UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 08-00141-WES
	:	CR No. 09-00062-WES
EDWARD PENA	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) and 18 U.S.C. § 3401(i) for proposed findings of fact concerning whether Defendant is in violation of the terms of his supervised release and, if so, to recommend a disposition of this matter. In compliance with that directive and in accordance with 18 U.S.C. § 3583(e) and Fed. R. Crim. P. 32.1, a revocation hearing was held on July 31, 2018, at which the Government presented one witness, Providence Police Officer Daryl Pfeiffer and one Computer Disk Exhibit containing police officer body camera footage. At the hearing, I ordered Defendant released pending my Report and Recommendation and final sentencing before Chief Judge William E. Smith. Based upon the following analysis and the admissions of Defendant, I recommend that Defendant continue on his existing term and conditions of supervision with no sanction.

Background

On May 18, 2018, the Probation Office petitioned the Court for the issuance of a warrant. On that day, the District Court ordered the issuance of a warrant. Defendant initially appeared in Court on June 13, 2018 and was released. On July 31, 2018, he appeared for a revocation hearing at which time Defendant knowingly and voluntarily admitted to the following charge:

> **Violation No. 2: Defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.**
>
> On May 5, 2018, Defendant committed the felony offense of Possession of Schedule I to V Controlled Substance, as supported by his arrest on that date by the Providence Police Department. As of the date of this report, Defendant has failed to contact this Officer regarding his arrest.

As Defendant has admitted this charge, I find he is in violation of the terms and conditions of his supervised release. Defendant exercised his right to a revocation hearing under Fed. R. Crim. P. 32.1(b)(2) and a hearing was held on July 31, 2018 regarding the following charge:

> **Violation No. 1: While on supervision, Defendant shall not commit another federal, state or local crime.**
>
> On May 5, 2018, Defendant committed the felony offense of Possession of Schedule I to V Controlled Substance, as supported by his arrest on that date by the Providence Police Department. On May 6, 2018, Defendant was released on personal recognizance. He is scheduled to appear in Sixth Division District Court on July 30, 2018 for a pre-arraignment conference under Docket #62-2018-04872.

After considering the evidence presented at the revocation hearing, the Court finds that the Government has not met its burden of proving Violation No. 1, a felony offense.

Recommended Disposition

Section 3583(e)(2), 18 U.S.C., provides that if the Court finds that Defendant violated a condition of supervised release, the Court may extend the term of supervised release if less than the maximum term was previously imposed. The maximum term of supervised release is life.

Section 3583(e)(3), 18 U.S.C., provides that the Court may revoke a term of supervised release and require the Defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term or supervised release without credit for time previously served on post release supervision, if the Court finds by a preponderance of evidence

that the defendant has violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be sentenced to a term beyond 5 years if the instant offense was a Class A felony, 3 years for a Class B felony, 2 years for a Class C or D felony, or 1 year for a Class E felony or a misdemeanor. Defendant was on supervision for Class A felony. Therefore, he may not be required to serve more than five years' imprisonment upon revocation.

Pursuant to 18 U.S.C. § 3583(h) and § 7B1.3(g)(2), when a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized, the Court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. The authorized statutory maximum term of supervised release is life.

Section 7B1.1 of the Sentencing Guidelines provides for three grades of violations (A, B, and C). Subsection (b) states that where there is more than one violation, or the violation includes more than one offense, the grade of violation is determined by the violation having the most serious grade.

Section 7B1.1(a) notes that a Grade A violation constitutes conduct which is punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device; or any other offense punishable by a term of imprisonment exceeding twenty years. Grade B violations are conduct constituting any other offense punishable by a term of imprisonment exceeding one year. Grade C violations are conduct constituting an offense punishable by a term of imprisonment of one year or less; or a violation of any other condition of supervision.

Section 7B1.3(a)(1) states that upon a finding of a Grade A or B violation, the Court shall revoke supervision. Subsection (a)(2) provides that upon a finding of a Grade C violation, the court may revoke, extend, or modify the conditions of supervision. Defendant is charged with a Grade A violation. Therefore, the Court shall revoke supervision if it finds Defendant guilty.

Section 7B1.3(c)(1) provides that where the minimum term of imprisonment determined under § 7B1.4 is at least one month, but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term. Should the Court find that Defendant has committed a Grade B or C violation, § 7B1.3(c)(2) states that where the minimum term of imprisonment determined under § 7B1.4 is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment. Neither of these provisions apply to this matter.

Section 7B1.3(d) states that any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of confinement or detention may be converted to an equivalent period of imprisonment. There is no outstanding restitution, fine, community confinement, home detention or intermittent confinement.

Section 7B1.4(a) provides that the Criminal History Category is the category applicable at the time Defendant was originally sentenced. Defendant had a Criminal History Category of III at the time of sentencing.

Should the Court revoke supervised release, the Revocation Table provided for in § 7B1.4(a) provides the applicable imprisonment range. Defendant is charged with a Grade A violation and has a Criminal History Category of III. Therefore, the applicable range of imprisonment for this charged violation is thirty to thirty-seven months.

Pursuant to § 7B1.5(b), upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

Discussion

It is undisputed that the Government bears the burden of proving this violation charge by a preponderance of the evidence. United States v. Portalla, 985 F.2d 621, 622 (1st Cir. 1993). It is also undisputed that the exclusionary rule is inapplicable in supervised release violation proceedings. United States v. Jimenez-Torres, CR No. 06-135-(PG), 2010 WL 2650318 at *4 (D.P.R. June 30, 2010); and United States v. Gravina, 906 F. Supp. 50, 55 (D. Mass. 1995). Finally, it is undisputed that hearsay evidence can be admissible in a supervised release revocation hearing subject to certain findings by the Court. See Fed. R. Evid. 1101(d)(3); Portalla, 985 F.2d at 622 (holding that the "tests of admissibility set forth in the Federal Rules of Evidence" are not applicable in revocation hearings but that evidence that does not satisfy those rules "must nonetheless be reliable"); see also United States v. Lowenstein, 108 F.3d 80, 83 (6th Cir. 1997) (supervised release violation finding may rest upon reliable hearsay).

Defendant was arrested on May 5, 2018 after a traffic stop. The traffic stop was instigated by information received from a confidential source. The confidential source was an individual

approached by police as a suspicious person in a parked car a few days earlier. Although he was apparently not engaging in any criminal behavior at the time, the individual appeared to be an intravenous drug user and later told the Officer he was a drug user. In addition, although not known to the Officer at the time, the individual was the subject of an outstanding warrant on a pending misdemeanor charge of operating a motor vehicle with a suspended license. The offense date was January 24, 2018 and a bench warrant issued on February 9, 2018 due to the individual's failure to appear in State District Court for arraignment.

The individual offered to assist police in the apprehension of a drug dealer.[1] The Officer gave his phone number to this individual. The individual called the Officer on May 5, 2018 and told him that a subject in his car would be in possession of narcotics. The Officer observed the car driving up Broadway and pulled the vehicle over for motor vehicle violations.

After the traffic stop, it is undisputed that a plastic bag containing seven smaller plastic bags each containing fentanyl (total 3.2 grams net weight) was seized from between the passenger seat and center console of the confidential source's vehicle. The confidential source was driving the vehicle, and Defendant was the front-seat passenger. The determinative factual issue in this case is whether Defendant possessed the seized bags of fentanyl. The only direct evidence connecting him to the drugs is the Officer's testimony that he observed Defendant secrete the bag with his left hand next to the passenger seat as he exited the vehicle pursuant to the Officer's commands.[2] The body camera footage from both of the Officers involved in the stop does not show anything in Defendant's left

[1] There is no competent evidence in the record regarding the individual's motivation to provide information to police. The Government posits that it was altruistic, i.e., an effort to remove a dangerous fentanyl dealer from the streets. Defense paints a different picture and suggests a set-up to curry favor with police. Both are plausible, but neither is established on this record.

[2] Defense counsel indicated that he found the Officer's testimony to be "quite credible," and I agree.

hand or any visible plastic bag or protruding plastic. Of course, the body camera angle is lower than the Officer's field of vision, and he would have a different view.

The Government contends that Defendant possessed the small bag in question and stuffed it between the passenger seat and console with his left hand as he was getting out of the vehicle. It relies on the Officer's brief observations and the positioning of Defendant's left arm (as shown in the body camera recording) as he turned and rose to get out of the vehicle. The body camera footage is inconclusive, and the Officer had only a brief opportunity to observe Defendant's movements. Further, the purpose of the traffic stop was to seize narcotics, and the Officer had been informed prior to the stop that narcotics would be present. Thus, the Officer was operating with an assumption that there would be narcotics in Defendant's possession. Defense counters that Defendant was set-up by the cooperating source in order to keep his promise of producing a drug dealer to the Officer.

This is a close case with strong advocacy on both sides. However, it is a case with some unanswered questions about the context of the traffic stop in question. Finally, it is a case that turns solely on what the Officer believed he observed over a very brief span of time. On balance, I conclude that the Government has not proven Violation No. 1 by a preponderance of the evidence. It is undisputed that the traffic stop was preplanned and that a small amount of narcotics was found in the vehicle. However, the totality of the evidence is neutral and simply does not tip the scale in favor of a finding that it was Defendant who actually possessed the seized narcotics on May 5, 2018. In other words, I cannot conclude on this record that it is more probably true than not.

There are equally plausible conclusions to be drawn from the totality of the evidence and little direct evidence to support either of those conclusions. I conclude that the limited evidence presented at this violation proceeding is not enough to carry the Government's burden. As to Violation No. 1 (failing to notify Probation of the arrest), it was admitted by Defendant and is a

Grade C violation. Probation became aware of the arrest within a couple of days and discussed it with Defendant several days later. His failure to promptly notify Probation of the arrest is a blatant violation but, by itself, does not warrant incarceration or other punitive measures under these circumstances beyond a stern admonishment that Defendant has been given the benefit of the doubt in this instance but will not get such benefit if there is evidence of future noncompliance. Defendant has completed over three years of supervision and this is his first violation case. Defendant has been a challenge to supervise, has had past driving offenses, and appears to abuse alcohol. Defendant is advised to improve his communication with Probation and keep them better informed as to his residential situation and contact information.

Conclusion

After considering the various factors set forth in 18 U.S.C. § 3553(a), I recommend that Defendant continue on his existing term and conditions of supervision with no sanction.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72(d). Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the District Court and the right to appeal the District Court's Decision. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
August 6, 2018