus 10 years of supervised release, which this court upheld. In 2006, Washington was re-sentenced following *United State v. Booker*, 543 U.S. 220 (2005), but received an identical sentence.

Washington thereafter twice attempted to reduce his sentence based on the crack-cocaine disparity, but with no success. Washington also petitioned for sentence reduction based on challenges to his career offender status, but again with no success.

Motivated by the 2018 First Step Act, and having spent 16 years in prison, Washington again challenged his career offender status. Due to changes in the law, this time he was successful; his sentence was reduced to 210 months with 6 years of supervised release. ORDER FOR SENTENCE REDUCTION PURSUANT TO SECTION 404 OF THE FIRST STEP ACT OF 2018 (July 8, 2019) (Maine Dist. DE #410).

After serving several more months to the expiration of his amended sentence, Washington was released, and supervision by the Office of Probation and Pretrial Services commenced in May 2020.¹

¹Supervision was transferred from the Maine District to the Massachusetts District in May 2021.

A. First Revocation of Supervised Release

After an arrest in a domestic dispute in Rhode Island, in 2021 the Government alleged Washington violated his supervised release. In August 2021, Washington stipulated to the violations, and was sentenced to 57 months of supervised release contingent on standard conditions of release, 18 U.S.C. § 3563, plus four additional conditions requiring drug testing, educational and vocational training, mental health treatment, and no contact with the complainant in the Rhode Island matter. JUDGMENT IN A CRIMINAL CASE (Aug. 26, 2021) (Mass. Dist. DE #15).

B. Second Revocation of Supervised Release

In December 2021, the Probation Office claimed it had difficulty locating Washington, and therefore issued an arrest warrant. *Transcript of Initial Appearance* at 10; VIOLATION REPORT (Aug. 24, 2022) at 5, *Appx.* at 3; ARREST WARRANT (Jan. 6, 2022) (Mass. Dist. DE #19). The Probation Office admitted, however, that its efforts to contact Washington were limited, and were conducted during the week of Christmas. VIOLATION REPORT (Aug. 24, 2022) at 4.

Washington told Probation he was scared to return its phone calls, and Probation acknowledged that Washington had indeed responded to its text messages. *Transcript of Initial Appearance* at 10. Moreover, Washington alleged, and Probation admitted, that because of staff reassignments in the Probation Office, the snafu was a result of miscommunication. *Id.* at 10, 11. Washington indicated he thought he was waiting for Probation to contact him, *id.* at 10, and Probation admitted it made no follow-up efforts before procuring an arrest warrant. *Id.* at 11. Despite Probation's assertion that Washington's "whereabouts are

unknown,” VIOLATION REPORT (Aug. 24, 2022) at 4, Probation admitted and the court understood that Washington was not in “absconder status.” *Bail Review Hearing* (July 20, 2022) at 4.

Having not heard anything from Probation for several months, Washington’s girlfriend urged him to present himself, which in July 2022 he voluntarily did. *Transcript of Initial Appearance* at 8; *Bail Review Hearing* (July 20, 2022) at 3; VIOLATION REPORT (Aug. 24, 2022) at 4; *Transcript of Hearing on Revocation of Supervised Release* (Aug. 29, 2022) at 11, *Appx.* at 14, 24. In addition, Washington has consistently appeared for his court dates. *Transcript of Initial Appearance* at 8.

Despite Washington’s cooperation, the Government nonetheless alleged four violations of supervised release: Washington’s urine tested positive for marijuana and cocaine; following an initial intake, he did not complete educational/vocational programming; he did not finalize a mental health assessment; and he did not sufficiently maintain contact with his probation officer.

The Government recommended revoking Washington’s release, but offered no evidence that reincarceration or home confinement would serve any rehabilitative purpose. AMENDED PETITION FOR SUMMONS OF OFFENDER UNDER SUPERVISION (Aug. 24, 2022) (Mass. Dist. DE #28), *Appx.* at 10; *Transcript of Initial Appearance, passim*; VIOLATION REPORT (Aug. 24, 2022) at 6; *Transcript of Hearing on Revocation of Supervised Release* (Aug. 29, 2022), *passim*.

On the advice of counsel, who judged that the Government could prove the violations by a preponderance of the evidence, Washington pleaded guilty. 18 U.S.C. § 3583(e).

The court sentenced Washington to 3 months imprisonment and 24 months supervised release. The conditions of release were the same as before, with the addition of 5 months of GPS monitoring and 5 months of home detention.² JUDGMENT IN A CRIMINAL CASE (Aug. 29, 2022), *Sealed Appx.* at 12, (Mass. Dist. DE #30); *Transcript of Hearing on Revocation of Supervised Release* (Aug. 29, 2022) at 15.

Washington served the time, and then commenced supervised release. The home confinement terms of his sentence, which Washington is challenging, provide:

You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved by the officer (Home Detention).

JUDGMENT IN A CRIMINAL CASE (Aug. 29, 2022) at 4.

²The judgment leaves ambiguous the period of home confinement, but 5 months was specified by the court during the revocation hearing.

II. Washington's Home Situation

Washington completed his high school equivalency GED, and additional education, while in prison. REVISED PRE-SENTENCE INVESTIGATION REPORT ¶ 19 (May 13, 2019), *Sealed Appx* at 3.

As noted, since his release from incarceration in 2022, Washington has been under supervised release. Home confinement is with his girlfriend at a three-floor walk-up in Dorchester, which Probation approved. *Transcript of Initial Appearance* (July 18, 2022) (Mass. Dist. DE #22) at 8; *Bail Review Hearing* (July 20, 2022) (Mass. Dist. DE #23) at 3. There is no question that Probation has Washington's current contact information. *Transcript of Initial Appearance* at 8.

Washington admits that spending 16 years in prison, and the knowledge that the time he served was much longer than that for which defendants are now sentenced for the same conduct, have affected his mind-set and transition into the community. *Hearing on Revocation of Supervised Release* (Aug. 26, 2021) at 10-11; *Hearing on Revocation of Supervised Release* (Aug. 29, 2022) at 11-13.

It also appears that, despite the Government's allegations about his failure to complete vocational counseling, as a 52-year-old ex-convict, Washington was nonetheless able to become employed. *Transcript of Initial Appearance* at 8; *Hearing on Revocation of Supervised Release* (Aug. 29, 2022) at 8.

The conditions of Washington's release require up to 104 drug tests per year, which is an average of twice per week. He failed only two, and the Government understands he suffers from PTSD. VIOLATION REPORT (Aug. 20, 2021) at 4. Washington also notes that marijuana use is

legal in Massachusetts, and that it may be effective to address PTSD symptoms. *See, e.g.*, Alfonso Abizaid, Zul Merali & Hymie Anisman, *Cannabis: A potential efficacious intervention for PTSD or simply snake oil?*, JOURNAL OF PSYCHIATRY & NEUROSCIENCE (Mar. 2019) at 75–78, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6397040/>>; Susan A. Stoner, *Effects of Marijuana on Mental Health: Posttraumatic Stress Disorder (PTSD)*, University of Washington, Alcohol & Drug Abuse Institute (June 2017), <<https://adai.uw.edu/pubs/pdf/2017mjptsd.pdf>>.

In addition, Washington has been helping to care for his girlfriend's autistic granddaughter, which may sometimes involve engagement with the community made difficult by home confinement. *Transcript of Initial Appearance* at 8.

SUMMARY OF ARGUMENT

George Washington's supervised release was revoked for four technical violations not involving criminality, all based on scant evidence. His sentence, which includes reincarceration and home confinement, constitutes over-supervision, and is not grounded in any evidence showing such conditions are conducive to rehabilitation. Finally, the judgment in Washington's case erroneously omits the period of time for which the home confinement condition lasts.

This court should accordingly vacate Washington's revocation, and remand for correction of the judgment and for revision of his sentence.

ARGUMENT

I. Supervised Release Was Unreasonably Revoked

Washington's release was revoked for four minor violations that should not have resulted in reincarceration or home confinement: not sufficiently maintaining contact with Probation, not completing educational/vocational programming, not finalizing a mental health assessment, and failing two urine tests.

Given the technical nature of Washington's violations, the preponderance of the evidence does not support a violation of supervised release. *United States v. Serrano-Berrios*, 38 F.4th 246, 250 (1st Cir. 2022) (vacating revocation sentence due to scant evidence).

A. Probation Office Failed to Adequately Contact Washington

The Probation Office has a duty to adequately communicate with its probationers, with a purpose to avoid reincarceration:

A probation officer shall ... use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition.

18 U.S.C. § 3603(3).

Here, however, Probation attempted to contact Washington only during Christmas week, and then neglected to follow up when he responded by text message. Probation admitted its failure was due, at least in part, to its own staff turnover. It nonetheless charged Washington for failure to maintain contact, and sought reincarceration.

B. Washington Achieved an Education and a Job Without Probation Programming

Washington completed his high school education while in prison. At this point in his life, any expectation of further educational attainment seems unrealistic and excessive. Washington should have been commended for his achievement rather than sanctioned for not completing further programming.

Similarly, during his supervised release, Washington found a job at the post office – apparently without any Probation-sponsored vocational programming. This achievement should have been recognized; instead he was bureaucratically punished for not checking Probation’s list.

C. Washington Completed a Mental Health Assessment

Probation alleged that, although Washington completed a mental health assessment, he did not complete a treatment program, and was therefore violated. As above, Washington should be commended for what he achieved, and led to further help. Neither incarceration nor home confinement appear to be rehabilitatively-related to the violation.

D. Marijuana Use is Lawful and May Address Washington’s PTSD

Washington suffers from PTSD. Although self-medication has risks, his admitted use of marijuana – which is lawful in Massachusetts – may be related. Of his on-average semi-weekly urine tests, only two showed positive results. Rather than being sentenced for the technical violation – which is unlikely to be rehabilitative – Washington should have been offered alternatives.

II. Home Confinement Does Not Serve Rehabilitative Purposes and is Over-Supervision

Even if Washington technically violated the conditions of his release, reincarceration and home confinement do not serve any rehabilitative purposes for Washington, and therefore should not have been imposed.

Among the purposes of federal sentencing is the rehabilitation of convicts. *Tapia v. United States*, 564 U.S. 319, 334 (2011) (Although courts cannot increase sentences for purposes of prison rehabilitative programming, “[a] court commits no error by discussing the opportunities for rehabilitation.”).

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime.

Pepper v. United States, 562 U.S. 476, 487-88 (2011) (quotations and citations omitted); *see Gall v. United States*, 552 U.S. 38, 57 (2007) (discussing offender’s efforts at rehabilitation).

The federal sentencing statute requires consideration of rehabilitation:

The court, in determining the particular sentence to be imposed, shall consider ... the need for the sentence imposed ... to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2)(D); *United States v. Robertson*, 662 F.3d 871, 880 (7th Cir. 2011) (“Substantial and reliable evidence of genuine rehabilitation ... must be properly addressed and weighed by the sentencing court.”).

Supervised release and its conditions are permissible if they are reasonably related to rehabilitative purposes. *United States v. Pabon*, 819 F.3d 26 (1st Cir. 2016).

However, over-supervision of supervised-release convicts hampers reentry into the community. “Probation and parole are designed to lower prison populations and help people succeed in the community. New data show they are having the opposite effect.” Council of State Governments, Justice Center, *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets* (June 2019) <<https://csgjusticecenter.org/publications/confined-costly/>>.

People under supervision must comply with a laundry list of conditions, requirements, and limitations on top of the many other challenges they face as they aim to navigate life post-release. Too often these lengthy and overly restrictive supervision conditions do nothing to improve community safety. Instead, they often lead to re-incarceration for minor noncriminal and technical violations such as breaking curfew or missing an appointment

with a probation or parole officer. In 2017, these violations made up a quarter of all state prison admissions.

Miriam Aroni Krinsky, Kalyn E. Hill, Rosemary Nidiry, *Working Toward A Fair and Just Reentry Process the Role of Prosecutors*, at 3, 7 CRIM. JUST. (Summer 2022).

The federal Office of Probation and Pretrial Services is aware of this effect. Lauren Shuman, *Addressing Legal Aspects of Implementation Challenges from Expanded Use of Home Confinement and Compassionate Release*, FED. PROBATION at 14, 18 (December 2020) (“Serving a term of supervised release after a period of prerelease custody that offered the same or substantially similar services can be duplicative, resulting in over-supervision in some cases that may even be counter-productive and reduce a person’s chance of success.”).

Here, Washington’s violations were not related to any new criminality. Home confinement does not aid employment, medical care, or counseling. Rather, it impedes Washington’s ability to reintegrate into society, or to even enjoy the fresh air of his neighborhood. If the court’s concern is being out late, perhaps a curfew would have been more appropriate.

In any event, there was no evidence that revocation, reincarceration, 24 months of supervision, and 5 months of home confinement, are reasonably likely to be rehabilitative for Washington.

Washington is 52 years old, has a job, helps take care of a disabled child, and is attempting reintegration into the community. Complying with Probation’s rules regarding 72-hours notice for mundane errands,

such as shopping and laundry, is an impediment to rehabilitation, and not reasonably related to Washington's rehabilitation. See Robert N. Altman, *Home Confinement: A 90's Approach to Community Supervision*, FED. PROBATION at 30, 31 (Mar. 1997); *Primer on Supervised Release*, U.S. Sentencing Comm'n, Office of the General Counsel (2002), <https://www.ussc.gov/sites/default/files/pdf/training/primers/2022_Primer_Supervised_Release.pdf>.

Moreover, the court sentenced Washington to home confinement without any consideration of whether it is reasonably related to the circumstances of his rehabilitation, or whether he is being subject to over-supervision. This court should thus order Washington's sentence be modified to better suit his particular circumstances, taking into account how different types and degrees of supervision will or will not serve his rehabilitation.

III. Judgment Omits Time Period of Home Confinement

Washington's revocation sentence was 3 months imprisonment, and "[u]pon release ... supervised release for a term of 24 months."

JUDGMENT IN A CRIMINAL CASE (Aug. 29, 2022) at 3. The home confinement terms of the sentence were:

You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved by the officer (Home Detention).

Id. at 4.

Other conditions of Washington's supervised release specify a time period: for example, "[y]ou will be monitored by GPS monitoring technology for a period of 5 months." *Id.*

During the revocation hearing, the court specified that the period of home confinement was 5 months. The written judgment, however, omits that required information, FED.R.CRIM.P. 32(k) ("In the judgment of conviction, the court must set forth ... the sentence."); see *United States v. Johnson*, 756 F.3d 532, 542 (7th Cir. 2014) ("If an inconsistency exists between an oral and the later written sentence, the sentence pronounced from the bench controls."), leaving corrections officers, probation officers, and others, without readily-available and easily-confirmable information regarding Washington's actual sentence.

Given such error, that portion of Washington's sentence is unlawful and unreasonable, and should be remanded for correction.

IV. Standard of Review and Plain Error

The burden of proof for revocation of supervised release is preponderance of the evidence. 18 U.S.C. § 3583(e)(3).

This Court ordinarily reviews the district court's imposition of a special condition of supervised release for abuse of discretion, but if the issue was forfeited, review is for plain error.

United States v. Prochner, 417 F.3d 54, 62 (1st Cir. 2005).

While the sentencing court's legal conclusions are reviewed *de novo* and its factual findings are reviewed for clear error, to the extent the issues presented herein were not argued below, this appeal receives plain error review. *United States v. Gierbolini-Rivera*, 900 F.3d 7 (1st Cir. 2018).

Under the plain error standard, the defendant must show: (1) that an error occurred, (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

Id. at 12 (quotations and citations omitted).

As noted, the revocation of Washington's supervised release, and the incarceration and additional conditions then imposed, constitute error, which should have been clear and apparent to the district court. The error affected Washington's substantial rights by limiting his liberty beyond that necessary to further the rehabilitative purpose of the sentencing statutes. Because Washington was incarcerated and has been living under conditions violating his rights, the error seriously impairs the integrity of judicial proceedings.

Accordingly, this court should vacate the revocation, and remand for revision of Washington's sentence.

CONCLUSION

Based on the foregoing, this court should vacate the revocation of Washington's supervised release, and remand for correction of the judgment and for revision of his sentence.

Respectfully submitted,

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/s/

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