No. 21-1264

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES K. GOODPASTURE,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois
The Honorable Staci M. Yandle, Presiding
Case No. 3:07-30185-SMY-1

Reply Brief of Defendant-Appellant

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ARGUMENT

The District Court erred in imposing five special conditions of supervised release, which were not reasonably related or narrowly tailored to Appellant's history and characteristics and the goals of sentencing, given the severity of the restrictions

a. Remote alcohol testing and participation in treatment for alcohol dependence. Defense Counsel argued in his opening brief Appellant's condition regarding alcohol use, treatment, and testing was not sufficiently supported by his history and characteristics. *See United States v. Goodwin,* 717 F.3d 511, 521-522 (7th Cir. 2013) (A supervised release condition "must be reasonably related to (1) the defendant's offense, history and characteristics."). Appellant is nearly 59 years old, and was 31 and 35 years old at the time of his driving under the influence convictions. He was in the community for thirteen years after the most recent of these convictions, with no indication of problematic alcohol use. (Doc. 64 ¶ 31, 33). He did consume alcohol once in violation of his release condition, but only to a limited degree, resulting in a 0.038 blood alcohol level. Appellant also was convicted of possession of a controlled substance, but over three decades ago, and his mother stated his marijuana use was not regular. (Doc. 64 ¶ 31, 66-68). Appellant argued these slim facts cannot support a reasonable or realistic inference that a condition requiring alcohol abstinence, monitoring, and treatment involves no greater deprivation of liberty than necessary, and is reasonably necessary to achieve the goals of deterrence, incapacitation, and rehabilitation. (Appellant's Brief p. 17-18).

Government Counsel's response brief emphasizes the fact that the District Court stated she reviewed Appellant's history, and also emphasizes Appellant's initial denial and inappropriate demeanor when confronted with the fact he consumed alcohol in violation of his release condition—a factor not included in the District Court's justification of the condition. (Gov. Brief p. 32-34). Even if the District Court had relied on this fact, Appellant's prior failure to take his alcohol restrictions seriously is not probative of a need for alcohol abstinence, testing and treatment. *See*

United States v. Rahseparian, 231 F.3d 1257, 1262 (10th Cir. 2000) ("[A]n inference is only reasonable where there exists a probability that the conclusion flows from the proven facts," and is unreasonable where it relies on "a degree of speculation and conjecture that renders its findings a guess or mere possibility.").

Defense Counsel suggests Appellant's initial failure to admit to his violation and inappropriate demeanor when confronted with it could be viewed as relevant to just punishment. However, there is no authority to impose supervised release conditions unrelated to a defendant's history and characteristics as punishment. *See United States v. Thompson,* 777 F.3d 368, 376 (7th Cir. 2015) ("We have warned against imposing a restrictive condition that is not reasonably related to the defendant's 'offense, history and characteristics * * * [involving] no greater deprivation of liberty than necessary to achieve the penological goals stated in 18 U.S.C. § 3553(a) . . .'") (citation omitted). The weak facts pointed to by Government Counsel simply do not support that this highly restrictive condition is necessary to serve the goals of sentencing.

b. Location Monitoring. Defense Counsel objected to the District Court's condition requiring location monitoring for 24 months based on Appellant's prior location monitoring violations and prior designation as a sexually dangerous person, a designation that has been dismissed by that court. In his brief, Defense Counsel pointed out the location monitoring condition was particularly restrictive, requiring an especially compelling justification. *United States v. Kappes,* 782 F.3d 828, 845-46 (7th Cir. 2015) ("[T]he more onerous the term [of supervised release], the greater the justification required—and ... a term can become onerous because of its duration as well as its content.") (citation omitted). Defense Counsel also noted two of Appellant's prior violations of this condition occurred at the beginning of Appellant's release term, when he first got a job and had to report for work orientation one day, and work the next. Two others related to transportation

problems to and from work, and the third related to helping his boss's son move, on which occasion he did not receive approval ahead of time, but did have his boss leave a message with the probation office regarding the situation. (Appellant's Brief p. 18-19).

Government Counsel responds that these prior violations justify the need for reimposition of the location monitoring condition. (Gov. Brief p. 34-36). However, as noted in Appellant's brief, although Appellant's violations show he failed to abide by the strict rules of location monitoring, they do not show his failure was for any criminal or mischievous purpose, such that would justify reimposing the term in order to protect the public or prevent criminal activity. In addition, Appellant's prior violations of this specific condition do not justify reimposing it in order to teach him the general lesson that he must abide by his release conditions. Rather, as noted above, supervised releases conditions must be reasonably related to a defendant's history and reasonably designed to serve the goals of sentencing.

The fact that Appellant agreed to the condition previously, as emphasized by Government Counsel, also does not support the conclusion that Appellant's history and characteristics support that the condition is reasonably necessary to serve the goals of sentencing; because Appellant agreed to the condition, whether the facts warranted it was not litigated. Nor does Appellant previous designated as a sexually dangerous person, where that designation which was dismissed after consideration of three expert opinions and a thorough review of his current status. Although the District Court found significant that two of three experts in that case believed the designation still applied, she provided no analysis of the substance of those experts' opinions, nor the reasoning of the judge for rejecting the opinions of those two experts: "Dr. Ross's and Dr. North's diagnoses do not make sense in light of the relevant diagnostic and legal criteria." *United States v. Goodpasture,* 5:15-hc-02188-BO at 5 (EDNC Mar. 1, 2020). Defense Counsel contends the bare fact that two experts

found Appellant to be dangerous, and only one did not, is not reliable evidence that he is dangerous, such that might justify location monitoring.

c. Third party notification. Defense Counsel objected to the District Court's condition requiring him to "notify third parties of risks that may be occasioned by the defendant's criminal record or history of criminal conduct, whether or not resulting in criminal charges, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement." (Rev. Tr. p. 84). Appellant's sex offenses and failure to register offense are over twenty years old, and his sexually dangerous person designation was dismissed after extensive litigation. In addition, Appellant is already prohibited from having contact with boys under the age of eighteen, the demographic involved in his prior offenses. (Appellant's Brief p. 21-22).

Government Counsel responds that the District Court reviewed Appellant's history in the PSR, and that all three of his sex offense convictions were committed while he was on some type of supervision, but does not address the remoteness of those convictions. She also emphasizes Appellant had initially agreed to the notification condition, before he was revoked, although without providing any authority to support that this prior agreement amounts to a waiver of his right to contest the condition before it is reimposed with a new term of supervised release. In addition, Government Counsel does not respond to Appellant's contention the condition is unnecessary because Appellant is already restricted from having contact with boys under the age of eighteen. (*See* Gov. Brief p. 36-37).

d. Warrantless search of places and things in Appellant's control. As noted in Appellant's brief, the District Court justified this search condition by with Appellant's history of possessing controlled substances—for which he was convicted at age twenty-one, more than three decades ago-- as well as his consumption of a very small amount of alcohol recently while on supervised release.

(Rev. Tr. p. 85). Appellant argued the justification was inadequate. Government Counsel counters again by emphasizing Appellant agreed to the condition prior to his initial release on supervised release (Gov. Brief p. 38-39), despite that this agreement is not probative of whether the condition is sufficiently related to Appellant's history and characteristics, narrowly tailored, and necessary to serve the goals of sentencing.

Government Counsel then implies that the condition was recommended by U.S.S.G. § 5D1.3(d)(7), based on Appellant's old sex offense convictions. (Gov. Brief p. 39). This is not correct. Paragraph (d)(7) plainly applies when "the instant offense of conviction is a sex offense," and "instant offense" is defined as the offense of conviction. U.S.S.G. § 1B1.1 n. 1(I) ("The term 'instant' is used in connection with 'offense,' * * * to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court . . .").

Lastly, Government Counsel tries to justify the condition based on facts not asserted by the District Court as part of her justification. She points to one of Appellant's violations for failing to follow the rules of the halfway house; the rules required him to leave the boxcutters, which he used at his job and carried back and forth, at the front desk, rather than placing them in his locker. Government Counsel also pointed to the fact that the gun with which he was charged in his underlying felon in possession offense was found in a drawer. Government Counsel cites no authority for the proposition that she may supplement, on appeal, the District Court's justification for imposing conditions of release, and this Court's precedent does not support such practice. *See Thompson*, 777 F.3d at 373 ("And being part of the sentence, the imposition of conditions of supervised release is subject to the further requirements that 'the court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence . . .."); *United States*

v. Robinson, 942 F.3d 767, 772 (7th Cir. 2019) ("We review the district court's explanation of the sentence; we do not entertain post hoc rationales for the court's action.")..

e. Computer monitoring and social media restrictions. The District Court imposed this condition, over Appellant's objection, despite that Appellant's prior offenses did not involve use of the internet. The District Court noted the offenses occurred when "access to the internet and internet-based sexual offenses were not prominent as they are today" (Rev. Tr. p. 62), and found the restrictions warranted based on Appellant's prior sex offenses, his previous designation as a sexually dangerous person, his lack of sex offender treatment, and his most recent sex offender evaluation and subsequent recommendations. (Rev. Tr. p. 87-91).

Defense Counsel argued in his brief these restrictions are overbroad and not reasonably related to Appellant's personal history and characteristics, such that they may be expected to promote the goals of sentencing. Defense Counsel contends only speculation supports the notion Appellant may not safely use unmonitored computer and internet devices and social media accounts, despite no history of inappropriate conduct connected with the use of these devices and accounts. Defense Counsel also cited Appellant's low risk of reoffending, based on his age, the findings of the court dismissing his sexually dangerous person designation, and Appellant's other supervise release condition restricting contact with individuals under age eighteen. Defense Counsel also cited the overlap with state sex offender requirements, and the fact that the restrictions will prevent Appellant from lawful activity by limiting his employment options, privacy, and ability to take advantage of modern technology. (Appellant's Brief p. 24-26).

In Government Counsel's response brief, she emphasizes the District Court stated she relied, in part, on Appellant's "most recent sex offender evaluation and subsequent recommendations." (Gov. Brief p. 39). The substance of this particular evaluation and

recommendation relied on by the District Court is unclear from the record, other than the District Court's reference, at another point in the hearing, "his most recent sex offender evaluation which recommends treatment . . .." (Rev. Tr. p. 90). Government Counsel's brief fails to reference any additional information from Appellant's "most recent sex offender evaluation" in support of her argument, and fails to explain how Appellant's need for treatment justifies such broad restrictions on Appellant's use of technology and social media, given his other restrictions. Government Counsel also again emphasizes that fact that Appellant previously agreed to this condition, without explaining how that fact demonstrates the condition is sufficiently related and narrowly tailored to Appellant's history and characteristics. (Gov. Brief p. 42).

Government Counsel also complains that Defense Counsel referenced details of Appellant's underlying sex offense case, despite that these details are public record. (Gov. Brief p. 42-43). The U.S. Probation Office and the District Court relied heavily on that proceeding in proposing and imposing conditions of release. Appellant's initial agreement to the modification of his conditions of release, referenced by Government Counsel numerous times in her appeal briefing, was filed in the instant case, along with the Probation Office's Request for Modification of those conditions. This document includes the following details about Appellant's civil case, including that court's findings and the opinions of the experts:

> On May 9, 2016, the offender was committed to the custody of the Attorney General as a sexually dangerous person pursuant to 18 U.S.C. § 4248. At the time, the Court determined he met the criteria for civil commitment in that he was engaged in or attempted to engage in sexually violent conduct or child molestation; he suffered from a serious mental illness, abnormality, or disorder; and as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.
>
> The Court found the offender engaged in sexually violent conduct in the past, he suffered from pedophilic disorder (non-exclusive type) and antisocial personality disorder, and he committed three prior acts of sexual conduct while on some form of supervision. The Court considered the interaction of the offender's two mental health conditions and found that it made re-offense more likely. The

> Court also considered a report from Dr. Dale Arnold which noted the offender's antisocial personality disorder "aggravates his risk of acting upon Pedophilic urges in that it impairs his ability to learn from experience or care about the consequences of his sexually abusive behavior upon others."
>
> The offender is currently in the custody of the Bureau of Prisons for an indeterminate period of time. The offender's attorney indicates they plan to seek release from the Bureau of Prisons pursuant to 18 U.S.C. § 4248(d).

Doc. 71, Request for Modifying the Conditions or Term of Supervision with Consent of the Offender (October 15, 2018).

U.S. Probation's second request for modification of Appellant's terms of supervised release, requesting that he reside in a residential reentry center, summarizes the same details from the civil commitment case. Doc. 73 (August 21, 2020). U.S. Probation's "Summary of Violation Conduct," contains these details, as well, along with the fact that the judge in the civil case granted Appellant's motion to dismiss the civil commitment. Doc. 91-2 (January 19, 2021).. U.S. Probation's proposed terms of supervised release references Appellant's prior designation as a sexually dangerous person numerous times in justifying certain terms. Doc. 99 (January 27, 2021). The District Court also referenced the prior designation multiple times, and discussed generally the findings of the three experts in the civil case. (Rev. Tr. p. 41-42, 60-62, 80, 87, 90).

In these circumstances, where a summary of the expert evidence and history of the civil case were already generally part of the record in the instant case and relied upon by the District Court, Defense Counsel knows of no impropriety in further fleshing out that information with publicly available details from that court's official record.

Government Counsel also asks that any remand in this case, based on the conditions of release, be for a full resentencing to allow the District Court to reconsider the length of Appellant's term of imprisonment. (Gov. Brief p. 44-45). Defense Counsel does not dispute this Court's precedent approves of this practice when the interplay between supervised release conditions and

the length of the time of imprisonment may be disrupted by changing the terms of supervised release. *Kappes,* 782 F.3d at 845. However, in Appellant's case, even if this Court agreed with Defense Counsel's challenge to all five of his conditions of release, Appellant would still be subject to severe restraints on his freedom, because of his remaining release conditions, leaving little room for the possibility his prison sentence would need to be adjusted to satisfy the goals of sentencing. In addition to the mandatory and administrative conditions the District Court imposed, Appellant must reside in a halfway house for 180 days, must work regularly, must participate in sex offender treatment, including submission to polygraph exams, and must refrain from any contact with persons under the age of 18 of the same gender as the victims of his prior offenses—conditions all designed to protect the public, prevent recidivism, and promote rehabilitation. (Rev. Tr. p. 74-92). Therefore, Defense Counsel suggests a full resentencing is unnecessary should this Court agree with any of his arguments.

CONCLUSION

The District Court erred in imposing the above release conditions, which were not reasonably related to Appellant's history and characteristics, and do not reasonably serve the goals of sentencing. The internet/computer condition also unnecessarily prohibits lawful conduct. Defense Counsel asks this Court to vacate the District Court's sentence, and remand for reimposition of conditions of supervised release, without the above conditions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants who are registered CM/ECF users will be served by the CM/ECF system.

s/ Todd M. Schultz
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