

No. 01-1276

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL ROSENBAUER
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of New York

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On October 6, 1994, Paul Rosenbauer pleaded guilty to a one-count Information charging him with making threats against the President. He was sentenced to 60 months in prison and three years of supervised release. Supervision commenced on February 11, 2000. A. 7.¹

On March 7, 2001, a petition to revoke Rosenbauer's supervised release was filed alleging he had committed another federal, state or local crime, to wit, the Class D Felony of Forgery, against the laws of New York State. Id. On May 2, 2001, a hearing was held before United States District Judge Charles J. Siragusa. During the hearing, Judge Siragusa revoked Rosenbauer's supervised release and sentenced him to 24 months imprisonment. A. 157.

The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and 18 U.S.C. § 3742(a), as an appeal from a final judgment of conviction and sentence in the United States District Court for the Western District of New York. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure on May 4, 2001. A. 1.

¹ The Appellant's Appendix is sequentially numbered and referenced by the letter "A."

STATEMENT REGARDING ORAL ARGUMENT

Rosenbauer requests oral argument in this case. This appeal involves a novel question in this Circuit regarding the right to allocution upon sentencing for violation of supervised release. The Court would be best served by hearing from counsel.

STATEMENT OF THE ISSUES PRESENTED

- (1) The District Court erred in denying Rosenbauer his right to address the court before passing sentence.

STATEMENT OF THE CASE

On October 6, 1994, Paul Rosenbauer was convicted of making threats against the President. He was sentenced to 60 months imprisonment. On February 11, 2000 he was released to supervision. A. 7.

The United States Probation Office for the Western District of New York filed a petition to revoke Rosenbauer's supervised release on March 7, 2001. Id. The basis for revocation was a pending state charge of forgery. On March 20, 2001, Rosenbauer pleaded guilty to attempted forgery in the second degree in Wayne County Court, New York. A. 20.

Hon. Charles J. Siragusa held a hearing on the revocation of Rosenbauer's supervised release on May 2, 2001. The government introduced evidence of the attempted forgery conviction. A. 15-24. The government also introduced the testimony of Newark Police Department Investigator John R. Clingerman to establish the facts supporting the state conviction. A. 28-70.

On cross-examination, and through the testimony of witnesses, Rosenbauer defended the alleged violation with evidence that Rosenbauer had accepted responsibility for the state crime in order to protect his father from prosecution. A. 70-147. Rosenbauer did not testify at the hearing.

At the conclusion of the hearing, Judge Siragusa stated he would announce

his decision. A. 148. The judge asked the attorneys if they had anything to say. They did not. *Id.* The court did not address Rosenbauer. He then announced he was revoking Rosenbauer's supervised release. A. 153. The court gave a lengthy explanation of the basis for revocation. The court then stated it was sentencing Rosenbauer to two years in custody, the maximum sentence allowed by statute. ("So I am, pursuant to 18 USC 3583, revoking your term of supervised release, and I'm sentencing you to two years in prison") A. 157. The court also fixed a fine. *Id.*

Rosenbauer's attorney then raised two issues. First, he objected to the authority of the Probation Office to file the petition. A. 158. Second, he asked that Rosenbauer be released before beginning his custody sentence. A. 159. It was at this time that the court stated:

I'm not inclined to do that, but in fairness I do not want to give – I indicated my sentence is two years; however, if you want to say anything, Mr. Krane, about the sentence that I'm proposing I would give you a chance. Mr. Rosenbauer, before we leave here I would give you a chance. *Id.*

Rosenbauer's attorney then inquired whether another term of supervised release would follow prison. The court stated it would not. A. 160. Attorney Krane

asked again for Rosenbauer to be released prior to serving his sentence. That was again denied. Id.

The court then addressed the defendant:

THE COURT: ...Mr. Rosenbauer, is there anything you want to say to me? We've had conversations before. As I said, I – I doubt whether there have been many violation of supervised release hearings that have taken this long, but I want to, because of your allegations concerning your interview, not merely receive evidence of plea minutes. So is there anything else you want to say to me?

THE DEFENDANT: Just that I would like to be placed as close as possible to home. I would like to go to McKeene.

THE COURT: You know what, while the sentence stands at two years, I am going to reccommend that you be placed as close to – I don't know what – I assume McKeene is the closest to Wayne County to –

THE DEFENDANT: Correct. Id.

After several more remarks about Rosenbauer's potential placement in the Federal Bureau of Prisons, and the possibility of an appeal, the hearing ended. A. 161-162.

SUMMARY OF THE ARGUMENT

The district court fixed Rosenbauer's sentence at the maximum punishment without first inquiring whether he wished to address the court.

ARGUMENT

A. Standard of Review

The right to allocution at sentencing is absolute. *United States v. Li*, 115 F.3d 125 (2d Cir. 1997). Resentencing is appropriate when the district court has not complied with that requirement. *United States v. Margiotti*, 85 F.3d 100 (2d Cir. 1996), *cert. denied*, 519 U.S. 940 (1996).

B. Denial of Right of Allocution

Without hearing from the defendant, or even defendant's counsel, the court stated it was sentencing Rosenbauer to the maximum statutory sentence of two years. A. 157. Later, after discussing voluntary surrender, a possible appeal, and prison placement, the court asked Rosenbauer whether there was "anything else you want to say to me." A. 160.

It is clear the court then realized it had failed to provide Rosenbauer an opportunity to address the court about his sentence, before the sentence was announced. However, instead of telling Rosenbauer that the court might reconsider the maximum punishment, the judge merely made a vague offer

allowing Rosenbauer to say something.² Rosenbauer, who had just heard his attorney arguing for voluntary surrender and a recommended placement in the Federal Bureau of Prisons, obviously thought the judge was talking about those issues. He merely asked “to go to McKeene.” *Id.*

There is no evidence that Judge Siragusa was offering to reconsider the maximum sentence. There is no evidence that Rosenbauer believed the judge would reconsider that sentence. In fact, the evidence shows the opposite, that Judge Siragusa made up his mind without hearing from Rosenbauer, and that Rosenbauer believed the judge had already made up his mind. The judge’s offer at that point was not a recognition of Rosenbauer’s right of allocution. It was too late.

This Circuit has held that the right of allocution pursuant to FRCP 32 is absolute. *United States v. Li, supra*. That right also exists at a resentencing following an appeal. *United States v. Maldonado*, 996 F.2d 598 (2d Cir. 1993). Other circuits have held that FRCP 32.1 provides the same right at sentencing for a violation of supervised release. *See United States v. Patterson*, 128 F.3d 1259 (8th Cir. 1997); *United States v. Rodriguez*, 23 F.3d 919 (5th Cir. 1994); *United States v. Carper*, 24 F.3d 1157 (9th Cir. 1994); and, *United States v. Waters*, 158

² Occurring almost four pages of transcript after announcing Rosenbauer’s sentence.

F.3d 933 (6th Cir. 1998).

In *Rodriguez and Carper*, the defendants were not present when sentence was imposed. However, in *Patterson*, the defendant was present and his counsel spoke on his behalf. The Eighth Circuit reversed the case because the court had not addressed the defendant prior to imposing sentence for the revocation of supervised release. *supra*.

The district court is not saved by its belated offer to allow Rosenbauer to speak. In *Green v. United States*, 365 U.S. 301 (1961), the Supreme Court was faced with an ambiguous record of whether the defendant received an opportunity for allocution. The Court stated:

However, to avoid litigation arising out of ambiguous records in order to determine whether the trial judge did address himself to the defendant personally, we think that the problem should be, as it readily can be, taken out of the realm of controversy. This is easily accomplished. Trial judges *before sentencing* should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak *prior to sentencing*. *at*, 305. (*emphasis added*).

That did not happen here. The judge addressed the Rosenbauer after sentencing him. It was unclear what issue he was giving the defendant an opportunity to talk about. The judge had made his mind up, stated his decision, and gave no indication the sentence was subject to reconsideration.

CONCLUSION

Rosenbauer's sentence should be reversed and a new hearing ordered at which the defendant is given an opportunity to address the court before sentence is imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lillian Spagnola, certify that today, April 24, 2002, a copy of the brief for appellant, a copy of the record excerpts, and the official record in this case, consisting of one appellate brief and appendix, were served upon, Bradley Tyler, Assistant United States Attorney, Western District of New York, by first class mail, postage prepaid to him at Office of the U.S. Attorney, 620 Federal Building, Rochester, New York 14614.

Lillian Spagnola

CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7).

1. Exclusive of the portions exempted by 2ND CIR. R. 32, this brief contains 1976 words.
2. This brief has been prepared in proportionally spaced typeface using Corel WordPerfect 8.0 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.
3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court's striking this brief and imposing sanctions against the person using the brief.

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