

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

BOBBY RAY EVANS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX A

**TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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736 Fed.Appx. 64 (Mem)

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Bobby EVANS, Defendant-Appellant.

No. 18-4184

|

Submitted: August 27, 2018

|

Decided: August 30, 2018

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., District Judge. (2:14-cr-00153-1)

Attorneys and Law Firms

Christian M. Capece, Federal Public Defender, David R. Bungard, Assistant Federal Public Defender, Jonathan D. Byrne, Research and Writing Specialist, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Michael B. Stuart, United States Attorney, Monica D. Coleman, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Before DUNCAN, THACKER, and HARRIS, Circuit Judges.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Bobby Evans appeals the district court's order revoking his supervised release and sentencing him to an 8-month term of imprisonment to be followed by a 22-month term of supervised release. Evans argues that, in lieu of prison, the district court should have ordered him to

participate in an inpatient drug treatment program. For the reasons that follow, we reject Evans' argument and affirm the district court's judgment order.

In 2014, Evans was convicted of distribution of heroin and sentenced to 27 months' imprisonment, to be followed by 3 years' supervised release. After his release on supervision in May 2016, Evans violated the terms of supervised release by using and possessing controlled substances. Rather than revoke supervised release, the district court entered an order on March 23, 2017, modifying the terms of supervision by ordering Evans to attend drug abuse counseling and treatment as directed by the probation officer. Evans once again violated the conditions of supervised release by using and possessing controlled substances, failing to attend individual and group substance abuse counseling and treatment, and failing to appear for urine tests, as instructed. This time, the district court revoked supervised release and sentenced Evans to 6 months' imprisonment, to be followed by a 30-month term of supervised release. In addition to the standard conditions of supervised release, the court imposed the special condition that *65 Evans participate in, and successfully complete, a 9-to 12-month residential drug abuse treatment program at Recovery Point.

When Evans completed his revocation sentence, he was released on supervision and immediately entered the Recovery Point residential drug treatment program. However, six days later, Evans chose to leave the program, in violation of the special condition of supervised release. For the third time, the probation officer filed a petition for revocation of supervised release. At the revocation hearing, Evans admitted the violation and, based on Evans' admission, the court found by a preponderance of the evidence that he had violated the terms of his supervised release. This time, the district court revoked supervised release and sentenced Evans to 8 months' imprisonment to be followed by 22 months of supervised release. Evans appeals this order.

We review for abuse of discretion a district court's decision to revoke supervised release. United States v. Padgett, 788 F.3d 370, 373 (4th Cir. 2015). Citing 18 U.S.C. § 3583(d) (2012), Evans argues that the district court abused its discretion by returning him to prison rather than allowing him to participate in another inpatient substance abuse treatment program.

Evans' argument fails, though, in light of the statutory provisions at issue here. Specifically, under 18 U.S.C. § 3583(g) (2012), revocation of supervised release is mandatory when the district court finds that a defendant has: (1) possessed a controlled substance in violation of the conditions of supervised release; (2) possessed a firearm in violation of federal law or the conditions of supervised release; (3) refused to comply with a condition of supervised release mandating drug testing; or (4) tested positive for controlled substances more than three times in a year. "[W]hen considering any action against a defendant who fails a drug test," the court must "consider whether the availability of appropriate substance abuse treatment programs,

or an individual's current or past participation in such programs, warrants an exception" from the mandatory prison term prescribed by § 3583(g). 18 U.S.C. § 3583(d) (2012).

The violation that resulted in the revocation of Evans' supervised release was not the use of illicit substances or any other violation triggering mandatory revocation of supervised release under § 3583(g) but, rather, Evans' failure to comply with the special condition of supervised release requiring him to participate in, and successfully complete, the 9- to 12-month substance abuse program at Recovery Point. Thus, as the Government rightly contends, the exception in § 3583(d) did not apply.

Evans admitted to violating the special requirement that he complete the 9- to 12-month drug abuse treatment program at Recovery Point. The district court observed that, the first time Evans was charged with violating the conditions of supervised relief, the court permitted him to remain on supervision with the modification that Evans was required to undergo drug abuse counseling and treatment as directed by the probation officer. Instead of complying with this modified condition, Evans proceeded to use illicit substances. This time, the court revoked Evans' supervised release. In lieu of a sentence within the 12- to 18-month Policy Statement range, the court imposed a 6-month prison term and the special condition of supervised release requiring his successful completion of the Recovery Point substance abuse program. Nevertheless, only days after his release on supervision, Evans violated this special condition by leaving the Recovery Point program. The court held that Evans' history of violating the conditions *66 of supervised release, and his latest and most egregious breach of the court's trust when he violated the special condition of supervised release, made revocation of supervised release and incarceration the appropriate course of action. We conclude that the court acted well within its discretion in revoking Evans' supervised release term on this basis. *See U.S. Sentencing Guidelines Manual* ch. 7, pt. A(3)(b), p.s. (2014) (in fashioning an appropriate supervised release sentence, "the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator").

Accordingly, we affirm the district court's sentencing decision. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

All Citations

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BRIAN J. KORNBRATH

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1 The Court would ask the parties whether or not you wish
2 findings on any other matter?

3 MS. COLEMAN: No, Your Honor.

4 MR. BUNGARD: No, Your Honor.

5 THE COURT: The Court makes those findings of the
6 Court by a preponderance of the evidence. And I'll ask
7 whether or not the parties wish to be heard on the question
8 of revocation?

9 MS. COLEMAN: Briefly, Your Honor. Given that
10 this is Mr. Evans' second violation in as many as six
11 months, the United States believes that revocation is
12 appropriate in this matter.

13 THE COURT: Thank you.

14 MR. BUNGARD: Your Honor, I've got a proposal for
15 Mr. Evans that would involve the Court not revoking today,
16 and would just note that the petition charges a Grade C
17 violation, and the proposal would be a modification of the
18 terms of supervised release that would essentially provide a
19 similar drug abuse treatment program to what was envisioned
20 when he went to Recovery Point, but at a different facility.

21 And that proposal would be that Mr. Evans would stay in
22 custody until a bed space opens up at the Presteria Riverside
23 Program in St. Albans. That is an inpatient drug treatment
24 facility for men.

25 We've contacted them. He is on their waitlist. Right

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1 now, he is Number 7. So he couldn't be released today even
2 if he wanted to be released today, because they're not ready
3 for him. But he's Number 7 on the waitlist. And today they
4 advised me, too, they want him to call in and do a
5 self-assessment over the phone with a counselor there. I
6 think that's for purposes of seeing whether he moves up the
7 waitlist or if he stays at that spot.

8 But he would initially be at Pretera Riverside and
9 they would evaluate him inpatient for 28 days.

10 At the end of that time period, he's reevaluated for
11 placement in their 90-day to 180-day, again, inpatient
12 program at the same facility.

13 And given the history that I read with Mr. Evans'
14 previous revocation that I wasn't involved with, but I did
15 see, he had numerous positive urine screens over a
16 several-month period in 2017, I feel pretty strongly that
17 he's -- they are going to recommend that he stay in there
18 for at least 90- to- 180 days.

19 And then following that, Mr. Evans would agree to apply
20 to stay at a sober living facility here in the Charleston
21 area, and possibly -- and would stay there, and ask the
22 Court also for a consideration at some point to be released
23 on home confinement so that he could go home and help his
24 mother run their convenience store that they have here on
25 the West side -- I'm sorry -- on the east end.

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1 That was the letter I sent to the Court on Friday from
2 her, from his mother, Mrs. Evans. And all of that, the
3 total time period that this would envision would run would
4 be the 9 to 12 months that was originally envisioned by the
5 Court when the Court directed him to go to Recovery Point.

6 THE COURT: Thank you.

7 Ms. Coleman.

8 MS. COLEMAN: Your Honor, it is the defendant who
9 requested to go to Recovery Point the last time. He made it
10 there six days before he violated the terms and conditions
11 of his supervised release. His prior violations in the
12 petition that defense counsel spoke of also included
13 failures to comply with his counseling and group therapy
14 sessions, both individual and group, at Presteria.

15 He clearly has failed to take advantage of any of the
16 counseling or rehabilitation offered to this point, and has
17 continued to violate the terms of his supervised release,
18 and this time, as I said, only making it six days.

19 Therefore, the United States believes revocation is
20 appropriate.

21 THE COURT: Thank you.

22 Mr. Bungard, anything further?

23 MR. BUNGARD: Yes. Your Honor, with respect to
24 the six days and the reason why Mr. Evans left. He left
25 because he feels that he was falsely accused of violating

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1 their rules and regulations at Recovery Point. And the gist
2 of what happened is that one of the people up there with him
3 reported that they saw him consuming alcohol, which was
4 something that he disputed. And Recovery Point basically
5 wanted him to admit that he had done that and they would
6 restart him on the program.

7 This wasn't a situation where he had tested dirty for
8 drugs or anything of that nature. But he left the program
9 as opposed to admit to something that he didn't do that was
10 reported on him by somebody else.

11 I would note that, and I think it's important to note,
12 that Mr. Evans has -- prior to the filing of the petition,
13 he did make contact with Mr. Fidler, and when he came in, he
14 gave a clean urine screen. So there wasn't any drugs in his
15 system when he was arrested on this charge.

16 So, again, this is a situation where his violations in
17 the past and today arise from a drug addiction issue, not
18 from being arrested on any new criminal conduct.

19 And I'd ask the Court to take into consideration that
20 for giving him a second opportunity at trying to get drug
21 treatment through Presteria.

22 THE COURT: Thank you.

23 Anything further on that, Ms. Coleman?

24 MS. COLEMAN: No, Your Honor.

25 THE COURT: The Court observes, as the

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1 government's pointed out, the defendant was here a year ago,
2 and at that time was permitted to remain on supervised
3 release with the direction that he participate in drug abuse
4 counseling and treatment as specified in that order.

5 Instead of that, he used, on numerous occasions,
6 methamphetamine and cocaine, and other illicit substances,
7 that then resulted in revocation of his supervised release
8 just here less than three months ago, in December.

9 At that time, the defendant was sentenced to a term of
10 six months and placed on supervised release, with a
11 condition of Recovery Point for 9 to 12 months. That was in
12 lieu of a guideline sentence that would otherwise have been
13 12 to 18 months.

14 The defendant immediately failed to comply and, as a
15 consequence, is here once more.

16 Under those circumstances, it appears to the Court that
17 breach of trust on this occasion, when viewed in the light
18 of that history that the Court has noted just in the last
19 year, satisfies the Court that it is appropriate to revoke
20 supervised release, and the Court accordingly does so.

21 Let me ask whether or not the parties are in agreement
22 that under the advisory United States Sentencing Guidelines,
23 the suggested guideline range is based on a Grade C
24 violation, with a Criminal History Category of IV, and that
25 that yields a suggested guideline range of six to 12 months'

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION NO. 2:14-00153

BOBBY RAY EVANS

SUPERVISED RELEASE REVOCATION AND JUDGMENT ORDER
MEMORANDUM OPINION AND ORDER

On March 12, 2018, the United States of America appeared by Monica D. Coleman, Assistant United States Attorney, and the defendant, Bobby Ray Evans, appeared in person and by his counsel, David R. Bungard, Assistant Federal Public Defender, for a hearing on the petition on supervised release submitted by United States Probation Officer Patrick M. Fidler. The defendant commenced a 30-month term of supervised release in this action on January 24, 2018, as more fully set forth in the Supervised Release Revocation and Judgment Order entered by the court on December 20, 2017.

The court heard the admissions of the defendant and the representations and argument of counsel.

For reasons noted on the record of this proceeding, which are ORDERED incorporated herein by reference, the court found that the defendant has violated the conditions of supervised release in the following respect: the defendant failed to abide by the special condition that he participate in and successfully complete the 9 to 12 month residential drug abuse treatment program at Recovery Point inasmuch as he entered the program on January 24, 2018, and left the program on January 30, 2018; as admitted by the defendant on the record of the hearing and as set forth in the petition on supervised release.

And the court finding, as more fully set forth on the record of the hearing, that the violation warrants revocation of supervised release and, further, that it would unduly depreciate the seriousness of the violation if supervised release were not revoked, it is ORDERED that the supervised release previously imposed upon the defendant in this action be, and it hereby is, revoked.

And the court having complied with the requirements of Rule 32(a)(1)(B) and (C) of the Federal Rules of Criminal Procedure, and finding, after considering the factors set forth in 18 U.S.C. § 3583(e), that the defendant should be confined to the extent set forth below, it is accordingly ORDERED that the

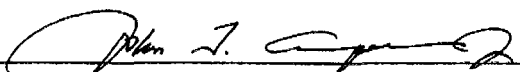
defendant be, and he hereby is, committed to the custody of the United States Bureau of Prisons for imprisonment for a period of EIGHT (8) MONTHS, to be followed by a term of twenty-two (22) months of supervised release upon the standard conditions of supervised release now in effect in this district as promulgated by the Administrative Office of the United States Courts (National Form AO 245B) and the standard conditions as set forth in Local Rule 32.3.

The defendant was remanded to the custody of the United States Marshal.

Recommendation: The court recommends that the defendant be designated to an institution as close to Charleston, West Virginia, as feasible.

The Clerk is directed to forward copies of this written opinion and order to the defendant, all counsel of record, the United States Probation Department, and the United States Marshal.

DATED: March 13, 2018


John T. Copenhaver, Jr.
United States District Judge