

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 19-131-WES
	:	
DAVID POOLE	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, 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 David Poole is in violation of the terms of his supervised release and, if so, for recommended disposition. In compliance with that directive and in accordance with 18 U.S.C. § 3583(e) and Fed. R. Crim. P. 32.1, Defendant appeared initially on January 5, 2024, was detained and the matter was continued. At the next hearing on January 10, 2024, Defendant requested a revocation hearing. At the final hearing on February 6, 2024, Defendant waived a revocation hearing and admitted Violations 1-4; as to Violation No. 5, Defendant admitted that the government has evidence sufficient to prove the two misdemeanor assault charges by a preponderance of the evidence and the other charged conduct was dismissed on the government's motion. The parties presented sentencing arguments and Defendant waived his right of allocution.

Based on Defendant's admissions and the following analysis, I recommend that the Court impose a five-month term of incarceration to be terminated early for in-patient treatment if and when it becomes available. I further recommend a fourteen-month term of supervised release. During the term of supervised release, I recommend that Defendant be subject to the following conditions:

Upon the commencement of supervision, as directed and approved by U.S. Probation, the defendant shall participate in in-patient treatment as medically indicated for up to ninety days, to begin immediately upon his release from incarceration and shall comply with all policies, procedures and regulations of such program, including without limitation step-down and transition recommendations.

For the remainder of supervision, the defendant shall reside in a sober living program or at another residence approved in advance by U.S. Probation. While at any facility, the defendant shall comply with all the policies, procedures, and regulations therein.

Any change in residence must be approved in advance by U.S. Probation.

The defendant shall participate in a program of substance abuse treatment (inpatient or outpatient), as directed, and approved by the Probation Office.

The defendant shall participate in a program of substance abuse testing (up to 72 drug tests per year) as directed and approved by the Probation Office.

The defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office.

The defendant shall contribute to the cost of all ordered treatment and testing based on ability to pay as determined by the probation officer.

The defendant shall permit the probation officer, who may be accompanied by either local, state, or federal law enforcement authorities, upon reasonable suspicion of a violation of supervision, to conduct a search of the defendant's residence, automobile, workplace, computer, and other electronic communication or data storage devices or media.

I. BACKGROUND

On May 23, 2023, the Court granted the Probation Office's petition for the issuance of a warrant charging Defendant with the following four Violations:

Violation No. 1. Standard Condition: The defendant must live at a place approved by the probation officer. If the defendant plans to change where he lives or anything about his living arrangements (such as the people he lives with), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

David Poole left his residence on or about March 29, 2023, as evidenced by his father's reports, and at the time of this writing is residing in an unapproved residence in Pawcatuck, CT.

Violation No. 2. Standard Condition: The defendant must not knowingly leave the federal judicial district where he is authorized to reside without first getting permission from the court or the probation officer.

David Poole left the state of Rhode Island as evidenced by his admission to staying in Pawcatuck, Connecticut several times per week, starting on or about March 29, 2023.

Violation No. 3. Mandatory Condition: The defendant must refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

David Poole used marijuana as evidenced by his positive drug screens on May 5, 2023, and May 13, 2023. David Poole used cocaine as evidenced by his positive drug screen on May 5, 2023.

Violation No. 4. Special Condition: The defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office.

David Poole missed three intake appointments with the mental health treatment program on February 21, 2023, March 24, 2023, and April 10, 2023. Mr. Poole has yet to schedule a follow-up appointment as evidenced by program clinician reports.

On May 26, 2023, this warrant was executed but then revoked because Defendant was hospitalized based on medical exigencies due to excessive use of alcohol. The Court issued a summons ordering Defendant to appear on June 6, 2023. Instead of compliance with this Court's conditions, on May 27, 2023, Defendant left the hospital and travelled to his girlfriend's apartment in Stonington, Connecticut, where, among other things, he assaulted the girlfriend and his mother. He was arrested by Connecticut law enforcement and charged with a felony (strangulation in the second degree) and four misdemeanors; he was held by the State of Connecticut pending further proceedings. On December 22, 2023, Defendant pled *nolo contendere* to two misdemeanors – assault in the third degree – in Connecticut Superior Court and the other charges (including the felony) were dismissed. Defendant was sentenced to

consecutive sentences of 364 days with ninety days to serve for each misdemeanor, effectively 180 days to serve in total. Because he had been detained in Connecticut since May 27, 2023, Defendant completed this sentence and was released on probation by Connecticut only four days later, on December 26, 2023.

Meanwhile, immediately following the May 27, 2023, incident, on May 31, 2023, this Court granted Probation's amended petition, issued a warrant and added Violation No. 5 based on the May 27, 2023, conduct:

Violation No. 5. Mandatory Condition: The defendant must not commit another federal, state, or local crime.

On May 27, 2023, David Poole committed the offenses of Strangulation in the Second Degree (Felony), Assault in the Third Degree of Elderly or other (PREGNANT) (Misdemeanor), Assault in the Third Degree of Elderly or other (HANDICAPPED) (Misdemeanor), Criminal Mischief in the Third Degree (Misdemeanor), and three counts of Breach of Peace (Misdemeanor), as evidenced by the Stonington Police Department Arrest Report.

Based on this warrant, Defendant was transferred into the custody of the U.S. Marshals upon his release by Connecticut and appeared initially in this Court on January 5, 2024. At this hearing, Defendant was advised of the charges and consequences based on both Grade A violations (in reliance on the Connecticut charges, which included a felony crime of violence) and Grade C (in reliance on the Connecticut conviction, which was based on a plea to two misdemeanors). He was detained pending further proceedings.

At the next hearing (January 10, 2024), the parties requested a continuance to continue to investigate the facts underlying the May 27, 2023, conduct, as well as to develop a release plan. On February 6, 2024, the Court held the final hearing. Defendant waived his right to a revocation hearing, admitted Violations Nos. 1-4 and, with respect to Violation No. 5, admitted only that the government has evidence sufficient to prove the two misdemeanor assaults for

which he had been sentenced by Connecticut by a preponderance of the evidence. In reliance on the latter admission, the government moved orally to dismiss the balance of Violation No. 5; the Court granted the motion. Based on his admissions, I found Defendant guilty of violating the terms and conditions of his supervised release. The parties presented their sentencing recommendations and Defendant waived his right of allocution.

II. APPLICABLE LAW

Title 18 U.S.C. § 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 of 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 five years if the instant offense was a Class A felony, three years for a Class B felony, two years for a Class C or D felony, or one year for a Class E felony or a misdemeanor. In this case, Defendant was on supervision for a Class C felony; therefore, he may not be required to serve more than two years imprisonment upon revocation.

Title 18 U.S.C. § 3583(e)(2) provides that if the Court finds that the 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. In this case, the maximum term of supervised release is three years.

Title 18 U.S.C. § 3583(h) and § 7B1.3(g)(2) of the United States Sentencing Guidelines (“USSG”) provide that 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. In this case, the authorized statutory maximum term of supervised release is three years. The Court may impose the above-noted statutory maximum, minus the term of imprisonment that was previously imposed and any term that is to be imposed for this revocation.

Section 7B1.1 of the USSG 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) of the USSG provides that a Grade A violation constitutes conduct that is punishable by a term of imprisonment exceeding one year, and 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) states that upon a finding of a Grade C violation, the Court may revoke, extend or modify the conditions of supervision. In this case, as originally charged, Defendant had allegedly committed Grade A violations; however, with the

acquiescence of the government, Defendant has admitted to committing Grade C violations. Therefore, the Court may revoke, extend, or modify the conditions of supervision.

Should the Court find that the defendant has committed a Grade B or C violation, § 7B1.3(c)(1) states 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 the 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. Because this proceeding is based on Grade C violations, the first provision applies to this matter.

Pursuant to § 7B1.3(d), 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 an outstanding special assessment balance of \$200.

Section 7B1.4(a) of the USSG provides that the Criminal History Category is the category applicable at the time the defendant was originally sentenced. In this instance, Defendant had a Criminal History Category of II 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. In this case, Defendant has admitted that he committed Grade C violations; he has a Criminal History Category of II. Therefore, the applicable range of imprisonment for this violation is four to ten months.

Section 7B1.5(b) of the USSG 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.

III. ANALYSIS

On June 25, 2020, Defendant pled guilty to being a felon in possession of a firearm and was leniently sentenced to three years of probation with the first six months at a residential re-entry center, followed by three months of home detention with RF monitoring.

Despite significant efforts by Probation (including residential treatment), Defendant's compliance difficulties began almost immediately, reflecting an ongoing pattern of persistent substance abuse (fentanyl, cocaine and excessive alcohol), defiant disregard of the Court's conditions designed to create stability (particularly as related to residence and treatment), repeatedly lying to Probation about substance use, and criminal conduct while intoxicated. In September 2021, the Court revoked probation and sentenced Defendant to five months imprisonment. Supervised release restarted on December 22, 2021, and, again, did not go well. Defendant continued to use marijuana, cocaine and fentanyl, did not remain at his approved residence and refused to engage in substance abuse treatment. In 2022, the Court approved a

warrant based on a petition alleging new supervised release violations and detained Defendant until he could procure placement in a residential treatment program. After Defendant completed this treatment, in February 2023, he was sentenced to time served with a new term of supervised release. Supervised release commenced for the third time on February 13, 2023, with an expiration date of May 12, 2024.

Again, Defendant's noncompliance was immediate and significant, involving not just substance use arising from addictive disease, but also defiant disregard for the Court's conditions. This quickly led to the original petition alleging the first four Violations (leaving the approved residence and residing intermittently in Connecticut, use of controlled substances and failure to engage in treatment). On May 23, 2023, the Court granted Probation's petition for a warrant, resulting in Defendant's arrest in Connecticut, on May 26, 2023. However, the U.S. Marshals were so concerned about Defendant's state of alcohol intoxication on arrest that they asked the Court to revoke the warrant and substitute a summons so that he could be taken immediately to a nearby hospital. Instead of compliance, Defendant left the hospital and, on May 27, 2023, committed the assaults on his girlfriend and his mother that underlie Violation No. 5 as admitted.¹

For sentencing, the parties agree that the Court should classify Defendant's admitted conduct as Grade C violations, implicating a suggested guidelines range of four to ten months in jail.

¹ As described in the Probation Violation Report, this incident involved troubling violence, with law enforcement observations of Defendant's intoxication and the victims' physical injuries and property damage. However, the Court has conducted no fact finding regarding what actually happened and Defendant's admissions are limited to having committed assault against his girlfriend and his mother in the third degree. My recommendation is based on the finding that Defendant is responsible for what he admitted and not for the incident as described.

Based on Defendant's pattern of troubling and dangerous conduct, not just driven by addiction but also in defiance of the Court's trust and its conditions, the government urges that I recommend six months of incarceration, followed by fourteen months of supervised release with Defendant required to live in a sober living program or at such other residence as Probation may approve in advance. The government argues that such a sanction is necessary to deter and protect the community because Defendant's personal use of illegal drugs and alcohol (despite Probation's significant attempts to provide treatment) leads to dangerous criminal conduct, which places the community at risk.² Because such an incarcerative sentence would begin running as of December 26, 2023, when Defendant first was detained in federal custody, the government's approach would result in a total period of consecutive incarceration of approximately thirteen months since Defendant's arrest in Connecticut on May 27, 2023.

In rebuttal, Defendant readily concedes that the admitted conduct is serious but argues that substance use disorder played a large role in what happened. To address this appropriately, he asked me to make a recommendation that effectively holds his incarcerative sentence in abeyance, keeping him incarcerated (whether detained or serving a sentence) until a bed becomes available in a residential addiction treatment program with release immediately to such a program (and with the strict condition that he must engage in treatment as directed by Probation) so that he can get treatment. Based on counsel's estimate that a bed will not be available for four to six weeks, this approach would likely result in release to residential treatment after serving a total of approximately two and a half to three months since December 26, 2023, for a total time in custody since his arrest on May 27, 2023, of approximately nine to ten months. Defendant

² In support of the argument that Defendant's conduct on May 27, 2023, was troublingly dangerous, the government proffered as an exhibit the statement of one of the victims. For the reasons stated in note 1 *supra*, I am unable to make any of the requisite findings for consideration of hearsay during a supervised release hearing. Therefore, I declined to rely on or consider this hearsay statement. It is marked for identification and has not been admitted.

asks the Court to impose twelve (not fourteen) months of supervision to follow with the conditions recommended by Probation.

The government countered that Defendant's approach would be acceptable, but only if the Court requires Defendant to serve at least another month. That is, in the event that a bed were to become available sooner than estimated, the government objects vigorously to his being released so early to take it.

One of the parties' sentencing disputes relates to an issue that this Court cannot definitively resolve. Based on information provided by Defendant's Connecticut attorney,³ Defendant posited that, because of the federal detainer and a peculiarity of Connecticut state law, Defendant was ineligible for release that otherwise would have been automatic after serving only half of the sentence of 180 days. Therefore, he asks this Court to consider that his effective period of incarceration because of the federal violations includes this extra ninety-day period. Viewed from this perspective, if Defendant were released to residential treatment in approximately a month after my February 6, 2024, hearing (when it is estimated that a bed will become available), he argues that he would effectively have served more than five months (including the second half of the Connecticut sentence) because of the federal violations. The government vigorously disputes this perspective, arguing that it is sheer speculation to posit that, but for the federal detainer, Defendant would have been released by Connecticut in September 2023. Mindful that the government is right that it rests somewhat on speculation, I have considered Defendant's argument, but not given it substantial weight.

³ I note that Defendant was not sentenced to serve 180 days in Connecticut until December 22, 2023, four days before that sentence was completed on December 26, 2023. Therefore, if this representation by an unknown Connecticut attorney is reliable, it must rest on factors that informed Defendant's strategy in approaching Connecticut plea negotiations and not on actual eligibility for early termination after serving half of a sentence that had not been imposed.

Defendant waived his right to allocution.

To sufficiently address the breach of trust and protection of the community (including the risk to Defendant himself of overdose and exacerbation of his condition), as well as to deter Defendant from continuing this conduct, I recommend a default term of incarceration of five months. However, I also recommend that the Court terminate this term of incarceration early and immediately upon a bed becoming available at a residential treatment program that has been approved in advance by Probation. I do not recommend that the Court adopt the government's approach of requiring an available bed to be allowed to pass until Defendant has served a minimum period; that is, if a bed opens sooner than estimated, I recommend that Defendant be released to take it.⁴ Following Defendant's release, I recommend that the Court impose a term of fourteen months of supervision with the conditions listed below.

IV. CONCLUSION

After considering the appropriate factors set forth in 18 U.S.C. § 3553(a) and for the reasons expressed above, I recommend the Court impose a sentence of five months, but with early termination to enter treatment as described above. I further recommend that the Court impose a fourteen-month term of supervised release. During the term of supervised release, I recommend that Defendant be subject to the following conditions:

Upon the commencement of supervision, as directed and approved by U.S. Probation, the defendant shall participate in in-patient treatment as medically indicated for up to ninety days, to begin immediately upon his release from incarceration and shall comply with all policies, procedures and regulations of such program, including without limitation step-down and transition recommendations.

For the remainder of supervision, the defendant shall reside in a sober living program or at another residence approved in advance by U.S. Probation. While at

⁴ If an appropriate residential drug treatment bed approved by Probation becomes available before the District Court sentences Defendant on the violations, Defendant may file an emergency motion for the Court to release him to enter treatment as a bail condition.

any facility, the defendant shall comply with all the policies, procedures, and regulations therein.

Any change in residence must be approved in advance by U.S. Probation.

The defendant shall participate in a program of substance abuse treatment (inpatient or outpatient), as directed, and approved by the Probation Office.

The defendant shall participate in a program of substance abuse testing (up to 72 drug tests per year) as directed and approved by the Probation Office.

The defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office.

The defendant shall contribute to the cost of all ordered treatment and testing based on ability to pay as determined by the probation officer.

The defendant shall permit the probation officer, who may be accompanied by either local, state, or federal law enforcement authorities, upon reasonable suspicion of a violation of supervision, to conduct a search of the defendant's residence, automobile, workplace, computer, and other electronic communication or data storage devices or media.

Any objections to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen days of service of this report and recommendation. See Fed. R. Civ. P. 72(b); DRI LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See Brenner v. Williams-Sonoma, Inc., 867 F.3d 294, 297 n.7 (1st Cir. 2017); Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
February 12, 2024