United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3005 **September Term, 2019**

FILED ON: MARCH 13, 2020

UNITED STATES OF AMERICA,
APPELLEE

v.

RANDALL G. CASSEDAY,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cr-00329-1)

Before: MILLETT, WILKINS and RAO, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the judgment of the District Court be **AFFIRMED.**

Appellant Randall Casseday pled guilty to possessing material constituting or containing child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), and enticing a child, in violation of D.C. Code § 22-3010(b)(1). The District Court sentenced Casseday to 60 months' imprisonment on the possession offense and 30 months' imprisonment on the enticing-a-child offense, to run consecutively, followed by a period of supervised release of 20 years on the possession offense and 3 years on the enticing-a-child offense, to run concurrently. Casseday served 72 months in prison and on April 5, 2013, began supervised release, which was set to conclude in April 2033. But Casseday's original sentence was interrupted.

At a scheduled hearing on violations of supervised release, a Probation Office report alleged three supervised release violations by Casseday on or about December 4, 2018: (1) possessing or using a computer that had access to any online computer service without the approval of Probation; (2) failing to truthfully answer all inquiries by the Probation officer and follow the

instructions of the Probation officer; and (3) failing to cooperatively participate in a mental-health program specifically related to sexual-offender therapy.

According to the report, Casseday used an Internet-capable phone he had taken from the lost-and-found at his work to conduct PayPal payments and send messages related to an online dating service for Asian women. After being instructed to bring in the device for a forensic search, Casseday indicated that he had thrown the device in a trash can, and when asked to retrieve the item, he "said he had smashed it and it was no longer available for a forensic search." J.A. 33. Additionally, Casseday was unsuccessfully discharged from sex-offender treatment for a failure to control "his risk behavior and willful failure to use the program-based or self-generated intervention." J.A. 34. At the hearing, Casseday conceded those violations.

The government concurred with the Probation Office's recommended Guidelines sentence of 9 months' imprisonment, expressing concern that Casseday's attempt to conceal and evade detection led to "an unknown extent of a violation." J.A. 37. Defense counsel made arguments related to mitigating factors, namely that this was the first violation of supervised release brought before the District Court and that imprisonment would jeopardize Casseday's stable employment, housing situation, and efforts at rebuilding relationships with his family. However, the Probation officer then informed the District Court that Casseday had a history of unauthorized computer use, including viewing sexual content involving young Asian women, which the Probation Office had previously tried to resolve without the District Court's intervention. The Probation officer expressed concern that a pattern of escalation and continued compulsive behavior was developing, and both the treatment provider and the Probation Office felt that Casseday had been given all the opportunities available without success. Thus, the Probation Office felt a term of imprisonment was the only way to convey "the importance of the conditions of supervision." J.A. 52. After finding that Casseday was a risk to the community, had been noncompliant with treatment, and was unwilling to comply with the conditions of release, the District Court revoked supervised release and committed Casseday to the Bureau of Prisons for 9 months' imprisonment, followed by a new term of supervised release of 216 months.

On appeal, Casseday first argues that, because the term of supervised release imposed following his revocation will extend beyond the date when his original period of supervised release would have expired, his sentence has been extended in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution. Because Casseday did not raise this issue below, we review for plain error. *United States v. Kelly*, 552 F.3d 824, 829 (D.C. Cir. 2009) ("We apply plain error review to the double jeopardy issue because Kelly 'allow[ed] [the] alleged error to pass without objection' below." (alterations in original) (quoting *In re Sealed Case*, 283 F.3d 349, 352 (D.C. Cir. 2002))). Under the plain-error standard, Casseday must establish "that (1) there was an error, (2) it was plain, (3) it affected substantial rights and (4) it seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotations and alterations omitted) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

Whether "an increase in a sentence" violates the Double Jeopardy Clause "turns on the extent and legitimacy of a defendant's expectation of finality in that sentence." *United States v.*

Fogel, 829 F.2d 77, 87 (D.C. Cir. 1987). A defendant does not have a legitimate expectation that his sentence will not be increased in the event of revocation. *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980) ("[T]here is no double jeopardy protection against revocation of probation[.]"); *United States v. Wyatt*, 102 F.3d 241, 245 (7th Cir. 1996) ("[T]he proper understanding of a revocation of supervised release is simply that by engaging in prohibited conduct (criminal or not) during the term of supervised release, a defendant triggers a condition that permits modification of the terms of his original sentence."); *Fogel*, 829 F.2d at 87. Casseday had no legitimate expectation that his original sentence would not be modified if he violated the terms of his supervised release, regardless of whether those violations occurred on the first day of his term of supervised release or the last, and Casseday has not argued that his modified sentence otherwise exceeds any statutory limits. Therefore, Casseday's double jeopardy argument fails to establish plain error.

Casseday next argues that the factual findings underpinning the violations of his supervised release needed to be determined by a jury applying the beyond-a-reasonable-doubt burden of proof because his violations are based on "conduct distinct from the original offense." Appellant's Br. 10. Casseday further argues that any "waiver of the right to a jury trial" made during the revocation hearing is void because he was never advised that he had a right to "a jury adjudication of the relevant factual issues." *Id.* at 11. Again, Casseday failed to assert this argument below, so we review for plain error.

Under a run-of-the-mill revocation sentencing in which a district court has revoked the defendant's supervised release, the district court has discretion to impose a new sentence of imprisonment (subject to certain limits not at issue here) based on judge-made findings "by a preponderance of the evidence that the defendant violated a condition of supervised release[.]" 18 U.S.C. § 3583(e)(3); *see Johnson v. United States*, 529 U.S. 694, 700 (2000) ("[V]iolative conduct [constituting a violation of supervised release] need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt."). Here, the District Court applied § 3583(e)(3) and imposed a new 9 month term of imprisonment, which Casseday does not challenge. Additionally, § 3583(h) authorizes a court to impose a new term of supervised release, so long as it does 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." *Id.* § 3583(h). Here, the District Court imposed a new 216-month term of supervised release for the non-criminal violations, which, even when combined with the term of supervised release already served, is less than the original offense's authorized maximum term of life. *Id.* § 3583(k).[1] The new term of supervised release therefore complies with § 3583(h).

Recently, a plurality of the Supreme Court concluded that one particular portion of § 3583(k), which sets forth certain mandatory minimum sentences upon revocation, violated a defendant's Fifth and Sixth Amendment rights by leaving factfinding to a judge applying the

[1] The maximum term of supervised release for a violation of § 2252, which is one of Casseday's original offenses, "is any term of years not less than 5, or life." *Id.* § 3583(k).

preponderance-of-the-evidence standard. *United States v. Haymond*, 139 S. Ct. 2369 (2019). Casseday argues that *Haymond* applied in his case, and that the factfinding at his revocation hearing should have been done by a jury applying the beyond-a-reasonable-doubt standard. We find no plain error here.

Haymond addressed a portion of 18 U.S.C. § 3583(k) that is not at issue in this case because Casseday did not commit any of § 3583(k)'s enumerated offenses while on supervised release. Under that provision, "if a judge finds by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses, . . . the judge *must* impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant's initial crime of conviction." 139 S. Ct. at 2374 (emphasis in original). This provision, therefore, can increase "the legally prescribed range of allowable sentences" based on the enumerated criminal violations without any findings being made by a jury under the beyond-a-reasonable-doubt standard, which the plurality concluded violates a defendant's rights under the Fifth and Sixth Amendments. *Id.* at 2378. The *Haymond* plurality explicitly limited its holding to that portion of § 3583(k), "pass[ing no] judgment one way or the other on § 3583(e)." *Id.* at 2382 n.7.

In light of our plain error standard of review, we need not decide today whether any application of § 3583(e)(3) or § 3583(h) utilizing a judge's factual findings by a preponderance-of-the-evidence standard may be unconstitutional. We simply conclude the District Court did not plainly err when it applied those provisions in fashioning Casseday's sentence using judge-made findings based on the preponderance-of-the-evidence standard. To start, this is not a § 3583(k) case, and Casseday's violations were not for criminal offenses. Our sister circuits that have examined *Haymond* have refused to extend it beyond § 3583(k). *See, e.g.*, *United States v. Horne*, No. 19-10233, 2019 WL 4724473, at *3 (11th Cir. Sept. 26, 2019) (stating that "*Haymond* did not overrule or abrogate our precedent" that "the violative conduct [for supervised-release violations] need only be found by a judge under the preponderance of the evidence standard, and not by a jury beyond a reasonable doubt"); *United States v. Aguirre*, 776 F. App'x 866, 867 (5th Cir. 2019) (*Haymond*'s holding limited to § 3583(k) and thus inapplicable to Aguirre's § 3583(e)(3) revocation); *United States v. Mooney*, 776 F. App'x 171, 171 n.* (4th Cir. 2019) ("[W]e conclude that *Haymond* had no impact on Mooney's run-of-the-mill revocation sentence imposed under 18 U.S.C. § 3583(e)(3)[.]"). There is also no dispute that the maximum term of supervised release for Casseday's original offenses is life, which means the new term of supervised release, although set to expire later than the original term of supervised release would have expired, did not go beyond the maximum term allotted for the original offense. *See* 18 U.S.C. §§ 3583(e)(3), (h). Thus, the imposed sentence does not run afoul of the principles set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding sentencing scheme enabling court to increase sentence beyond statutory maximum based on new facts found by preponderance of evidence to be unconstitutional). Lastly, this is not a case involving any mandatory minimums. *See Alleyne v. United States*, 570 U.S. 99, 116 (2013) ("[F]acts that increase mandatory minimum sentences must be submitted to the jury."). Therefore, even assuming Casseday has identified an error, the error is not plain. *See In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009) (explaining that an "an error is plain if it contradicts circuit or Supreme Court precedent" or "violates an 'absolutely clear'

legal norm") (quoting *United States v. Merlos*, 8 F.3d 48, 51 (D.C. Cir. 1993)).

Finally, Casseday argues that the District Court's sentence was unreasonably harsh. The Court reviews a procedurally sound sentence for abuse of discretion. *In re Sealed Case*, 527 F.3d 188, 190 (D.C. Cir. 2008). In addition, because Casseday's sentence fell within the Guidelines range, the Court presumes it is reasonable. *United States v. Mattea*, 895 F.3d 762, 765 (D.C. Cir. 2018). Casseday's only argument for unreasonableness is that his violations were "relatively technical and minor," but the District Court disagreed, referring to Casseday's "deceitfulness" with respect to the use of the phone as "serious" and "concern[ing]." J.A. 57. The District Court explained why the violations were so serious and concerning, providing a reasoned decision. *See* J.A. 59-60. "We cannot say that the district court acted unreasonably when concluding that the egregious character of [the defendant's] offense necessitated a more severe sentence." *See Mattea*, 895 F.3d at 769 (internal quotation marks and alterations omitted). The District Court also expressly took into account Casseday's advancing age. "[W]e 'defer to the district court's judgment when,' as here, 'it has presented a reasoned and reasonable decision that the [statutory sentencing] factors, on the whole, justified the sentence.'" *Id.* (quoting *United States v. Ventura*, 650 F.3d 746, 751 (D.C. Cir. 2011)). The District Court thus did not abuse its discretion by imposing a new 216-month term of supervised release. We affirm the judgment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution 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/
Daniel J. Reidy
Deputy Clerk