United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3083 **September Term, 2018**

FILED ON: APRIL 5, 2019

UNITED STATES OF AMERICA,
APPELLEE

v.

DAVID BERNIER,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cr-00088-1)

Before: GARLAND, *Chief Judge*, TATEL, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the district court's November 9, 2018, Judgment revoking Appellant's supervised release be affirmed, that the Judgment be remanded solely for the correction of typographical errors, and that Appellant's claims of ineffective assistance be remanded for further factual development for the reasons set forth in the memorandum filed simultaneously herewith.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

M E M O R A N D U M

David Bernier appeals the district court's final judgment, which revoked his supervised release and imposed a term of imprisonment. Finding no reversible error, we affirm the district court's judgment.

Bernier pled guilty to one count of making false statements in violation of 18 U.S.C. § 1001. The district court sentenced him to six months imprisonment followed by twenty-four months of supervised release. As his prison term was nearing an end, Bernier signed a form that waived his right to counsel and conceded the imposition of a computer and internet monitoring condition during supervised release. On June 23, 2017, by recommendation of the U.S. Probation Office for the District of Maine ("Maine's Probation Office"), the district court modified the terms of Bernier's supervised release to add the condition. On August 23, 2018, the district court found, by a preponderance of the evidence, that Bernier had repeatedly violated the conditions of his supervised release. On October 30, 2018, the district court revoked supervised release and sentenced Bernier to an additional six months of imprisonment, followed by twenty-four months of supervised release.

Bernier now contends that his sentence should be vacated because: (1) it was improper for Maine's Probation Office to unilaterally advance the recommendation of a computer and internet monitoring condition; (2) Bernier's waiver was improperly obtained; and (3) the condition itself lacked relevance to Bernier's underlying conviction.

Bernier's challenge is not properly before us. Undoubtedly, Bernier was aware of the condition imposed against him. The record is clear that Bernier signed a waiver that outlined the parameters of the computer and internet monitoring condition on June 19, 2017. The record further indicates that Bernier signed a specific monitoring contract with Maine's Probation Office on

September 12, 2017. He did not object to, or otherwise challenge the condition, either by motion in the district court or by noticing appeal, prior to violating the condition. In fact, Bernier violated the computer and internet monitoring condition twice on August 25, 2017, and again on October 10, 2017. His first objection to the condition did not come until October 24, 2017—nearly two months after his first and second violations, and two weeks after his third violation.

It is well established that "a defendant's notice of appeal must be filed in the district court within 14 days . . . of . . . the order being appealed." *See* Fed. R. App. P. 4(b)(1)(A). Not only did Bernier fail to comply with Rule 4, he did not even object until four months after the district court imposed the computer and internet monitoring condition. While we may not typically enforce Rule 4 to its strictest terms for *pro se* defendants, Bernier not only exceeded the time limit provision in the rules, but also waited until he had repeatedly violated the condition before voicing any objection to it. Even for a *pro se* litigant, this surpasses the limits of leniency. We therefore dismiss his untimely objection.

Separately, Bernier requests a remand of the district court's November 9, 2018, Judgment revoking Bernier's supervised release to correct a series of typographical errors involving (1) the numbering scheme of each violation, and (2) an erroneous statement that Bernier had admitted to violating his supervised release. The Government does not oppose Bernier's request. Accordingly, the district court's November 9, 2018, Judgment will be remanded for the limited purpose of correcting these errors.

Lastly, Bernier raises a pair of claims for ineffective assistance of counsel: (1) that his attorney conceded guilt to certain violations during the revocation hearing, and (2) that his attorney failed to provide him with the revised terms of his supervised release conditions after those conditions materially changed in April 2018, leading to additional violations. Although Bernier presents colorable claims of error, we decline to resolve the matter because it requires further factual

development. Pursuant to our ordinary practice, these claims will be remanded for an evidentiary hearing. *See United States v. Rashad*, 331 F.3d 908, 909–10 (D.C. Cir. 2003).

For the foregoing reasons, we affirm the district court's November 9, 2018, Judgment revoking Bernier's supervised release, remand that Judgment solely for correction of typographical errors, and remand Bernier's ineffective assistance claims for further factual development.