

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 05-231
	:	
JOHN KAY	:	
	:	

MEMORANDUM

STENGEL, J.

December 10, 2007

On June 9, 2005, the defendant, John Kay, entered a plea of guilty to seven counts of criminal violations of the Clean Air Act, 42 U.S.C. § 7413, arising out of the defendant's illegal, improper and unsafe removal of thousands of feet of asbestos-covered heating pipes from a factory in Clifton Heights, Pennsylvania. Through his improper removal and disposal of the asbestos, even after the Environmental Protection Agency notified him of his obligation properly to clean up the asbestos at the work site, the defendant placed numerous people at risk of exposure to harmful chemicals. Mr. Kay was sentenced to 10 months imprisonment, followed by 3 years of supervised release. After serving less than half of his three-year term, the defendant has requested the court to terminate his supervised release and discharge him.

Mr. Kay seeks early termination in order to obtain a real estate license in Arizona so that he may continue to work as a real estate agent following his family's move to Arizona. Mr. Kay submits that he will be unable to obtain a real estate license in Arizona

while on supervised release, which is a form of “community supervision” under Arizona Department of Real Estate regulations. See A.R.S. § 32-2124.M (prohibiting the Department from issuing licenses to persons under community supervision). However, Mr. Kay acknowledges that his supervised release will not prevent him from obtaining a real estate license in Pennsylvania. His move to Arizona is necessary because his wife, Ms. Dana Gao, is being transferred by her employer, the United States Defense Contract Management Agency, to Scottsdale, Arizona, effective January 7, 2008. The couple has a son, Bryson, born April 13, 2007. While Mr. Kay clearly has the freedom to pursue other employment opportunities in Arizona, he seeks termination of his supervised release in order to continue in the real estate business upon relocating there.

Title 18 U.S.C. § 3583(e) authorizes the court to grant early termination of probation in certain circumstances. That section provides:

The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) – (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.

18 U.S.C. § 3583(e).¹ The court has discretion to grant early termination of probation or

¹The factors to be considered are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed . . .
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and

supervised release; however, early termination is warranted only where the defendant can show that significantly changed circumstances require a refashioning of his sentence. See United States v. Rasco, No. 88-817, 2000 WL 45438, at *3 (S.D.N.Y. Jan. 19, 2000) (decision to grant early termination in the sound discretion of the court; defendant has the burden to demonstrate that early termination is warranted); United States v. Weintraub, 371 F. Supp. 2d 164, 166 (D. Conn. 2005) (“Such relief is warranted only occasionally, when changed circumstances . . . will render a previously imposed term or condition of release either too harsh or inappropriately tailored to serve the general punishment goals of section 3553(a)”) (quoting United States v. Lussier, 104 F.3d 32, 36 (2d Cir. 1997)) (internal citations omitted). In short, “early termination of probation should be ordered only in extraordinary circumstances.” United States v. Guillatt, No. Crim. A. 01-408, 2005 WL 589354, at *1 (E.D. Pa. Jan. 18, 2005).

The fact that Mr. Kay may not be able to obtain an Arizona real estate license

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- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; . . .
 - (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 – [or]
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission . . .
 - (5) any pertinent policy statement . . .
 - (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.

See 18 U.S.C. § 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

while on supervised release does not present a change in circumstances that would warrant a termination of his supervised release, particularly considering that his status does not bar him from obtaining a license in Pennsylvania, nor is he denied the opportunity to seek other employment in Arizona while he completes his sentence. See United States v. Abuhouran, No. 95-560, 2006 WL 1805546 (E.D. Pa. June 6, 2006) (Pollack, J.) (denying early termination where probationer argued that her status prevented her from obtaining a license, job and health care).

There is no dispute that Mr. Kay has fully complied with all the terms of his release and has made a successful transition back into society. While good behavior on supervised release alone does not justify early termination, Mr. Kay's efforts are commendable and I have taken account of these facts in considering his request. See, e.g., United States v. McKay, 352 F. Supp. 2d 359, 361 (E.D.N.Y. 2005) (commending defendant on compliance with terms of supervision, but denying early termination without "exceptional behavior"). However, the defendant should be required to face the consequences of his sentence, which appropriately reflected the gravity of his crimes and the harm his actions inflicted on society. A voluntary move to Arizona does not create a sufficient ground to alter that sentence. I will therefore deny Mr. Kay's motion to terminate his supervised release. An appropriate Order follows.

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ORDER

STENGEL, J.

AND NOW, this 10th day of December, 2007, upon consideration of defendant John Kay's Motion to Terminate Supervised Release and Discharge Defendant (Document #21), and the government's response thereto, it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel

LAWRENCE F. STENGEL, J.