

DOCKET NO.
02-1763

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-v-

TYRONE M. PERKINS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX ON APPEAL FOR DEFENDANT-APPELLANT,
TYRONE M. PERKINS**

Copy to:
Elizabeth S. Riker, Esq.
Assistant U.S. Attorney
Office of the U.S. Attorney
PO Box 7198
100 S. Clinton Street
Syracuse, New York 13261
(315) 448-0672

Respectfully submitted:

ALEXANDER BUNIN
Federal Public Defender
MELISSA A. TUOHEY, ESQ.
(As to Brief)
LISA A. PEEBLES, ESQ.
Asst. Federal Public Defender
4 Clinton Square, 3rd Floor
Syracuse, New York 13202
(315) 701-0080

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STATEMENT OF JURISDICTION PURSUANT TO F.R.A.P. 28 (a) (2).

1. This appeal is taken from a Judgment of Conviction entered against Defendant-Appellant, Tyrone M. Perkins, in the Northern District of New York by the Honorable Frederick J. Scullin, Jr., Chief United States District Court Judge, on December 4, 2002.

2. The District Court had subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, because this was a criminal case alleging violations of the laws of the United States under 18 U.S.C. § 514(a)(2).

3. Jurisdiction in this appeal is invoked in this Court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

4. A Notice of Appeal was timely filed on December 10, 2002, pursuant to Rule 4 (b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES PRESENTED

1. DID THE DISTRICT COURT FAIL TO RECOGNIZE THAT IT HAD THE LEGAL AUTHORITY TO GRANT THE DEFENDANT-APPELLANT A CONCURRENT SENTENCE PURSUANT TO U.S.S.G. § 5G1.3(c) and 18 U.S.C. § 3584(a)?

2. SHOULD THE DISTRICT COURT HAVE IMPOSED CONCURRENT TERMS OF IMPRISONMENT PURSUANT TO THE FACTORS ENUMERATED UNDER 18 U.S.C. § 3553(a)(2)?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On February 7, 2002, a Federal Grand Jury for the Northern District of New York returned a three-count indictment against the Defendant-Appellant Tyrone M. Perkins. (A 12). Each count charged that Mr. Perkins, on three separate dates, “did knowingly, willfully, and with the intent to defraud pass, present, and offer a false and fictitious document purporting and contriving through scheme or artifice to be an actual security and financial instrument issued under the authority of the United States,” in violation of 18 U.S.C. § 514(a)(2). (A 12). On May 1, 2002, Mr. Perkins entered a plea of guilty to count 1 of the Indictment pursuant to a sealed plea agreement. (A 9).

The above charges arose from three attempts by Mr. Perkins to collect \$1,000,000 on fraudulent sight drafts on October 30, 2001, November 15, 2001, and November 20, 2001. (A 12, PSR¹ ¶¶4,5,A). Each of the drafts purported to be issued by the United States Treasury. (A 12). Mr. Perkins was arrested on December 4, 2001 and ordered detained by the Hon. Gary L. Sharpe, United States Magistrate Judge. (PSR ¶3). Mr. Perkins was released on personal recognizance and under Pretrial Services Supervision on May 1, 2002 but violated the

¹ “PSR” refers to the United States Probation Department Presentence Investigation Report prepared on November 6, 2002 and submitted to this Court in a sealed envelope marked “Confidential.”

conditions of his release by testing positive for marijuana and was ordered detained on July 1, 2002. (PSR ¶3).

At the time of his arrest on December 4, 2001, Mr. Perkins was serving a term of supervised release resulting from a Judgment of Conviction entered in the United States District Court for the Northern District of New York on January 13, 1995, and amended on June 21, 1996, for Conspiracy to Distribute and to Possess with Intent to Distribute Crack Cocaine; Carrying a Firearm in Connection with Drug Trafficking; Possession of a Firearm by a Convicted Felon; in violation of 21 U.S.C. § 846, 18 U.S.C. §§ 924(c), 922(g)(1), respectively. (PSR ¶29). Mr. Perkins was sentenced to 48 months imprisonment and 4 years of supervised release. (PSR ¶29). Mr. Perkins's supervised release was revoked on two occasions for Failure to Abstain from the Use of Controlled Substances and he was sentenced to 7 months imprisonment and 1 year of supervised release for the first revocation, and 7 months imprisonment and 30 months of supervised release on the second revocation. (PSR ¶29).

A Petition for Warrant for Offender Supervision was filed on January 3, 2002, by the United States Probation Department charging Mr. Perkins with four violations. (A 15). Violation Number 1 alleged new criminal conduct in that Mr. Perkins was arrested on December 4, 2001 and charged with violating 18 U.S.C. §

514(a)(2). (A 15). Violation Number 2 alleged that Mr. Perkins failed to report to his probation officer on November 14 and 27, 2001. (A 15). Violation Number 3 alleged that Mr. Perkins tested positive for marijuana on August 7, 2001 and November 5, 2001. (A 15). Violation Number 4 alleged that Mr. Perkins was discharged from a substance abuse evaluation house due to loss of contact on October 8, 2001. (A 16).

According to the PSR, Mr. Perkins's Guideline range of imprisonment for violating 18 U.S.C. § 514(a)(2) was 46 to 57 months imprisonment. (PSR ¶54). Mr. Perkins was sentenced for this offense on December 4, 2002 before the Hon. Frederick J. Scullin, Jr., Chief United States District Court Judge. (A 10). Chief Judge Scullin granted the Government's motion for a downward departure pursuant to U.S.S.G. § 5K1.1 based upon Mr. Perkins's substantial cooperation and assistance to authorities and sentenced Mr. Perkins to 30 months imprisonment for this offense. (A 29).

At sentencing, Mr. Perkins admitted violating the terms of his supervised release that were imposed on January 20, 1995, a Grade A Violation. U.S.S.G. § 7B1.1(a)(1). (A 32). His guideline range of imprisonment for this violation was 18 to 24 months and Chief Judge Scullin sentenced Mr. Perkins to 20 months imprisonment. (A 32).

Mr. Perkins requested the district court to order the above terms of imprisonment to be served concurrently. (A 31). Chief Judge Scullin ordered that the terms of imprisonment be served consecutively stating, “I cannot impose a concurrent sentence under the Guidelines.” (A 31).

This appeal ensued as a result of the district court’s failure to recognize it had the legal authority under 18 U.S.C. § 3584 and U.S.S.G. § 5G1.3(c) to impose concurrent terms of imprisonment.

POINT I

MR. PERKINS'S SENTENCE MUST BE VACATED BECAUSE THE DISTRICT COURT FAILED TO RECOGNIZE IT HAD THE LEGAL AUTHORITY TO IMPOSE CONCURRENT TERMS OF IMPRISONMENT UNDER 18 U.S.C. § 3584(a) and U.S.S.G. § 5G1.3(c).

The district court denied Mr. Perkins's request for concurrent terms of imprisonment because the court believed that it could not impose a concurrent sentence under the Guidelines. (A 31). The United States Sentencing Guideline and the Statute that govern this issue are U.S.S.G. § 5G1.3(c) and 18 U.S.C. § 3584(a). Both the Guideline and the Statute reveal that a consecutive sentence was not mandatory in Mr. Perkins's case.

STANDARD OF REVIEW

18 U.S.C. § 3742 (a)(2) provides that a defendant may appeal a final sentence if the sentence was imposed as a result of an incorrect application of the United States Sentencing Guidelines. This case presents a purely legal question concerning the proper application of U.S.S.G. § 5G1.3(c) and 18 U.S.C. § 3584(a), subjecting the district court's decision to de novo review by this Court. See United States v. Maria, 186 F.3d 65,69 (2d Cir. 1999)(citing United States v. Kirvan, 86 F.3d 309, 311 (2d Cir. 1996)); United States v. Vazzano, 906 F.2d 879, 883 (2d Cir. 1990).

18 U.S.C. § 3584 provides in part:

(a) If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms *may* run concurrently or consecutively... Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. 18 U.S.C. § 3584(a)(emphasis added).

The corresponding Guideline, Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment, is set forth in U.S.S.G. § 5G1.3, which provides:

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(c) (Policy Statement) In any other case, the sentence for the instant offense *may* be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense. U.S.S.G. § 5G1.3(c)(emphasis added).

U.S.S.G. § 5G1.3(a) is not applicable to this case because Mr. Perkins was not serving a term of imprisonment at the time he was sentenced for violating 18 U.S.C. § 514(a)(2). The term “imprisonment” is used throughout the Guidelines to denote time in a penal institution. United States v. Phipps, 68 F.3d 159, 162-163 (7th Cir. 1995); Prewitt v. United States, 83 F.3d 812, 817-818 (7th Cir. 1996); see also United States v. Rosado, 2003 WL 57005, *3 (SDNY 2003). Although Mr. Perkins’s was on supervised release when he violated 18 U.S.C. §514(a)(2), supervised release is not considered a “term of imprisonment.” U.S.S.G. § 5G1.3(b) is also not applicable because Mr. Perkins’s violation of his supervised release was not fully taken into account in the determination of his offense level for violating 18 U.S.C. § 514(a)(2). In circumstances not covered under subsection (a) or (b), subsection (c) applies. See, U.S.S.G. § 5G1.3, comment.(n.3).

18 U.S.C. § 3584(a) states that terms of imprisonment imposed at the same time are to run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. The district court stated that the Guidelines did not permit a concurrent sentence. However, § 5G1.3(c), like 18 U.S.C. § 3584(a), contains permissive language and allows the court to impose a concurrent, partially concurrent, or consecutive sentence. This Circuit has specifically held

that § 5G1.3(c) “clearly vests broad discretionary authority in the sentencing court.” Maria, 186 F.3d at 69.

Although Application Note 6 to § 5G1.3(c) *recommends* a consecutive sentence where a defendant was on federal supervised release at the time of the instant offense and such supervised release was revoked, this Circuit has specifically held “that a sentencing court retains the discretion under Note 6 to sentence a defendant concurrently or partially concurrently.” Maria 186 F.3d at 72; see also United States v. Swan, 275 F.3d 272 (3d Cir. 2002). This is because Application Note 6 contains the word “should” rather than “shall.” Maria 186 F.3d at 70. “The common meaning of ‘should’ suggests or recommends a course of action.” Id. Thus, the district court was not required to impose consecutive terms of imprisonment under § 5G1.3(c).

U.S.S.G. § 7B1.3 (Policy Statement), cross referenced in Application Note 6 to § 5G1.3, does not change the result. The United States Sentencing Commission has issued “policy statements” but not guidelines for re-sentencing after a violation of conditions of supervised release. See, U.S.S.G. Ch. 7, Pt. B. Although U.S.S.G. § 7B1.3(f) provides that “[a]ny term of imprisonment imposed upon a revocation of probation or supervised release shall be ordered to be served consecutively to any term of imprisonment that the defendant is serving,” policy

statements are “merely advisory” and a sentencing court “only need consider them in rendering a decision for sentence.” United States v. West, 59 F.3d 32,33 (6th Cir. 1995)(citations omitted). Moreover, Mr. Perkins was not serving a term of imprisonment when he was sentenced for violating his terms of supervised release.

Despite the discretionary language contained in 18 U.S.C. § 3584(a) and U.S.S.G. § 5G1.3(c), Chief Judge Scullin stated at sentencing that he “cannot impose a concurrent sentence under the Guidelines.” (A 31). In Maria, this Circuit concluded that the district court’s statement that “a concurrent sentence was not permissible under the [] circumstances” was an expression of the district court’s erroneous belief that Application Note 6 bound the court to issue consecutively running sentences. Id. at 67, 68, 74. Similarly, the Tenth Circuit found the district court’s statement that “this sentence *cannot* be served with the State sentence” to be an “unequivocal comment” that the lower court did not understand its discretionary authority under the Guideline. See United States v. Tisdale, 248 F.3d 964, 979-980 (10th Cir. 2001).

Mr. Perkins’s sentence must be vacated because the sentencing record clearly reveals that the district court was not aware of its discretionary authority under U.S.S.G. § 5G1.3(c) and 18 U.S.C. § 3584(a) to impose a concurrent term of imprisonment. Maria, 186 F.3d at 70, 74.

POINT II

THE DISTRICT COURT SHOULD HAVE IMPOSED THE TERMS OF IMPRISONMENT TO RUN CONCURRENT PURSUANT TO THE FACTORS ENUMERATED UNDER 18 U.S.C. § 3553(a)(2).

In applying U.S.S.G. § 5G1.3(c), the Guidelines commentary directs the sentencing court to consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)). See, U.S.S.G. § 5G1.3(c), comment.(n. 3).

These factors include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing

Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.”
18 U.S.C. § 3553(a).

In addition, § 5G1.3(c) directs the sentencing court to be cognizant of:

(a) the type (e.g. determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(b) the time served on the undischarged sentence and the time likely to be served before release;

(c) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(d) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

U.S.S.G. § 5G1.3, comment.(n.3).

After considering the above cited factors, the district court should impose concurrent terms of imprisonment.

The history and characteristics of Mr. Perkins were set forth at sentencing and in the PSR. At the time of sentencing Mr. Perkins was taking the prescription drug Paxil, an anti-depressant for Post Traumatic Stress Disorder (PTSD). (PSR

¶45). Mr. Perkins was diagnosed with PTSD while incarcerated at FCI Ray Brook and this diagnosis was confirmed by McPike Addiction Treatment Center, Utica, New York in January of 1999. (PSR ¶46). Mr. Perkins’s final diagnosis at McPike was alcohol dependence; cannabis dependence; PTSD, and depressive disorder. (PSR ¶ 46). Mr. Perkins was physically abused until the age of 20 by his stepfather. (PSR ¶ 46). Mr. Perkins did not begin addressing and receiving help with these issues until he was incarcerated at FCI Ray Brook at the age of 26. After being released from Ray Brook, Mr. Perkins would smoke marijuana when he could not obtain Paxil to treat his PTSD. (PSR ¶ 46).

At sentencing Mr. Perkins, who is now 35 years old, expressed a desire to change his negative behavior. (A 22). Mr. Perkins told the court “I’ve learned through experience I just want to do what’s right, seek an education to better myself, help myself, and take care of my family. I don’t want to go through the pain and suffering I’ve been going through. I’ve learned my lesson, I don’t want to go through the same thing.” (A 22).

Even the Government recognized that Mr. Perkins has the potential to achieve a better way of life. Specifically, the Government stated at sentencing:

“I’ve never said this about a defendant before. I like Mr. Perkins. I’ve met him, I’ve spent a lot of time with him because every time he gets arrested he cooperates and he usually does a good job. This is

the second 5K motion I've made for him...And he is not a person who is without some very fine qualities. He's kept his word to me. I mean, he breaks the law, that's absolutely true, and we prosecute him every single time, but when he makes promises to us, he keeps them and I find it sort of paradoxical that he can't sort of keep the promise we all make to society which is to follow the laws when he can make them to the U.S. Attorney's office and keep them. He's also an articulate fellow. He's a pleasant personality and I have no doubt if he applied himself to some kind of meaningful employment, he would probably do a good job. It's hard to spend much time around him and not notice these qualities, so it's especially disappointing on occasions like this one where I come to court on his sentencings, and I can only hope that his remarks to you today about his sincere desire to change his life are in fact sincere..." (A 24-25).

While Mr. Perkins was incarcerated at FCI Ray Brook, he obtained his GED, took courses in business management, received an Asbestos Handling Supervisor Certificate issued by the New York State Department of Labor and took courses to become an Emergency Response Technician. (PSR ¶50).

Admittedly, Mr. Perkins did violate his terms of supervised release after he was released from Ray Brook by using controlled substances. (PSR ¶ 29). However, he made the unfortunate choice to use marijuana, rather than obtaining a prescribed medication, to treat his PTSD. This was clearly the result of his substance abuse problem that Mr. Perkins needs to address and has expressed a desire to address.

Mr. Perkins has a 14 year old daughter, a 3 year old and an 8 year old son. (PSR ¶ 43). Mr. Perkins's 3 year old son lives with Mr. Perkins's mother in Utica, New York. (PSR ¶ 43). Mrs. Perkins addressed the court at sentencing and explained that she needed Mr. Perkins's assistance because she was raising his son and also taking care of her ailing parents. (A 26).

Concurrent sentences would not frustrate the goal of providing "adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Persons on supervised release are aware that they will be subject to a term of imprisonment if they commit new criminal conduct during their period of supervised release.

An additional factor to be considered is "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7). Mr. Perkins's violation of 18 U.S.C. § 514(a)(2) did not require restitution to any victims since none of the fraudulent sight drafts were honored. While presentation of the sight drafts in and of itself is a serious offense, no loss occurred in this case.

Mr. Perkins's supervised release violation was incidental to his presentation of false sight drafts. Because the criminal conduct for the two convictions is inextricably linked, the sentence of 30 months of incarceration and three years supervised release for violating 18 U.S.C. § 514(a)(2) sufficiently accounts for Mr. Perkins's criminal conduct. Cf. United States v. Bakhtiari, 729 F.Supp.11 (SDNY

1989)(ordering sentence for defendant's two escape convictions to run concurrent to term of imprisonment previously imposed for weapons and false statement convictions because the escapes constituted criminal conduct entirely distinct from that underlying defendant's weapons and false statement convictions). Under the circumstances of this case, the district court should impose concurrent terms of imprisonment.

CONCLUSION

For the reasons advanced above, Mr. Perkins's sentence must be vacated and remanded to the District Court for re-sentencing.

DATED: June 29, 2006

Respectfully submitted,

ALEXANDER BUNIN
Federal Public Defender

By:

Lisa A. Peebles, Esq.
Asst. Federal Public Defender
Bar Roll No: 507041
Melissa A. Tuohey, Esq. (as to Brief)
Research and Writing Attorney
Bar Roll No.: 510807
Office of the Federal Public Defender
4 Clinton Square, 3rd Floor
Syracuse, New York 13202
(315) 701-0080