

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 23-6697

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON STEVEN KOKINDA,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Thomas S. Kleeh, Chief District Judge. (2:21-cr-00020-TSK-MJA-1; 2:23-cv-00003-TSK)

Submitted: November 3, 2023

Decided: November 28, 2023

Before AGEE and THACKER, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Jason Steven Kokinda, Appellant Pro Se. Brandon Scott Flower, Assistant United States Attorney, Sarah Wagner, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Appendix-A

PER CURIAM:

In this case, Appellant Jason Steven Kokinda appealed the district court's order dismissing his 28 U.S.C. § 2255 motion. *United States v. Kokinda*, Nos. 2:21-cr-00020-TSK-MJA-1; 2:23-cv-00003-TSK (N.D.W. Va. June 6, 2023). The court dismissed the motion for lack of jurisdiction because Appellant's direct appeal, *United States v. Kokinda*, No. 22-4595, remains pending, and the direct appeal substantially overlapped with Appellant's § 2255 motion. We have reviewed the record and find no reversible error.

Appellant also filed on October 23, 2023 a third motion for bail or release pending appeal. *See United States v. Kokinda*, No. 23-6697 (4th Cir. Oct. 23, 2023), ECF No. 25. We previously dismissed Appellant's first motion for release. ECF No. 13. Appellant filed a second motion for release, ECF No. 22, which we denied in an order dated November 3, 2023, ECF No. 28. We have reviewed Appellant's third motion for release and find that it presents no meritorious grounds. Accordingly, we deny Appellant's third motion for release on bail pending appeal.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRIMINAL NO. 2:21-CR-20
CIVIL NO. 2:23-CV-3
(KLEEH)

JASON STEVEN KOKINDA,

Defendant.

MEMORANDUM OPINION AND ORDER DENYING MOTION UNDER 28 U.S.C. §
2255, ADOPTING R&R, AND OVERRULING DEFENDANT'S OBJECTIONS

On February 21, 2023, the pro se Petitioner, Jason Steven Kokinda ("Kokinda"), filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion"). ECF No. 200, 2:21cr20; ECF No. 1, 2:23cv3.¹ Pursuant to 28 U.S.C. § 636 and the local rules, the Court referred the action to United States Magistrate Judge Michael J. Aloï (the "Magistrate Judge") for review. On February 24, 2023, the Magistrate Judge entered a Report and Recommendation ("R&R"), recommending that the Court deny the Motion and dismiss it without prejudice. ECF No. 203. On March 7, 2023, Kokinda filed objections to the R&R. ECF No. 206.

Following a careful review and for the reasons that follow,

¹ Unless specifically referenced differently, all docket entries cited herein are to the criminal action: 2:21cr20.

MEMORANDUM OPINION AND ORDER DENYING MOTION UNDER 28 U.S.C. § 2255, ADOPTING R&R, AND OVERRULING DEFENDANT'S OBJECTIONS

the Court **ADOPTS** the R&R [ECF No. 203], **OVERRULES** Kokinda's objections [ECF No. 206], **DENIES** his § 2255 petition [ECF No. 200], and **DISMISSES WITHOUT PREJUDICE** Civil Action Number 2:23cv3.

I. BACKGROUND

After he was found guilty by petit jury to Count One of the Indictment, Failure to Update Sex Offender Registration in violation of 18 U.S.C. § 2250(a), the Court sentenced Kokinda to 63 months incarceration on October 13, 2022. He was given credit for time served from November 14, 2019, to December 17, 2020, and since February 3, 2021. The Court imposed a term of supervised release for life. Kokinda timely filed his notice of appeal on October 20, 2022.

On March 31, 2023, Kokinda, by counsel, filed his Brief of Appellant with the United States Court of Appeals for the Fourth Circuit. ECF No. 24, Appeal No. 22-4595. Therein, he argues four (4) issues on appeal:

1. Whether the jury instruction incorrectly defined the elements of Failure to Register, 18 U.S.C. § 2250(a), by grafting passages from the Attorney General's Guidelines onto the statutory text, which broadened the circumstances under which the requirement to register is triggered?
2. Whether SORNA, as applied, violated the Tenth Amendment, by failing to provide fair notice because of the inconsistent registration requirements, as explained in the jury instruction, vis-a-vis the less onerous standards of West Virginia's SORNA-noncompliant sex offender registry?

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3. Whether, the district court erred by enhancing the defendant's guidelines sentence with an eight (8) level increase, based on the "clearly erroneous" finding that the government presented sufficient indicia of reliability to support the probable accuracy (U.S.S.G. §6A1.3) of evidence that the defendant committed a "sex offense against a minor" (U.S.S.G. §2A3.5(b)(1)(C))?

4. Whether it was procedurally and substantively reasonable for the district court judge to sentence the defendant to lifetime supervision and severe limits on computer use?

Id. at 1-2. On May 30, 2023, the United States filed its Appellee's Brief. ECF No. 38, Appeal No. 22-4595. The appeal remains pending before the Fourth Circuit.

On February 21, 2023, Kokinda, pro se, filed his Motion under 28 U.S.C. § 2255. ECF No. 200. Therein he moves the Court to vacate his sentence on four grounds, summarized by the Magistrate Judge as follows:

First, that the Court erred in its interpretation of 18 U.S.C. § 2250(a) in the jury instructions. Second, that the Government's reading of 18 U.S.C. § 2250 is in conflict with state law and that Kokinda's reliance on state law "operated as an entrapment." [Doc. 200 at 5]. Third, that Elkins police charged him in bad faith as retaliation and that his counsel was ineffective for not raising this argument as an objection. Fourth, that the Court imposed an unreasonable sentence and that Kokinda's objections demonstrated that enhancements and supervision beyond five years are unreasonable.

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ECF No. 203 at 3-4. The Magistrate Judge recommended Kokinda's Motion be denied as premature and dismissed without prejudice. Id. On March 7, 2023, Kokinda timely filed objections to the R&R. ECF No. 206.

II. LEGAL STANDARD

a. 28 U.S.C. § 636

When reviewing a magistrate judge's R&R, the Court must review de novo only the portions to which an objection has been timely made. 28 U.S.C. § 636(b)(1)(C). An objection must be specific and particularized to warrant such review. See United States v. Midgette, 478 F.3d 616, 621-22 (4th Cir. 2007). Otherwise, "the Court may adopt, without explanation, any of the magistrate judge's recommendations" to which there are no objections. Dellarcirprete v. Gutierrez, 479 F. Supp. 2d 600, 603-04 (N.D.W. Va. 2007) (citing Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983)). Courts will uphold portions of a recommendation to which no objection has been made unless they are clearly erroneous. See Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005).

The R&R informed the parties that they had fourteen (14) days from the date of service of the R&R to file "specific written objections, identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection." ECF No. 203 at 4. It further warned them that the "[f]ailure to file written objections . . . shall constitute a

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waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals." Id. Kokinda accepted service of the R&R on February 28, 2023. ECF No. 205. He timely filed objections to the R&R on March 7, 2023. See ECF No. 206. Kokinda also requested immediate release or expedited disposition of his petition. ECF No. 208.

b. District Court Jurisdiction During an Appeal

"Generally, a timely filed notice of appeal transfers jurisdiction of a case to the court of appeals and strips a district court of jurisdiction to rule on any matters involved in the appeal." Doe v. Pub. Citizen, 749 F.3d 246, 258 (4th Cir. 2014). Only under "exceptional circumstances" should motions to vacate or alter sentences be heard during the pendency of a direct appeal. Bowen v. Johnston, 306 U.S. 19, 27 (1939). "Among these exceptional circumstances are those indicating a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions." Id. (citation omitted). A "[m]ovant may not avail himself of collateral relief prior to the final adjudication of his direct appeal." Kiser v. United States, No. 2:06-00151, 2010 WL 4780376, *1 (S.D.W. Va. Nov. 16, 2010).

III. ANALYSIS

First, the Court must determine whether Kokinda has presented "extraordinary circumstances" compelling the Court to consider his

MEMORANDUM OPINION AND ORDER DENYING MOTION UNDER 28 U.S.C. § 2255, ADOPTING R&R, AND OVERRULING DEFENDANT'S OBJECTIONS

Motion under § 2255 during the pendency of his appeal to the Fourth Circuit. The Court finds he has not. Decision on Kokinda's § 2255 motion would require the Court to rule on matters over which it has no jurisdiction because they are pending before the Fourth Circuit Court of Appeals. Kokinda raises similar grounds in his Motion under § 2255 to his direct appeal and has raised nothing in his Motion that demonstrates "exceptional circumstances" for the Court to consider the § 2255 motion during the pendency of his direct appeal. Kokinda's Motion under § 2255 is denied without prejudice on this ground.

Additionally, Kokinda's objections to the R&R restate his arguments raised in his motion and fail to identify the specific portions of the R&R to which he objects. He does not point with any specificity to factual errors in the R&R and takes no issue with the R&R's legal analysis. In short, the "objection" document was of no aid to this Court in reviewing the R&R and added nothing to the record not already stated. Therefore, the objections fall short of the specificity requirement to warrant a de novo review, and the Court need only review the R&R for clear error.

Finding no clear error, and finding that Kokinda failed to demonstrate exceptional circumstances to warrant consideration of his § 2255 motion during the pendency of his direct appeal, the Court **ADOPTS** the R&R and dismisses the case without prejudice. ECF No. 203.

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IV. APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings, the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." If the Court denies the certificate, "a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Id. The Court finds it inappropriate to issue a certificate of appealability in this matter because Defendant has not made a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). The Court, therefore, **DENIES** issuing a certificate of appealability.

V. CONCLUSION

For the reasons discussed, the Court **ADOPTS** the R&R [2:21CR20, ECF No. 203; 2:23CV3, ECF No. 4], **OVERRULES** Kokinda's objections [2:21CR20, ECF No. 206; 2:23CV3, ECF No. 6], **DENIES** Kokinda's § 2255 petition [2:21CR20, ECF No. 200; 2:23CV3, ECF No. 1], and **DISMISSES WITHOUT PREJUDICE** the § 2255 petition and Civil Action Number 2:23CV3. Kokinda's motion for immediate release or expedited disposition of the petition is **DENIED AS MOOT** [2:21CR20, ECF No. 208].

It is so **ORDERED**.

The Court **DIRECTS** the Clerk to enter a separate judgment order in favor of the United States in Civil Action Number 2:23CV3; to

**MEMORANDUM OPINION AND ORDER DENYING MOTION UNDER 28 U.S.C. §
2255, ADOPTING R&R, AND OVERRULING DEFENDANT'S OBJECTIONS**

transmit a copy of this Order to Kokinda via certified mail, return receipt requested; to transmit a copy of this Order to counsel of record by electronic means; and to strike Civil Action Number 2:23CV3 from the Court's active docket.

DATED: June 6, 2023

Tom S. Klee

THOMAS S. KLEEH, CHIEF JUDGE
NORTHERN DISTRICT OF WEST VIRGINIA

FILED: January 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6697
(2:21-cr-00020-TSK-MJA-1)
(2:23-cv-00003-TSK)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JASON STEVEN KOKINDA

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Thacker, and Senior Judge Floyd.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix-C

01:31:42 1 offender lives with some regularity, where the sex offender
01:31:47 2 actually lives -- in any place in which the sex offender lives
01:31:51 3 for at least 30 days, and the sex offender has a home in the
01:31:55 4 jurisdiction, or if the sex offender lives in the jurisdiction
01:31:57 5 for at least 30 days. Okay. Well what about a homeless or a
01:32:03 6 transient sex offender? Because that's kind of what we are
01:32:07 7 looking at here. Mr. Kokinda even told you, he didn't have a
01:32:09 8 home here. He was, in his words, a "digital nomad" living out
01:32:15 9 of his car, driving around, driving all over the place. No
01:32:21 10 fixed abode or permanent residence. You don't have a definite
01:32:26 11 address. SORNA still requires to you register. *You heard Mrs. Leary*
01:32:28 12 those and see those in your jury instructions. Transient,
01:32:31 13 homeless individuals are still required to register. Even a
01:32:36 14 transient or homeless sex offender is still required to
01:32:38 15 provide a description of the place they habitually live. That
01:32:46 16 is some, more or less specific, description of the place or
01:32:50 17 places the defendant habitually lives. What is that? Those
01:32:56 18 are places where the defendant stations himself during the day
01:33:00 19 or sleeps at night. It's not just the place where you sleep
01:33:05 20 at night. Those places that you go with some regularity,
01:33:10 21 station yourself during the day. And we are going to talk
01:33:16 22 about, now, how the defendant, with a good bit of regularity,
01:33:22 23 stationed himself here in Elkins and in the Northern District
01:33:26 24 of West Virginia, in this Elkins area. Where did he go? What
01:33:33 25 places did he go to? What were his habitual locals? Well, we

Appendix - D

1 know, the Elkins City Park; he was there quite a bit. The
2 Elkins library. The Elkins YMCA. Anytime Fitness here in
3 Elkins. Yokum's Vacationland. Seneca Rocks and the Five
4 River Campgrounds in Parsons, up in Tucker County, which we
5 talked about, not very far from here, half hour, 45 minutes.
6 We're not talking hours and hours away. Again, I want you to
7 think about reason and common sense. Is it really reasonable
8 to make common sense if someone is going to drive hours and
9 hours and hours a day, living somewhere else, and keep coming
10 back to Elkins on a daily basis. Does that make sense? The
11 defendant agreed that these are the places he stationed
12 himself during the days and nights -- August 24th, 2019,
13 through September 29th, 2019. I asked him that question.
14 "You went to these places? You stayed at these places on a
15 regular basis, didn't you?" "Yes," that's what he said.
16 These are the places he went with regularity. It's not --
17 habitually lives is not where he would choose to characterize
18 his residence. And in this particular case, nowhere. That's
19 not what we are looking at. It is someone who lives in a
20 jurisdiction for 30 days and those places that they frequent
21 on a regular basis. He was here well more than 30 days, at
22 least August 24th through September 29th, 2019, well over a
23 month, on an almost daily basis, in Elkins. How do we know
24 that, ladies and gentlemen? How do we know he was here in
25 this jurisdiction in West Virginia? How do we know that? I

01:35:43 1 know it was long. It was tedious. It wasn't the most
01:35:46 2 exciting testimony you probably anticipated hearing when you
01:35:48 3 came in here for jury service, but we went through a lot in
01:35:52 4 those financial records yesterday. Hour, two hours worth of
01:35:56 5 testimony with Corporal Miller, and I will be honest, I didn't
01:36:01 6 have a fun time going through those records with you guys.
01:36:03 7 It's tedious, but it's important. And I told you why. It
01:36:07 8 gives us where he was and when he was in those locations. Of
01:36:14 9 note, and of importance, that we specifically went through,
01:36:18 10 Corporal Miller and I during that testimony, were those
01:36:20 11 transactions in those records starting on August 24th of 2019,
01:36:25 12 all the way through September 27th, of 2019, because that's
01:36:29 13 what the financial records showed. I am not going to go
01:36:35 14 through that now again. We did that yesterday. I am sure you
01:36:37 15 will remember that. I am sure it's seared into your memory.

01:36:43 16 This is an example from August 24th of 2019, through
01:36:49 17 August 31st of 2019, here, into September 2019, September 2nd
01:36:59 18 through September 18th, 2019. Again, these are all just out
01:37:04 19 of the Wells Fargo records. Those almost daily purchases at
01:37:09 20 Kroger, Walmart, and again through September 27th, 2019. And
01:37:17 21 that summary chart, that's to help you understand. It's very
01:37:24 22 little, because there is so much in that one page. How many
01:37:26 23 transactions he had; dozens, dozens of transactions, in
01:37:30 24 Randolph County and in this area. Just look at Kroger and
01:37:35 25 Walmart in Elkins alone. There are dozens of transactions, on

almost a daily basis, and multiple transactions on some days, daily basis. The Government's Exhibit 18, the summary chart, if you look at it, the highlighted section in orange, those are those transactions here in the Elkins area, in Parsons, Buckhannon. These areas that aren't far from Elkins, the place that he keeps coming back to every day. When you look at that, out of all those transactions, there are nine, nine that didn't occur here. But the thing that you look at with these is where was he right before and right after, sometimes the same day, and right after -- Elkins. Here in Randolph County. He was here every day, living here, using the facilities, the amenities, the shopping, the public accommodations. He was living here. This is where he was doing his living, was here.

What else, besides those financial records? Well, we know from September 8th through September 22nd, 2019, he rented that campsite up at Yokum's, 45 minutes from here, just up the road, and was here in Elkins almost every day in that time period, with some regularity. For that two-week period, he said, "I'm staying here. I'm staying at Yokum's." And he moved around, but he came to Elkins every day. But also remember, he is using aliases, names, addresses, that aren't good. Why? Ask yourself that: Why? And we are going to talk about that in just a second. Yokum's, Five River Campgrounds in Parsons. Right after he leaves Yokum's, what's

01:39:46 1 on the financial records on September 22nd? Transaction in
01:39:48 2 Parsons at SHOP 'n SAVE. Where is Five River Campgrounds? In
01:39:51 3 Parsons. So he then goes up there and stays there. But
01:39:57 4 what's he doing in that same time? He is coming to Elkins.
01:40:00 5 Coming to Elkins every day, using the park, using the library,
01:40:07 6 using the YMCA, using Anytime Fitness.

01:40:17 7 Left his camping equipment. It was still there
01:40:20 8 September 29th. Wasn't in his car, because he was going to go
01:40:23 9 back up there, and he was still going to stay there. Again,
01:40:29 10 using the amenities here, the Elkins YMCA. Again, remember
01:40:34 11 the name that he used at the Elkins YMCA. Five different
01:40:37 12 dates he goes to the YMCA to use that facility. Several times
01:40:41 13 he goes to Anytime Fitness to use that facility. Testified he
01:40:46 14 used the name Jason Koda when he did that.

01:40:49 15 The Elkins City Park. Roseanne Bell and Dave Parker,
01:40:59 16 your heard their testimony. It's your job to assess their
01:41:02 17 credibility, whether you believe them or not. Rose Bell
01:41:04 18 testified, for the entire month of September, every week, she
01:41:07 19 took her daughter two to three times a week to that park, and
01:41:10 20 every time she was there, who did she see? The defendant,
01:41:14 21 Jason Kokinda, with a computer, on his laptop, swings, picnic
01:41:22 22 table, but he was at the park. Is it a coincidence that he
01:41:28 23 was just there on every day that Rose Bell was there? And on
01:41:36 24 September 29th of 2019, we know he was there, because that's
01:41:41 25 the day the Elkins Police Department found him there, right

01:41:45 1 beside there. The Davis & Elkins campus is right beside it.
01:41:49 2 I mean, there is a road that goes right between them. They
01:41:52 3 are right beside each other. You see photographic evidence,
01:41:57 4 he was at the park. Rose Bell took a picture of him on the
01:42:00 5 swing. He goes to the park on a regular basis here in Elkins,
01:42:04 6 so he can get on his computer, write, whatever it is.

01:42:13 7 The public library. You heard from Ruth Mitchell, who
01:42:16 8 works at the Elkins library. She saw him there on a frequent,
01:42:21 9 regular basis in September, fall of 2019. Not just once, more
01:42:28 10 than once -- regular basis. And he shopped at the local
01:42:34 11 Elkins businesses, on a daily basis: Kroger, Walmart, gas
01:42:41 12 stations, the Speedway. You will see transactions for gas
01:42:46 13 stations that really aren't all that far from here, Belington.
01:42:51 14 Enterprise, he went to Enterprise, rented cars. Used local
01:42:56 15 auto repair shops, on a daily basis. He is here, living here,
01:43:05 16 coming to Elkins. He is not passing through Elkins. He is
01:43:09 17 living in Elkins. Again, if he was just passing through, he
01:43:14 18 wouldn't be coming back over and over to the geographical
01:43:21 19 anomaly that is Elkins. That's not what Elkins was. Elkins
01:43:27 20 was his base. This was where he was living. This was where
01:43:30 21 he came to.

01:43:35 22 How do we know he knowingly failed to register? Well, he
01:43:39 23 used aliases, multiple addresses. Could have gotten permanent
01:43:43 24 housing, and he didn't; he chose not to. He wanted to be a
01:43:47 25 digital nomad. Aliases, how many aliases did Mr. Kokinda use?