

United States Court of Appeals
For the Eighth Circuit

No. 20-2750

United States of America

Plaintiff - Appellee

v.

Ulises Alvarado

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Western

Submitted: March 15, 2021

Filed: May 25, 2021

[Unpublished]

Before SHEPHERD, ERICKSON, and KOBES, Circuit Judges.

PER CURIAM.

After his refusal to take a COVID-19 test, the district court¹ revoked Ulises Alvarado's supervised release and sentenced him to four months in prison. Alvarado

¹The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

argues the district court abused its discretion in revoking his supervised release and argues that his counsel was ineffective. We affirm.

I.

Alvarado was subject to five years of supervised release after completing his sentence for failing to register as a sex offender. One of the terms of his supervised release required him to spend the first 120 days at a Residential Reentry Center. To enter the center, Alvarado needed to provide a negative COVID-19 test, administered by a nasal swab. Alvarado refused, claiming it was “very painful and invasive.” Alvarado Br. 4. While he offered to take an “alternative test” like a throat swab or to quarantine for 14 days, Alvarado refused to take the nasal swab and told his probation officer that he would continue to refuse all COVID-19 testing in the future.

The U.S. Probation Office filed a petition to revoke Alvarado’s supervised release. The magistrate judge² held a preliminary hearing and found probable cause that Alvarado refused to comply with the reentry center’s rules. The district court then held a final revocation hearing and found that Alvarado had violated a term of his supervised release by refusing the COVID-19 test as required by the reentry center. The district court noted that mandatory COVID-19 testing “is a rational and reasonable rule” when imposed “in the middle of a worldwide pandemic,” and Alvarado’s present and future unwillingness to comply with the rule surpassed a simple technical violation of his supervised release. The district court sentenced Alvarado to four months in prison followed by four years of supervised release.

On appeal, Alvarado argues that the district court abused its discretion by revoking his supervised release. He also argues that his attorney’s failure to ask

²The Honorable Kelly K.E. Mahoney, Chief Magistrate Judge, United States District Court for the Northern District of Iowa.

about whether an alternative COVID-19 test would satisfy the reentry center's requirement was ineffective assistance of counsel.

II.

We review a district court's decision to revoke for abuse of discretion, reviewing "any findings of fact as to whether or not a violation occurred for clear error." United States v. Petersen, 848 F.3d 1153, 1156 (8th Cir. 2017). "A district court may 'revoke supervised release if the government proves by a preponderance of the evidence that the defendant violated a condition of supervised release.'" Id. A "decision to revoke probation should not merely be a reflexive reaction to an accumulation of technical violations" United States v. Melton, 666 F.3d 513, 516 (8th Cir. 2012) (quoting United States v. Reed, 573 F.2d 1020, 1024 (8th Cir. 1978)). But "actions indicating . . . a persistent and 'pervasive unwillingness' to comply with . . . the orders of a reentry center are not technical violations and may warrant the revocation of a supervised release." Melton, 666 F.3d at 516.

We conclude the district court did not abuse its discretion in revoking Alvarado's supervised release. The terms of his release required him to abide by all the reentry center's rules and regulations. On admission into the reentry center, Alvarado was required to take a COVID-19 test. He was and remains unwilling to do so. Persistent and pervasive unwillingness to submit to a required test is not a technical violation, see id., so the district court did not abuse its discretion.

III.

Alvarado next argues that his counsel was ineffective because his attorney failed to ask after the preliminary hearing about whether the reentry center would allow him to quarantine for 14 days or take a different COVID-19 test in place of the nasal swab. Alvarado argues that if the lawyer asked those questions, the information could have been presented to the district court.

Generally, we do not consider a claim for ineffective assistance of counsel on direct appeal, unless “the record has been fully developed, where not to act would amount to a plain miscarriage of justice, or where counsel’s error is readily apparent.” United States v. Oliver, 950 F.3d 556, 566 (8th Cir. 2020). To succeed, Alvarado must show “that counsel’s performance ‘fell below an objective standard of reasonableness,’ and that the deficient performance prejudiced his defense.” United States v. Davis, 406 F.3d 505, 508 (8th Cir. 2005) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

He shows neither here. Alvarado argues the attorney should have investigated whether alternative COVID-19 tests were available, and his failure to do so constituted a deficient performance that prejudiced his defense. We see no error in his counsel’s performance. U.S. Probation Officer Jennifer Elliott testified that the reentry center required a negative COVID-19 test. Alvarado refused to provide it, and he maintained he would continue refusing to be tested. Because the nasal swab was the test being administered at the time, Alvarado cannot show that the attorney’s failure to inquire about other methods of testing “fell below an objective standard of reasonableness” or that it would have made a difference in the outcome of his case. Id. Because the record needs no further development here, we reject his ineffective assistance of counsel claim on its merits.

IV.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ULISES ALVARADO,

Defendant.

No. CR19-4059-LTS

TRANSCRIPT OF
PRELIMINARY
EXAMINATION

The Preliminary Examination held before the Honorable Kelly K.E. Mahoney, Chief Magistrate Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, July 31, 2020, commencing at 10:01 a.m.

APPEARANCES

For the Plaintiff: KEVIN C. FLETCHER, ESQ.
Assistant United States Attorney
Ho-Chunk Centre - Suite 670
600 Fourth Street
Sioux City, IA 51101

For the Defendant: NATHAN LAB, ESQ.
Lab Law Firm
Suite 12
7701 Pacific Street
Omaha, NE 68114

Also present: Jennifer Elliott, U.S. Probation

Transcribed from Shelly Semmler, RMR, CRR
digital recording by: 320 Sixth Street
Sioux City, IA 51101
(712) 233-3846

APP 5

1 the specifics of what was said and done on July 16 what
2 the rule is and what he was supposed to do and whether or
3 not he did not follow that rule, please.

4 A. Sure. One of -- just due to the ongoing COVID
5 pandemic, Dismas had a requirement that all individuals
6 that reside within their facility undergo a COVID test
7 specifically just to ensure the safety of all the other
8 residents. They need to monitor the health and safety.
9 And so new individuals coming into the facility in order
10 for them to control the spread of the disease, she had
11 required that each individual complete a COVID test.
12 Without the COVID test, all admission to the reentry
13 center is denied.

14 The defendant refused to complete the COVID test,
15 and thus Dismas would not be able to allow him to reside
16 there. So based upon my conversations with the executive
17 director of Dismas, she has denied his entry to the
18 facility until he can provide verification that he
19 completed that test.

20 Q. Did you also check with the United States marshals
21 as to whether or not the defendant had refused to take
22 COVID-19 tests while he was in their custody?

23 A. I did. I had a conversation with the supervisor of
24 our local marshal's team, and he had indicated that the
25 defendant had refused all COVID testing while in United

1 communicate that he would not be able to go to Dismas
2 until that was done and that was -- he needed to be there
3 based upon the judge's orders, that's when he -- I almost
4 describe the behavior as nuclear. So he began to say
5 things like -- and I quote -- fuck you, fuck the court,
6 fuck the judge, end quote, over and over and over,
7 incredibly loud, disrespectful. I couldn't get a word in
8 edgewise. I mean, he just went on and on and on until he
9 was interrupted by Dakota County Jail staff.

10 Q. In regards to the testing that was going to be
11 done -- needed to be done on the defendant, was it the
12 swab where they place that inside the nose and get a
13 sample that way?

14 A. There's no requirement that it has to be the nasal
15 swab. I'm -- I myself have not had a COVID test, so from
16 what I've learned through various media outlets, there's
17 the nasal swab, and there's a different test, maybe at
18 the back of the throat. They do not require a certain
19 type of COVID test. All the Dismas director needed was
20 just some type of documentation that indicated the test
21 was completed and the result was negative.

22 Q. You're not aware of Dismas requiring a blood sample
23 being drawn.

24 A. No, I'm not -- I have no knowledge of that.

25 Q. Approximately how long do you think you spoke on the

1 BY MR. LAB:

2 Q. Officer Elliott, in your interactions with the
3 defendant, Mr. Alvarado, did he ever indicate an
4 unwillingness to comply with any of the RRC's, being
5 Dismas's, policies outside of the COVID-19 testing?

6 A. We never had a conversation to discuss any other of
7 the reentry center rules other than this initial rule of
8 just gaining entry into the facility.

9 Q. So he never indicated that he was unwilling to enter
10 into the RRC and comply with their rules. His only
11 refusal was for the nasal swab in regards to the
12 COVID-19. Is that fair?

13 A. That's fair.

14 Q. And you mentioned -- I'll admit I'm heading into new
15 territory with this. You mentioned there may be an
16 alternative test to COVID-19 that is a nonnasal swab or
17 perhaps less invasive. Is that correct?

18 A. Well, I believe there is a less-invasive one. I
19 don't know the reliability of those tests. I leave that
20 up to the medical experts. But from what I understand
21 just looking -- watching the news along with everybody
22 else is there potentially may be a throat swab or
23 something similar to like a strep test. But I'm not a
24 medical expert, and I don't have personal hand experience
25 with any type of COVID testing. So it's only what I've,

1 Q. I guess fair to say it's at least -- the policy was
2 put in place some time after Mr. Alvarado was sentenced
3 by the district court; is that fair?

4 A. That's fair.

5 Q. And then as far as the test, if someone was to take
6 the COVID-19 test in any form and it were to come back
7 positive, what would then be the, I guess, agenda for
8 that individual as far as either entrance into the RRC or
9 what would happen to them?

10 A. That's a real good question. I don't -- I wouldn't
11 know what to do I guess. I would have to get some
12 further guidance if we're specifically referencing this
13 defendant. Most individuals arriving at Dismas are
14 coming from the Bureau of Prisons, and so from what I've
15 learned that if they've received a positive COVID test,
16 they're actually held with the Bureau of Prisons in
17 quarantine for the 14 days, and then they are moved into
18 Dismas from the facility.

19 And from -- in speaking in conversations with Dismas
20 staff and other officers within my department is that
21 each defendant leaving the Bureau of Prisons is tested
22 for COVID. Because this defendant was not in the custody
23 of Bureau of Prisons, the marshal's service was the
24 agency that was offering to test the defendant.

25 Q. And going back to then the hypothetical positive

1 test, it sounds like if any individual were to test
2 positive expecting to go into Dismas, they would then be
3 required to quarantine for 14 days, and then after that
4 time period, they would be allowed into Dismas Charities.
5 Is that -- is that fair?

6 A. Yes, I believe that's the protocol that would take
7 place, yes.

8 Q. They wouldn't be required to continually retest
9 until there was a negative test. It would just be a
10 requirement that they quarantine for a long-enough period
11 of time to know that the COVID virus would not be -- that
12 they would not be infected or if they were it would have,
13 I guess, left their body? And I apologize for saying
14 that very unscientifically.

15 A. You know, I don't know for sure if they would
16 require follow-up testing. Seeing the guidance that's
17 kind of coming down from Bureau of Prisons and Dismas, I
18 believe if the individual was showing signs of COVID,
19 even, you know, toward the end of their 14 days, one
20 could reasonably expect that they would remain in
21 quarantine a little bit longer. They may require
22 follow-up tests. I don't know.

23 As far as what I do know is that if a person
24 remained asymptomatic, not showing signs of the virus, I
25 don't believe they would have any follow-up testing. But

1 THE COURT: Okay. Would -- and be willing to
2 be subject to cross-examination. Obviously you'd have
3 the right to object, or are you saying no
4 cross-examination?

5 MR. LAB: Thank you, Your Honor. I just wanted
6 to confer with Mr. Alvarado. I do believe if placed
7 under oath the government probably has a right to
8 cross-examination, but I will be quite diligent if I
9 believe there's anything objectionable to their
10 questions.

11 THE COURT: Okay. Very well.

12 Mr. Alvarado, please raise your right hand.

13 ULISES ALVARADO, DEFENDANT, SWORN

14 THE COURT: Okay. You can put your hand down.
15 And you can go ahead and read your statement, sir.

16 THE DEFENDANT: Thank you, Your Honor. Good
17 morning. Your Honor, in my opinion a double standard is
18 being applied to this violation case. When you have a
19 federal or state incarcerated inmate that has been housed
20 for over 12 months at a jail security level where there
21 is a significant 14-day quarantine precautionary measure
22 in place that is terminated upon the inmate's negative
23 response of any action in which no signs or symptoms of
24 the virus have occurred during my multiple quarantines in
25 the past and throughout this present moment, and only

1 MR. FLETCHER: Yes, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. FLETCHER:

4 Q. Mr. Alvarado, in regards to the evasive test you
5 have mentioned, what do you understand the evasive test
6 to consist of?

7 A. The evasive test would consist of a -- long, skinny
8 steel rods inserted way far up into my nostrils and that
9 that -- I've talked to several inmates that had endured
10 this procedure all whom which testified to me or said to
11 me that it was very painful to them afterward. That's
12 what I consider evasive, sir.

13 Q. But you don't know. You just know what other
14 inmates told you.

15 A. Well, from describing of the nurse who, in fact, was
16 in front of me presenting this and telling me how this
17 was to be conducted and -- and together with what the
18 inmate had told me, yes, I find it -- I find it extremely
19 evasive.

20 Q. In regards to this nurse, where were you when you
21 had this dealings with the nurse and your allegation that
22 it was a metal rod?

23 A. I was in my cell in -- in the detention center in --
24 gosh, I've been through so many. Over here where I just
25 came from.

1 Q. Dakota County or Woodbury County?

2 A. Dakota County.

3 Q. Dakota County, Nebraska.

4 A. Yes. She was in my room, sir. She had the
5 instrument in her hand in the package, and it was long,
6 and it was steel, and I didn't want -- I said no.

7 Q. In regards to this, did any of the inmates say to
8 you that you would bleed or need stitches?

9 A. Well, they --

10 Q. Yes or no. I don't need an explanation. Just yes
11 or no, please.

12 A. No.

13 Q. In regards to your situation when you were with the
14 United States Marshal's Office and they were housing you
15 while you were serving your sentence, were you asked to
16 take a COVID-19 test then?

17 A. I was asked if I wanted to.

18 Q. So you're saying they gave you an option of whether
19 you'd take one or not.

20 A. Right.

21 Q. And did they tell you what the testing would be?

22 A. No, they didn't. They were -- they were like
23 approximately like 30 feet away from me. I was in the --
24 I was in a cell that was segregated throughout -- I've
25 been segregated throughout the beginning of December 2019

1 start following the court order that you have some
2 responsibility here?

3 A. And as far as --

4 Q. Did you hear that, sir? Yes or no.

5 A. I heard that, yes.

6 Q. All right. In regards to what you -- in regards to
7 taking tests, did you hear the testimony of the Probation
8 Officer Elliott today that said and your -- as you were
9 using the F word with her that you weren't going to take
10 any COVID test? Is that true?

11 A. She --

12 Q. Yes or no, sir.

13 A. No, that's not true.

14 MR. FLETCHER: Nothing further, Your Honor.
15 Thank you.

16 THE COURT: Any direct, Mr. Lab?

17 THE WITNESS: I'd like to say something
18 because . . .

19 MR. LAB: Thank you, Your Honor. I do have
20 just a couple of quick questions.

21 THE COURT: Okay.

22 EXAMINATION

23 BY MR. LAB:

24 Q. Mr. Alvarado, would you be willing to take a
25 less-invasive test regarding COVID-19?

1 A. Sure. As long -- may I answer in response? As long
2 as it's nothing evasive like the nasal with a rod going
3 implanted up for 15 seconds up into your nasal passage
4 and I don't -- I'm not quite sure how deep but it's
5 not -- as long as it's not anything invasive like that,
6 yes, I would be open to go ahead and do this. Your
7 Honor, look, I'm not trying to --

8 MR. FLETCHER: Objection. Nonresponsive to the
9 question.

10 THE COURT: I think I understood your answer,
11 Mr. Alvarado.

12 Mr. Lab, any other questions?

13 MR. LAB: Very briefly, Your Honor.

14 BY MR. LAB:

15 Q. Mr. Alvarado, would you be willing to quarantine for
16 a period of time of at least 14 days in order to be
17 allowed entry into Dismas Charities?

18 A. Sure.

19 Q. Would you be willing to follow and comply with all
20 other rules that you are aware of of Dismas Charities
21 outside of this one requirement for a nasal swab COVID-19
22 test?

23 A. Absolutely.

24 MR. LAB: That's all the questions I have.

25 THE COURT: All right. Anything further,