

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 27 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES FITZGERALD BRANCH,

Defendant-Appellant.

No. 22-50202

D.C. No. 2:21-cr-00403-PA-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Submitted January 9, 2024**
Pasadena, California

Before: CALLAHAN, CHRISTEN, and BENNETT, Circuit Judges.

Charles Branch appeals his jury conviction and sentence for two counts of possessing stolen mail in violation of 18 U.S.C. § 1708. We presume the parties' familiarity with the facts and do not discuss them in detail here except as needed to provide context. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 3742. We affirm.

1. Branch argues that the district court abused its discretion in admitting Officer Koh's testimony that, prior to arresting Branch on November 23, 2020, he overheard on the police radio that a detective had replayed surveillance footage of the apartment complex's mailroom and relayed a description of a subject removing items from mailboxes. Branch argues that this statement constituted inadmissible hearsay because the declarant—Detective Anderson—did not testify at trial, and the evidence had no relevance other than to establish the truth of the matter asserted, *i.e.*, that Branch was observed stealing mail prior to his arrest.

Branch's argument fails because Detective Anderson's statement was offered to establish the effect it had on the listener—here, Officer Koh—rather than the truth of the matter asserted. Officer Koh testified that when he arrived at the apartment complex he saw Branch's black drawstring bag, and when he searched the drawstring bag, he found mail not belonging to Branch. When asked why he searched Branch's bag, Officer Koh testified that he did so because of Detective Anderson's statement that the suspect had put mail into a black drawstring bag. Detective Anderson's description of the suspect was therefore not hearsay, as it was offered to explain Officer Koh's actions regardless of whether Detective Anderson's statement was true. *See United States v. Lopez*, 913 F.3d 807, 826 (9th Cir. 2019).

Even if Detective Anderson's statement were hearsay, it would nonetheless

be admissible as a present sense impression. Detective Anderson had personal knowledge of what he was describing, and he described the surveillance footage “while or immediately after” viewing it. Fed. R. Evid. 803(1); *Bemis v. Edwards*, 45 F.3d 1369, 1373 (9th Cir. 1995). According to the police report, Detective Anderson gave his description of the suspect within four minutes of watching the surveillance footage, indicating he did not have a “chance for reflection” between seeing the footage and making the description. *Bemis*, 45 F.3d at 1372; *United States v. Orm Hieng*, 679 F.3d 1131, 1142 n.2 (9th Cir. 2012) (holding that reports of an event “some minutes” after the declarant observed that event was “sufficiently close in time” to satisfy Rule 803(1)).

2. Branch further argues that the district court abused its discretion by admitting evidence of Branch’s parole violation and arrest warrant, and excluding evidence that Branch was transient at the time of his arrests. According to Branch, evidence of his parole violation and arrest warrant was prejudicial because it communicated to the jury that Branch was a criminal and that there could be no innocent explanation for the mail in his possession. Similarly, Branch asserts that exclusion of evidence that he was transient at the time of his arrests was prejudicial because it would have provided an innocent explanation for Branch’s possession of multiple bags.

Branch’s arguments do not carry the day. Even if the district court’s

evidentiary rulings were an abuse of discretion, any error was harmless because it did not have a “material impact on the verdict.” *United States v. Lopez*, 4 F.4th 706, 714 (9th Cir. 2021). Mention of Branch’s parole violation and arrest warrant “came up only incidentally,” and the government “did not state the crime” for which Branch had been on parole. *United States v. Guerrero*, 756 F.2d 1342, 1347 (9th Cir. 1984). The district court also instructed the jury to not consider “evidence that [Branch] committed other crimes,” which further supports a finding of harmless error. *See United States v. Neill*, 166 F.3d 943, 947 (9th Cir. 1999). Finally, the government presented extensive evidence for the jury to conclude that Branch committed the charged offense, including three instances where Branch possessed stolen mail. Further, the evidence showed that Branch did not simply possess a few pieces of stolen mail—which perhaps could have happened by accident—but rather possessed hundreds of items that were not addressed to him. And the mail Branch possessed was not likely to be mistakenly discarded by others, as it included financial documents, tax forms, credit card statements, and medical records. Accordingly, the district court’s evidentiary rulings, even if erroneous, were nonetheless harmless.¹

3. Branch next argues that his sentence was procedurally and

¹ For these same reasons, Branch’s argument that the cumulative effect of the district court’s evidentiary errors rendered his trial “fundamentally unfair” also fails. The evidence of guilt in this case was “otherwise overwhelming.” *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007).

substantively unreasonable because the district court did not consider the 18 U.S.C. § 3553(a) factors, instead focusing on Branch's prior unrelated conduct. Branch also argues that the district court improperly increased his sentence to foster rehabilitation, in violation of *Tapia v. United States*, 564 U.S. 319 (2011).

The record shows that at sentencing, the district court explicitly considered the § 3553(a) factors, including the need for the sentence to protect the public from Branch's future crimes, 18 U.S.C. § 3553(a)(2)(C). The district court also considered the sentencing range established for Branch under the U.S. Sentencing Guidelines, *id.* § 3553(a)(4), and determined that the 18-to-24-month range was "insufficient and does not satisfy the statutory goals of sentencing."

There was no *Tapia* error, either. Although the district court stated that the sentence would "hopefully put [Branch] in a position where he can get the help that he deserves," a court does not err "by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs," *Tapia*, 564 U.S. at 334. Moreover, the district court "adequately explained the sentence" in view of Branch's recidivism and the need to protect the public. *United States v. Laurienti*, 731 F.3d 967, 975 (9th Cir. 2013); 18 U.S.C. §§ 3553(a)(1), 2(C).

4. Finally, Branch argues that the district court abused its discretion by imposing an alcohol condition as part of Branch's supervised release because he claims there was no indication that he had prior conduct related to alcohol, that

alcohol was relevant to the charged offense, or that he drank regularly. For support, Branch points to *United States v. Betts*, 511 F.3d 872 (9th Cir. 2007), but in that case, “there was no evidence that Betts had any past problems with alcohol.” *Id.* at 878. Here, the record shows that Branch most certainly had “past problems with alcohol.” For example, Branch had been arrested for driving under the influence of alcohol with a blood alcohol content of 0.14 percent, and had been arrested for possessing a controlled substance, during which police officers found him drinking from an open container of Schlitz Malt liquor. Therefore, unlike in *Betts*, the district court here had reason to impose the alcohol condition. The district court also noted that Branch “began using drugs at an early age,” and had multiple arrests and convictions for possessing controlled substances and controlled-substance paraphernalia. In light of Branch’s history of drug abuse, it was reasonable for the district court to require that Branch stay “drug-free.” *United States v. Vega*, 545 F.3d 743, 747 (9th Cir. 2008).

AFFIRMED.

United States District Court
Central District of California

UNITED STATES OF AMERICA vs.

Docket No. CR 21-403 PA

Defendant Charles Fitzgerald Branch

Social Security No. 2 3 4 5

Bell, Gerard

Branch, Vince

Eleby, Michael

George, Gerald

akas: Johnson, Charles Thomas

(Last 4 digits)

SENTENCING JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH	DAY	YEAR
Sept	12	2022

In the presence of the attorney for the government, the defendant appeared in person on this date.

COUNSEL

Steven Brody, CJA

(Name of Counsel)

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea.

NOLO
CONTENDERE

NOT
GUILTY

FINDING

There being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offense(s) of:

Possession of Stolen Mail in violation of 18 U.S.C. § 1708 as charged in Counts 1 and 2 of the First Superseding Information. The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Charles Fitzgerald Branch, is hereby committed on Counts 1 and 2 of the First Superseding Indictment to the custody of the Bureau of Prisons for a term of 33 months. This term consists of 33 months on each of Counts 1 and 2 of the First Superseding Indictment, to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term consists of three years on each of Counts 1 and 2 of the First Superseding Indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04.
2. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.
3. The defendant shall cooperate in the collection of a DNA sample from the defendant.
4. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.
5. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.

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6. The defendant shall participate in mental health treatment, which may include evaluation and counseling, until discharged from the program by the treatment provider, with the approval of the Probation Officer.
7. During the course of supervision, the Probation Officer, with the agreement of the defendant and defense counsel, may place the defendant in a residential treatment program for co-occurring disorders approved by the United States Probation & Pretrial Services Office for treatment of mental health disorders and substance abuse or drug dependency, which may include psychiatric services, counseling and substance abuse testing. The defendant shall reside in the treatment program until discharged by the Program Director and Probation Officer.
8. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.
9. During supervision, the Probation Officer, with the agreement of the defendant and defense counsel, may place the defendant in a residential reentry center (pre-release component) for a period of no more than 180 days, and the defendant shall observe the rules of that facility.
10. The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification in any name, other than the defendant's true legal name, nor shall the defendant use, any name other than the defendant's true legal name without the prior written approval of the Probation Officer.
11. The defendant shall submit to a search, at any time, with or without warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computers, cell phones, other electronic communication or data storage devices or media, email accounts, social media accounts, cloud storage accounts, effects and other areas under the defendant's control, upon reasonable suspicion concerning a violation of a condition of supervision or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

The Court authorizes the Probation & Pretrial Services Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of the sentencing judge.

The Court authorizes the Probation Office to disclose the Presentence Report, and/or any previous mental health evaluations or reports, to the treatment provider. The treatment provider may provide any information (excluding the Presentence Report), to State or local social service agencies (such as the State of California, Department of Social Services), for the purpose of the client's rehabilitation

The Court recommends that the Bureau of Prisons conduct a mental health evaluation of the defendant and provide all necessary treatment.

It is ordered that the defendant shall pay to the United States a special assessment of \$200, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline §5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

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The Court recommends that the defendant be incarcerated in a Federal Correctional Institution in Terminal Island, California.

On Government's motion, the underlying Indictment is ORDERED dismissed.

Defendant advised of his right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

September 13, 2022

Date


U. S. District Judge/Magistrate Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

September 13, 2022

Filed Date

By /s/ K.Sali-Suleyman

Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

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The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(1)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid):
 - Non-federal victims (individual and corporate),
 - Providers of compensation to non-federal victims,
 - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

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Docket No.: CR 21-403 PA

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____
Defendant noted on appeal on _____
Defendant released on _____
Mandate issued on _____
Defendant's appeal determined on _____
Defendant delivered on _____ to _____
at _____
the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By _____

Date _____

Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By _____

Filed Date _____

Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____
Defendant _____

Date

U. S. Probation Officer/Designated Witness

Date

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 21 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CHARLES FITZGERALD BRANCH,
Defendant-Appellant.

No. 22-50202

D.C. No. 2:21-cr-00403-PA-1
Central District of California,
Los Angeles

ORDER

Before: CALLAHAN, CHRISTEN, and BENNETT, Circuit Judges.

The panel has voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.