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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

September 12, 2024

The Honorable Patricia A. Howard
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: State v. Terrell Denard Knightner – Appellate Case #2023-001436

Dear Ms. Howard:

This Court held an oral argument in the above-referenced criminal appeal at 11:00 a.m. on September 11, 2024, during its term of court conducted at the Citadel. Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, the State believes the following supplemental citation—which was referenced by the State during the oral argument—may be relevant to this Court’s resolution of the case: United States v. Johnson, 138 F.3d 115, 117-118 (4th Cir. 1998) (declining to review the merits of Johnson’s appellate challenge to the special conditions of his supervised release upon concluding his appeal from an order revoking his probation was an improper and untimely means of challenging conditions that were imposed at the time of he was originally convicted and sentenced). A copy of the referenced decision has been included with this letter. Thanks, and please just let me know if you have any questions or need any additional information.

Sincerely,

Mark R. Farthing
Senior Assistant Deputy Attorney General
S.C. Bar Number 76901

MRF/

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division



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Declined to Extend by United States v. Castellano, 4th Cir.(Va.),
February 17, 2023

138 F.3d 115

United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Keith Bernard JOHNSON, a/k/a Bonji
Denard Crane, Defendant–Appellant.

UNITED STATES of America, Plaintiff–Appellee,

v.

Keith Bernard JOHNSON, a/k/a Bonji
Denard Crane, Defendant–Appellant.

Nos. 96–4541, 97–4596.

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Argued Dec. 5, 1997.

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Decided March 4, 1998.

Synopsis

Defendant was convicted in the United States District Court for the Western District of North Carolina, Robert D. Potter, Senior District Judge, of producing counterfeit birth certificates, and was sentenced to term of imprisonment and term of supervised release. Defendant was subsequently convicted in the District Court of failing to surrender for service of sentence, and was sentenced to term of imprisonment and term of supervised release. Following appeal and remand from Court of Appeals with instructions to consider defendant's ineffective assistance claim, the District Court revoked defendant's supervised release and imposed consecutive sentences for the two convictions. Defendant appealed. The Court of Appeals, Wilson, Chief District Judge, sitting by designation, held that: (1) appeal from order revoking supervised probation was improper means of appealing conditions of supervised release; (2) District Court had authority to impose consecutive sentences; (3) District court properly considered pertinent statutory factors in exercising its discretion as to whether to impose concurrent or consecutive sentences; and (4) revocation order did not implicate rule that sentence orally imposed in open court takes precedence over later written conflicting order.

Affirmed.

Attorneys and Law Firms

***116 ARGUED:** Thomas Norman Cochran, Federal Public Defender's Office, Greensboro, North Carolina, for Appellant. Brian Lee Whisler, Assistant United States Attorney, Charlotte, North Carolina, for Appellee. **ON BRIEF:** William E. Martin, Federal Public Defender, John Stuart Bruce, Deputy Federal Public Defender, Greensboro, North Carolina, for Appellant. Mark T. Calloway, United States Attorney, Charlotte, North Carolina, for Appellee.

Before WILLIAMS, Circuit Judge, WILSON, Chief United States District Judge for the Western District of Virginia, sitting by designation, and MORGAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Chief Judge WILSON wrote the opinion, in which Judge WILLIAMS and Judge MORGAN joined.

OPINION

WILSON, Chief District Judge:

Keith Bernard Johnson appeals the revocation of his supervised release and the resulting consecutive sentences imposed by the court based on two separate convictions, one for producing counterfeit birth certificates in violation of 18 U.S.C. § 1028 and the other for failing to surrender for service of his sentence in violation of 18 U.S.C. § 3146(a)(2).¹ Johnson makes three arguments. First, Johnson maintains that, when it initially sentenced him, the district court improperly required drug screening, made inadequate findings concerning his ability to pay a fine and the costs of court-appointed counsel, and unconstitutionally delegated the fine payment schedule to the probation office. Second, Johnson argues that the district court improperly imposed consecutive sentences when it revoked his supervised release. Third, he contends that the district court could not reimpose the balance of the fine and costs of court-appointed counsel in the written judgment order revoking his supervised ***117** release after it failed to reimpose them in open court. We find that the proper time for Johnson to have challenged the district court's drug screening order and the imposition of the fine and costs of court-appointed counsel would have been in

the appeal of the judgment of conviction rather than in this appeal of the district court's revocation order, that the district court properly imposed consecutive sentences, and that the district court did not err when it reimposed Johnson's fine and reimbursement obligation. Accordingly, we affirm.

1 Johnson was indicted for, and pleaded guilty to, violating § 1028 under the name Bonji Denard Crane.

I.

In April 1993, Johnson pled guilty in the United States District Court for the Western District of North Carolina (Case No. 3:93CR-29-01, hereinafter "CR-29") to producing counterfeit birth certificates in violation of § 18 U.S.C. § 1028(a)(1). The court sentenced Johnson to five months imprisonment and three years of supervised release, and assessed a \$500 fine to be paid on an installment schedule prepared by the probation office. The district court also imposed the standard conditions of supervised release as well as various special conditions, including drug screening as directed by the probation office, the payment of unpaid fines, and reimbursement for the costs of court-appointed counsel. Johnson did not appeal.

After Johnson failed to surrender for service of his sentence, the grand jury indicted him (Case No. 3:93CR-268, hereinafter "CR-268") for violating § 18 U.S.C. § 3146(a)(2).² A jury found Johnson guilty, and the court sentenced him to sixteen months imprisonment, to run consecutively with his earlier sentence, and two years of supervised release. The court also imposed the standard conditions of supervised release and various special conditions, including drug screening as directed by the probation office, the payment of unsatisfied fines, and the maintenance of lawful employment. Johnson appealed on several grounds. He did not raise any of the grounds he raises in this appeal. This court affirmed in part and remanded with instructions to consider, under 28 U.S.C. § 2255, an ineffective assistance of counsel claim raised by Johnson in the appeal.

2 § 3146(a)(1) states: "Whoever, having been released under this chapter knowingly ... fails to appear before a court as required by the conditions of release ... shall be punished

as provided in [§ 3146(b)]." § 18 U.S.C. § 3146(a)(1).

Johnson did not fare well on supervised release. Most pertinent to this appeal, Johnson refused to work, falsified work records, made no discernible serious effort to pay his fine, and failed to submit to drug screening on eight occasions. Predictably, the probation office petitioned the court to revoke Johnson's supervised release in both CR-29 and CR-268. At the July 1996 revocation hearing, the district court found that Johnson had violated five of the special conditions of his supervised release in CR-29, including the special condition that Johnson submit to drug screening and the special condition that Johnson pay his fine. The district court also found violations of two of the special conditions of Johnson's supervised release in CR-268, the special condition that Johnson submit to drug screening and the special condition that Johnson maintain lawful employment. The court revoked Johnson's supervised release in each case and sentenced Johnson to consecutive terms of imprisonment, eleven months in CR-29 and ten months in CR-268.

The court entered its written revocation orders on July 15, 1996, imposing the consecutive terms of imprisonment. Additionally, the revocation order in CR-29 noted: "[b]alance of CAC will remain in effect pursuant to SRT Violation Hearing July 1, 1996" and "[f]ine will remain in effect pursuant to SRT Violation Hearing held July 1, 1996." The court did not reimpose supervised release.

II.

We conclude that we lack jurisdiction over Johnson's first argument challenging various special conditions of his supervised release. Rule 4 of the Rules of Appellate Procedure requires the defendant to file his notice of appeal "within 10 days after the entry either of the judgment or order appealed from, or a notice of appeal by the Government." Fed. R.App. P. 4(b). *118 The district court imposed the challenged special conditions in CR-29 in July 1993, and in CR-268 in March 1994. If Johnson found those conditions objectionable, he should have raised his objections in a timely appeal of that initial sentence. An appeal from the revocation order will not suffice. *See United States v. Nolan*, 932 F.2d 1005, 1007 (1st Cir.1991); *United States v. Stine*, 646 F.2d 839, 844-45 (3d Cir.1981).³ Consequently, we decline to review the merits of

Johnson's challenges to the special conditions of supervised release imposed by the initial judgements of conviction.⁴

3 In *United States v. Taylor*, this court permitted the defendant to challenge the revocation of his probation for non-payment of his fine despite his failure, in an earlier appeal, to challenge the fine based on his inability to pay. See 321 F.2d 339, 341–42 (4th Cir.1963). *Taylor* is clearly distinguishable. In that case, the defendant did not challenge the imposition of his fine. See *id.* Instead, he challenged the propriety of the revocation based upon his failure to pay a fine he allegedly was unable to pay. See *id.* (noting that the defendant's challenge was based “upon his impecunious state in 1963 when defaulting, not in 1961 when probationed”).

4 The government contends that the mandate rule precludes these challenges. Unless there are exceptional circumstances, the mandate rule precludes relitigation of issues expressly or impliedly decided on appeal or waived because not presented in the district court. *United States v. Bell*, 5 F.3d 64, 66 (4th Cir.1993). However, because we conclude that we are without jurisdiction, we do not address this contention.

III.

Johnson argues that 18 U.S.C. § 3624(e) and Chapter 7 of the Sentencing Guidelines do not authorize consecutive sentences for “simultaneous violations of supervised release,” and that, even if they do authorize consecutive sentences, the district court abused its discretion when it failed to explain why it imposed them. In arguing that § 3624(e) precludes consecutive sentences, Johnson makes essentially the same argument rejected by the Eighth Circuit in *United States v. Cotroneo*, 89 F.3d 510, 512–13 (8th Cir.), cert. denied, 519 U.S. 1018, 117 S.Ct. 533, 136 L.Ed.2d 419 (1996), an argument we also reject. According to that argument, because the plain language of § 3624(e) requires terms of supervised release to run concurrently, terms of imprisonment following revocation also must run concurrently.⁵ See *Cotroneo*, 89 F.3d at 513. We also reject Johnson's contention that the district court abused its

discretion by not demonstrating on the record that it had considered the relevant factors under 18 U.S.C. § 3553(a) when sentencing Johnson. We address Johnson's arguments in turn.

5 Section 3624(e) provides that “[t]he term of supervised release ... runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release.” 18 U.S.C. § 3624(e).

A.

We reject Johnson's contention that § 3624(e) controls the imposition of terms of imprisonment upon revocation of supervised release. Its plain language lends no support for the notion that it governs anything other than “[s]upervision after release.” See 18 U.S.C. 3624(e). Instead, § 3584, which governs “[m]ultiple sentences of imprisonment” and which is not limited by its language to terms of imprisonment imposed in the initial judgment of conviction, controls. See 18 U.S.C. § 3584. According to § 3584(a), “[i]f multiple terms of imprisonment are imposed on a defendant at the same time, ... the terms may run concurrently or consecutively.” 18 U.S.C. § 3584(a). *United States v. Cotroneo* is instructive.

In *Cotroneo*, the defendant was serving concurrent terms of supervised release for credit card fraud and escape. See 89 F.3d at 513. The district court revoked the defendant's supervised release and sentenced him to twenty-four months consecutive imprisonment on each conviction. See *id.* at 512. The defendant appealed and made the same argument Johnson makes here. See *id.* at 512–13. The Eighth Circuit concluded that “[b]ecause § 3584(a) is not limited, in terms, to the imposition of sentence at the conclusion of trial (as distinguished from the imposition of sentence after revocation of a defendant's *119 supervised release) ... the District Court retains discretion to impose either concurrent or consecutive sentences after revocation of a defendant's supervised release.” *Id.* at 513. In contrast, the

court continued, § 3624(e) “governs the trial court's initial imposition of terms of supervised release, not its subsequent sentencing discretion upon revocation of that supervised release.” *Id.* Accordingly, the Eighth Circuit held that § 3624(e) does not preclude consecutive terms of imprisonment upon revocation of supervised release. *See id.* Instead, the court concluded, “ § 3584(a) allow[s] the District Court to impose consecutive rather than concurrent sentences upon revocation of ... concurrent terms of supervised release.” *Id.* We agree. Accordingly, we hold that the district court had the authority to impose consecutive sentences upon Johnson when it revoked his supervised release.

B.

Section 3584(a) gives district courts discretion in choosing concurrent or consecutive terms of imprisonment. *See* 18 U.S.C. § 3584(a). In exercising that discretion, § 3584(b) directs only that sentencing courts consider the factors set forth in § 3553(a). *See* 18 U.S.C. § 3584(b). Those factors include: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most efficient manner; the kinds of sentences available; pertinent guidelines; pertinent policy statements; the need to avoid unwanted sentence disparities; and the need to provide restitution.⁶ *See* 18 U.S.C. § 3553(a). We presume in *non-departures*, unless some contrary indication exists, that a district court properly considered the pertinent statutory factors.

⁶ The sentencing court's discretion is necessarily proscribed in part, however, in order to implement “the statutory mandate to the Sentencing Commission to promulgate guidelines to be used by courts in determining whether to sentence concurrently or consecutively.” *United States v. Rogers*, 897 F.2d 134, 137 (4th Cir.1990). USSG § 5G1.3 directs that some sentences run consecutively. We have reconciled this guideline

with § 3584(a) by applying a departure analysis. *See Rogers*, 897 F.2d at 137. For example, if the district court follows the appropriate procedures for departing and properly justifies its departure, the district court may exercise its discretion and depart to impose a concurrent sentence when a consecutive sentence is called for by the guidelines. *See id.*

The *advisory* Chapter 7 policy statements of the guidelines apply to the revocation of supervised release. They also specify circumstances under which sentences imposed upon revocation should run concurrently or consecutively. A close reading of the pertinent provisions—USSG § 7B1.3(f), Application Note 4, and the “Introductory Commentary” to Chapter 7 (1995 Guidelines Manual)—reveals no official policy favoring or disfavoring running terms of imprisonment, resulting from terms of supervised release that are revoked together, consecutively *to each other*. This is in contrast to the clear policy that “any sentence of imprisonment for a criminal offense that is imposed *after* revocation of probation or supervised release be run consecutively to any term of imprisonment imposed upon revocation,” or that a sentence imposed upon revocation be run consecutively to an undischarged term of imprisonment. USSG § 7B1.3, comment. (n.4) (emphasis added); *see United States v. Puckett*, 61 F.3d 1092, 1098 (4th Cir.1995).

Statutory changes and the sentencing guidelines have dramatically altered the sentencing landscape. Congress never intended, however, for sentencing to become a hyper-technical exercise devoid of common sense. The district court heard each of these cases (a plea in one and a jury trial in the other); reviewed a presentence report in each case before initially sentencing Johnson; had the benefit of the two petitions to revoke Johnson's supervised release and the supervised release revocation reports recommending consecutive sentences; at the revocation hearing, patiently listened to testimony of Johnson's obstinacy, to Johnson's counsel, and to Johnson during allocution; and, finally, imposed a sentence that is consistent with the guidelines and policy statements. We are convinced that the district

court properly considered the nature and circumstances of Johnson's offense, his criminal history, and all other relevant factors when it sentenced Johnson to consecutive terms of imprisonment. See **120 United States v. Davis*, 53 F.3d 638, 642 (4th Cir.1995) (sentencing court need not engage in a “ritualistic incantation in order to establish its consideration of a legal issue”). Like the Eighth Circuit, we do not believe that a district court errs when it fails “to explain a revocation sentence that is consistent with all applicable policy statements.” *United States v. Caves*, 73 F.3d 823, 825 (8th Cir.1996).⁷

⁷ We express no opinion on the obligations imposed on the district court by § 3553(c) or on whether it complied with those obligations. Section 3553(c) requires district courts to “state in open court the reasons for its imposition of the particular sentence.” See 18 U.S.C. § 3553(c). Johnson argues that the district court erred because it did not demonstrate its compliance with §§ 3584 and 3553(a) on the record. But Johnson did not raise the independent issues accompanying § 3553(c), and we, therefore, will not address them.

IV.

In addition to imposing eleven months confinement, the district court's revocation order in CR–29 stated that the unpaid portions of Johnson's fine and reimbursement costs for his court appointed counsel “remain in effect.” Johnson argues that the district court could not reimpose those obligations in the written judgment order revoking Johnson's supervised release when it failed to reimpose them in open

court in the revocation hearing. See *United States v. Layman*, 116 F.3d 105, 108 (4th Cir.1997) (holding that sentence is imposed when the district court orally pronounces it). We find that those obligations existed regardless of the court's statements in the revocation hearing or written order. Their inclusion in the revocation order was nothing more than a reminder and, therefore, was proper.

At the time of the revocation hearing, the district court's original judgments of conviction remained final and binding. In the original judgment of conviction in CR–29, the district court fined Johnson and ordered him to reimburse the government for the costs of his court-appointed counsel. Those obligations survived the revocation of his supervised release. See *United States v. Eicke*, 52 F.3d 165, 166–67 (7th Cir.1995). “Reminding him that he still owes the United States this money is not akin to imposing a new fine. No additional punishment has been assessed.” *Id.* at 166. Because the district court's revocation order imposed no additional punishment, it did not implicate the well-established rule that the sentence orally imposed in open court takes precedence over a later written conflicting order. Accordingly, Johnson's challenge fails.

V.

For the reasons stated, the judgments of the district court are affirmed.

AFFIRMED.

All Citations

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