

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 15-00046-WES
	:	
ANTONIO FORTES	:	

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 March 24, 2023, at which time Defendant, through counsel and personally, admitted that he was in violation of his supervised release conditions as charged. At this hearing, I ordered Defendant detained pending my Report and Recommendation and final sentencing before District Judge William E. Smith.

Background

On July 24, 2019, the Probation Office petitioned the Court for the issuance of an arrest warrant to be lodged as a detainer. On that date, the District Court reviewed the request and ordered the issuance of the warrant. On March 24, 2023, Defendant was brought before the Court for a revocation hearing at which time he admitted to the following charges:

Violation No. 1. Standard Condition. Defendant shall report to the Probation Officer in a manner and frequency directed by the Court or Probation Officer.

Defendant has not returned a call placed to him by the Probation Officer on July 2, 2019. Additionally, the Probation Officer attempted to both call and text Defendant on July 8, 2019 but was unable to get through.

Violation No. 2. Special Condition. Defendant shall participate in a program of mental health as directed and approved by the Probation Office. Defendant shall contribute to the costs of such treatment based on ability to pay as determined by the Probation Officer.

Defendant failed to attend treatment at Fellowship Health Resources on June 14, 2019.

Violation No. 3. Mandatory Condition. While on supervision, Defendant shall not commit another federal, state, or local crime.

On June 30, 2019, Defendant committed the offenses of Assault with a Dangerous Weapon (shod foot) and Conspiracy to Commit a Felony Assault resulting in serious bodily injury as evidenced by Defendant's plea of nolo contendere to these charges on January 2, 2020 in Rhode Island Superior Court.

Recommended Disposition

Section 3583(e)(2) 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), 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. If a term of imprisonment was imposed as a result of a previous supervised release revocation, that term of imprisonment must be subtracted from the above-stated maximums to arrive at the current remaining statutory maximum sentence. Defendant was on supervision for a Class C felony. Therefore, he may not be required to serve more than two 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 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 has committed Grade A and C violations. Therefore, the Court shall revoke supervision.

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 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) 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 provision applies 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 VI 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 committed Grade A and C violations and has a Criminal History Category of VI. Therefore, the applicable range of imprisonment for this violation is thirty-three to forty-one months, however, the range is restricted to twenty-four months by statute.

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

Analysis and Recommendation

Defendant plead nolo to felony assault charges in Superior Court and received a ten-year sentence with eight years to serve. He is currently serving this state sentence and waived his rights under the Interstate Agreement on Detainers to appear in Federal Court to resolve these pending violation charges.

Defendant admitted to the Grade C violations (Numbers 1 and 2) and, absent objection from Defendant, the Court takes judicial notice of Defendant's state court nolo plea (see Defendant's Exh. A) and thus finds that he committed Violation Number 3 as a Grade A violation.

Defendant has served approximately forty months of his state sentence and is eligible for potential parole. The parties have agreed that Defendant plead nolo to the state charges with the understanding that he would not receive any federal incarceration in addition to his state

prison term. Thus, the parties agree to a time-served sentence on these violations, and I concur and so recommend. The parties disagree as to the need for further federal supervised release. On balance, I conclude that twenty-four months of further federal supervised release following Defendant's release from state custody is warranted by his prior record and the seriousness of the conduct resulting in this violation case and Defendant's state nolo plea. The state case arose out of an altercation resulting in a death that was initially charged against Defendant as a murder. Accordingly, I conclude that further federal supervised release is warranted to protect the community and to assist Defendant in more positively transitioning back to the community.

Conclusion

After considering the sentencing factors set forth in 18 U.S.C. § 3553(a), I recommend that Defendant be sentenced to time served with twenty-four months of supervision with the following special conditions:

1. Defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office.
2. Defendant shall participate in a program of substance abuse treatment (inpatient or outpatient) as directed and approved by the Probation Office.
3. Defendant shall participate in a program of substance abuse treating (up to seventy-two drug tests per year) as directed and approved by the Probation Office.
4. Defendant shall contribute to the costs of such treatment and testing based on ability to pay as determined by the Probation Office.

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. Fed. R. Crim. P. 59; LR Cr 57.2. 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
March 27, 2023