Docket No. **05-1652**

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

TYHEIM SMITH,

Defendant-Appellant.

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

Brief on Appeal for Defendant-Appellant

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Table of Contents

Table of Authorities ii

Statement of Jurisdiction 1

Statement of the Question Presented

I. Whether the District Court Erred in Its Classification of a Violation of Supervised Release ?. 2

II. Whether the Sentence Imposed for the Violation of Supervised Release was Unreasonable? 2

Statement of the Case 3

Statement of Relevant Facts 5

Summary of the Argument 9

Argument 10

Conclusion 17

Table of Authorities

Cases

Parr v. United States, 351 U.S. 513 (1956) 1

United States v. Chatelain, 360 F.3d 114 (2d Cir. 2004) 9, 14

United States v. Fleming, 397 F.3d 95 (2d Cir. 2005) 9, 10

United States v. Jones, 299 F.3d 103 (2d Cir.2002) 10

United States v. Kingdom, 157 F.3d 133 (2d Cir. 1998) 10, 15

United States v. McNeil, ___ F.3d ___,
2005 WL 1691552 84, J. Jacobs, (2d Cir. July 20, 2005) . . . . *passim*

United States v. Rubenstein, 403 F.3d 93 (2d Cir. 2005) 10

United States v. Sanchez, 225 F.3d 172 (2d Cir. 2000) 11

United States v. Selioutsky, 409 F.3d 114 (2d Cir. 2005) 10, 15

Statutes

18 U.S.C. § 3583(d)(Thomson/West 2004) 1

18 U.S.C. § 3583(e)(3)(Thomson/West 2004) 8

18 U.S.C. § 3742 (Thomson/West 2004) 1

21 U.S.C. § 841(a)(Thomson/West 2004) 3

28 U.S.C. § 1291 (Thomson/West 2004) 1

McKinney's N.Y. Penal Law § 221.25 (Thomson/West 2004) 12

Rules

Rule 32.1(b)(2)(A), Federal Rules of Criminal Procedure (West 2003) 13

Guidelines

U.S.S.G. § 7B.1.1, Application Note 1 (*West* 2003) 13

U.S.S.G § 7B1.1, Application Note 3 (*West* 2003) 12

U.S.S.G. § 7B1.4 (*West* 2003) 13, 15, 16

STATEMENT OF JURISDICTION

The revocation proceeding which is the subject of this appeal was conducted on March 10, 2005. Mr. Smith was sentenced to 34 months imprisonment. A notice of appeal was timely filed on March 29, 2005. A.

This sentence and revocation is a final judgment of the United States District Court for the Northern District of New York. Parr v. United States, 351 U.S. 513 (1956). Mr. Smith may not appeal directly to the Supreme Court. A sentence of imprisonment imposed for a violation of a condition of supervised release is a final judgment for purposes of appeal. *See* 18 U.S.C. § 3583(d). This Court has jurisdiction to review a challenge to a sentence and sentencing procedures pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF QUESTIONS PRESENTED

I. Whether the District Court Erred in Its Classification of a Violation of Supervised Release ?

II. Whether the Sentence Imposed for the Violation of Supervised Release was Unreasonable?

STATEMENT OF THE CASE

On July 12, 1999 Mr. Smith pled guilty to a violation of 21 U.S.C. § 841(a) admitting possession with intent to distribute crack cocaine. He was sentenced to 46 months imprisonment with a 5 year term of supervised release. His term of supervised release commenced on February 17, 2003. On October 20, 2003 a probation representative requested a modification of supervised release seeking placement in a community corrections center for 4 months. The modification was granted.

A petition seeking the first revocation of supervised release was sought and an arrest warrant issued on November 19, 2003. Mr. Smith appeared on July 19, 2004 after arrest on the warrant. The Federal Public Defender Office was appointed to represent Mr. Smith at the appearance. A detention hearing was held on July 22, 2004. Mr. Smith was initially detained but then released on July 27, 2004, only to be remanded on July 29, 2004. An amended petition and order was issued on July 23, 2004. A final hearing for revocation was held September 8, 2004. An additional condition of supervision added an electronic surveillance requirement. Mr. Smith commenced his second term of supervised release that same day.

On November 17, 2004 Judge Scullin of the Northern District of New York

issued a warrant pursuant to a petition filed by the probation officer on November 12, 2004. The Federal Defender Office was once again appointed and an appearance was scheduled for November 23, 2004. The defendant appeared and admitted the violation. He was again placed on 3 years supervised release and released on conditions previously set.

An initial appearance was held on February 18, 2005, at which time Mr. Smith was detained. On March 1, 2005, an preliminary revocation proceeding was held at which time Mr. Smith was prepared to admit the five violations alleged in the petition. The District Court scheduled a later hearing as a result of the government's insertion of additional criminal conduct into the proceedings. The hearing and revocation proceeding was held on March 1, 2005. After hearing testimony, the district court judge found the defendant had committed a Grade A violation and sentenced him to 34 months imprisonment. This appeal followed.

STATEMENT OF RELEVANT FACTS

The petition for Warrant or Summons forming the basis for the arrest in the presently challenged revocation was sought on December 29, 2004 and issued on January 5, 2005. On January 11, 2005 the defendant failed to appear pursuant to the summons for an initial appearance. Mr. Smith had not received the summons because he was no longer at the address to which it was sent. The district court judge issued a bench warrant. The summons issued on January 5, 2005 was returned as undeliverable on January 19, 2005. Mr. Smith appeared before the court for an initial appearance on February 18, 2005. He was remanded to the custody of the U.S. Marshals.

On March 1, 2005 at a preliminary revocation hearing, Mr. Smith appeared and was ready to admit the violations. The district court recognized the violations as Class C with a Criminal History Category of I. The district also recognized the Sentencing Guidelines policy recommended a sentence of 3 to 9 months. A. 30 The court also indicated that the defendant failed to appear at the hearing on those violations which would impact the sentence. A. 31. This failure was later attributed to Mr. Smith not having received notice of the appearance. Mr. Smith indicated he was ready to admit all five of the listed violations. A. 31

Counsel for Mr. Smith sought to offer additional facts to mitigate some of

the sentence. A. 32. These facts included: the believed faulty nature of the electronic monitoring, the misconstruction of the attendance at treatment sessions and the failure of Mr. Smith to receive notice of the appearance. A. 32-34.

The Government upon asked for their position brought up a new violation based upon an allegation of recent criminal conduct. The government alleged that when Mr. Smith was arrested five pounds of marijuana were found at the apartment in which he was arrested as an additional aggravating factor. A. 38. Defense counsel objected to the consideration of the factor without more information supporting the reliability of the allegation. A. 38-40. The district court advised the government to draft an additional violation petition. A. 42. A hearing was set at which time evidence would be heard. A. 42-43

The hearing was held by video on March 10, 2005. The defendant would not admit the added violation related to the marijuana. A. 48. The government presented one witness. Richard Sprague, a detective sergeant with the City of Troy Police testified he was called by U.S. Marshal, Deputy Oprava, (sic.) who had taken Mr. Smith into custody and that they had found drugs in the apartment where they had taken him in custody. A. 53. Upon arriving at the apartment, Detective Sprague read Mr. Smith his *Miranda* warnings. A. 53-54. According to his testimony, he questioned Mr. Smith about the marijuana and Mr. Smith told

him the marijuana was his, how much there was, and where additional amounts were located. A. 54. The bags of marijuana were entered as exhibits. A. 55. Counsel for the defendant reserved his right to later assert issues under the Fourth, Fifth and Sixth Amendments related to the exhibits. A. 56. The witness also testified that a number of Ziploc baggies and cash were seized. A. 57.

Defense counsel presented one witness, Deputy Marshal Michael Woerner. Deputy Woerner testified that he went to an apartment where he believed Mr. Smith was located. At some point he entered the apartment. A. 66. He was accompanied by individuals from state police, state parole and the city of Troy Police Department. Mr. Smith was almost instantaneously arrested upon entry. A. 67. The marijuana was found in a bedroom. The marshal then contacted a Troy Police detective and informed him of the drugs. Representatives from the local police agencies arrived at the apartment and took control of the drugs and mirandized Mr. Smith.

The district court judge found by a preponderance of the evidence that the defendant was in possession of marijuana on February 18, 2005 and in violation of a condition of his supervised release. A. 69. Counsel for Mr. Smith argued that the charge was a level B violation, changing the applicable policy statement range from 3 to 9 months to 4 to 10 months. A.69. The government argued that the

violation was a grade A violation, felony possession of marijuana, a controlled substance offense with a range of 12 to 18 months. A. 70. Counsel for Mr. Smith further argued that the violation did not involve trafficking and for that reason was a Grade B violation. A. 70-71. The Government countered stating that there need not be trafficking because the definition under U.S.S.G. § 7B1.1 required the conduct only need constitute a state offense punishable by imprisonment exceeding a year. A. 71.

The Court found that Mr. Smith had committed a Grade A violation[1]. Mr. Smith was sentenced to 34 months without imposition of an additional term of supervised release based on the court's finding as to the violation and the admissions of the other violations. A. 73.

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[1] The court also expressed that even if it were a Grade B violation it had the authority under the sentencing guidelines and pursuant to Title 18, United States Code, Section 3583(e)(3) to sentence the defendant to any term of imprisonment not to exceed more than three years, that hasn't already been served by him for violations. A.73.

SUMMARY OF THE ARGUMENT

The District Court elevated and found the defendant guilty of a violation not alleged in the petition violating the due process rights of Mr. Smith. *See* United States v. Chatelain, 360 F.3d 114, 121 (2d Cir. 2004)(Due process requires defendant receive written notice of the charges against him before his release is revoked). The violation as alleged in the petition did not convey that a drug trafficking offense was the basis for the violation. As a result, the discretionary sentence range was erroneous and any sentence derived therefrom unreasonable.

In addition, the sentence is also unreasonable because it exceeded the advisory range without stating an adequate basis for so doing. *See* United States v. Fleming, 397 F.3d 95 (2d Cir. 2005).

ARGUMENT

The finding of a violation of supervised release related to the interpretation of a guideline is reviewed *de novo*. United States v. Rubenstein, 403 F.3d 93, 99 (2d Cir. 2005). A sentence resulting from a violation of supervised release is reviewed for unreasonableness. United States v. Fleming, 397 F.3d 95, 95, 99 & at n. 5 (2d Cir. 2005).

A sentencing judge may impose a term lower or higher than the recommended Guidelines range, but must start with a legally correct interpretation of the Guidelines. United States v. Kingdom, 157 F.3d 133, 1136 (2d Cir. 1998). A District Court's interpretation of the federal sentencing guidelines will be reviewed *de novo*. United States v. McNeil, ___ F.3d ___, 2005 WL 1691552 84, J. Jacobs, (2d Cir. July 20, 2005). An error in the determination of the applicable guidelines range may result in the sentence ultimately being deemed unreasonable. United States v. Selioutsky, 409 F.3d 114, 118-19 (2d Cir. 2005).

I. The Sentence for the Violation of a Condition of Supervised Release Violated Due Process

Due process requires, inter alia, that a defendant charged with violating a condition of supervised release be afforded notice of the charges against him before the court may revoke his supervised release. *See, e.g.*, United States v.

Jones, 299 F.3d 103, 109 (2d Cir.2002)("constitutional guarantees governing revocation of supervised release are identical to those applicable to revocation of parole or probation"); United States v. Sanchez, 225 F.3d 172, 175 (2d Cir. 2000) (same). A violation petition must allege the actual conduct forming the basis for the finding of the violation or it would violate Due Process. McNeil, 2005 WL 1691552 *5.

In *McNeil*, the violation as charged alleged a Grade B violation. However, the defendant, as in this case, was sentenced on a Grade A violation. In *McNeil* and in the present case the classification of the violation rested upon whether the violation as alleged supported a finding of a Grade A violation. To support such findings the District Court would have had to apply the definition in Section 7B1.1(a) of, "a controlled substance offense" that is "punishable by a term of imprisonment exceeding one year." This definition is further narrowed by Section 4B1.2 delineating a "controlled substance offense" to include, (i) distribution or (ii) possession with intent to distribute. *See* U.S.S.G § 7B1.1, Application Note 3 (Instructing that definitions in § 4.B.2 apply when determining offense levels for § 7B1.1.) A Grade B violation, in comparison, covers any offense punishable by imprisonment exceeding a year. U.S.S.G. § 7B1.1.

The petition for the violation against Mr. Smith alleged,

> On February 10, 2005, Smith was arrested by the U.S. Marshal's Service in an apartment located in the (sic.) Troy, NY. During the arrest, a subsequent search followed and marijuana in excess of 4 pounds was found. According to the arresting officer, Smith admitted that the marijuana belonged to him.

A. 45-46.

The petition also indicated that the Marshal Service contacted the Troy Police Department who filed a warrant charging Mr. Smith with Criminal Possession of Marijuana in the Second Degree.[2] Neither the petition allegation nor the underlying state offense included the requirement of intent to distribute or distribution. A. 45-46.

As in *McNeil*, the actual conduct alleged supports only a finding of simple possession and as such is defined as a Grade B violation. McNeil, 2005 WL 1691552*5 (Finding that where the District Court could only adjudge that the defendant violated a statute that forbids simple possession, the appropriate Guidelines range was for that of a Grade B violation). In the case of Mr. Smith a

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[2] The applicable New York statute charges that,

> A person is guilty of criminal possession of marihuana in the second degree when he knowingly and unlawfully possesses one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of more than sixteen ounces.

McKinney's Penal Law § 221.25 (Thomson/West 2005).

Grade B violation would have corresponded to a sentence range of 4 to 10 months according to U.S.S.G. § 7B1.4. Instead Mr. Smith was found to have a Grade A violation with a corresponding sentence range of 12-18 months. Mr. Smith received 34 months.

The Guidelines were incorrectly interpreted and as a result misapplied. In the present case, as in *United States v. McNeil*, the probation department failed to allege a factual basis supporting a Grade A violation in the petition. 2005 WL 1691552 . Specifically, the Government failed to allege a basis for a finding of "trafficking". As a result of that failure and the requirement that a grade classification rest on the "actual conduct" charged as supporting the revocation, the court could not define the violation as a Grade A. 2005 WL 1691552 *5. *See* U.S.S.G. § 7B.1.1, Application Note 1. The violation as alleged in the present case was no more than a Grade B violation. The Government argued, over the objection of defense counsel that "trafficking" was not required. A. 71-72 . The District Court then found a Grade A violation. A. 73. The District Court found that the Government had proven by a preponderance of the evidence that, "the defendant was in possession of marijuana on February 18, 2005, and in violation of the terms and conditions of supervised release, ..." A. 69. This finding does not support a Grade A violation. It also highlights the lack of factual basis for the

Government's argument that "trafficking had occurred. An argument that was also in error. McNeil, 2005 WL 1691552 *5.

The District Court could not *sua sponte* amend the allegation to and make the Grade A finding because to do so violated due process and Rule 32.1(b)(2)(A)of the Federal Rules of Criminal Procedure. *See* McNeil, 2005 WL 1691552 *5 ("It does not matter that there was evidence of trafficking; the District Court adjudged *only* that [the defendant] violated the statute that forbids simple possession.")(*emphasis in original)*. *See also* United States v. Chatelain, 360 F.3d 114, 121 (2d Cir. 2004)(Due process requires adequate notice in a proceeding to revoke probation)(Citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). The finding of a Grade A violation by the District Court absent an allegation within the petition supporting such a finding exposed Mr. Smith to an increased punishment without adequate notice of the charge.

II. **The Sentence Imposed Was Unreasonable Because it was Based Upon An Incorrect Finding by the District Court Increasing the Recommended Guideline Range.**

Upon imposing sentence for a supervised release violation the sentencing judge is free to assess a term lower or higher than the recommended Guidelines range, but must start with a legally correct interpretation of the guidelines. *See* McNeil, 2005 WL 1691552 *4. As a result of the error in adjudicating the violation, the court incorrectly formulated the advisory guideline range. The highest Guidelines sentence available for the Grade B violation as charged was exceeded by 24 months. Had it been properly adjudicated a Grade B violation the advisory sentence range would have been 4 to 10 months according to U.S.S.G. § 7B1.4.

Assessing the legality of a sentence determination must start with a legally correct interpretation of the Guidelines. *See* United States v. Kingdom, 157 F.3d 133, 1136 (2d Cir. 1998). An error in the interpretation of the Guidelines resulting in the determination of the applicable guidelines range results in an unreasonable sentence. McNeil, 2005 WL 1691552 *4; United States v. Selioutsky, 409 F.3d 114, 118-19 (2d Cir. 2005).

Although a district court has the discretion to impose a sentence not conforming to the policy statements of the Guidelines, in so doing it must

unambiguously state the basis for its sentencing. Kingdom, 157 F.3d at 136. In the present case, it appears the judge incorrectly believed Mr. Smith to be guilty of a Grade A violation. The district court judge indicated the sentence was based upon the finding of the Grade A violation. A. 73. Although there appears to be some indication that he may have arrived at the same sentence, it is difficult to know how married his sentence considerations were to the belief that Mr. Smith was guilty of a Grade A violation. *See* McNeil, 2005 WL 1691552 *4 (Sentence for committing a Grade A violation was erroneous because the violation charges was classified as a Grade B violation under U.S.S.G. § 7B.1.1). *See also* Kingdom, 1257 F.3d at 136 (18 U.S.C. § 3553(a) imposes an obligation of correct interpretation of the Guidelines and remand is necessary when uncertain about a district court's sentence after error found). Lastly, this Court cannot ascertain whether the sentence for the violation was intended to exceed the highest Guidelines sentence by 16 months or more. Nor did the District Court adequately state the factual bases for the sentence imposed.

CONCLUSION

WHEREFORE, Mr. Smith respectfully requests that his sentence be vacated and his case remanded with instructions to sentence him according to the level of violation charged.

DATED: August 5, 2005

Respectfully submitted,

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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 3068 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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