

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 :
 :
 :
ROBERT F. SIMONE : NO. 92-35-1

MEMORANDUM

Dalzell, J.

November 19, 1997

Having served twenty-nine months in prison, been disbarred from practicing law, and facing a restitutionary obligation of over \$160,000, defendant Robert Simone now seeks to modify some of the conditions of his supervised release. In particular, Simone moves to: (1) have Probation Supervisor Elwood Hipple ("Hipple") and Probation Officer Jay Purcell ("Purcell") removed from supervising his case; (2) amend the travel restrictions beyond the ten-county area of the Eastern District of Pennsylvania to a radius of 100 miles from Philadelphia, or, alternatively, to allow travel in southern New Jersey; and (3) eliminate the Probation Office's requirement to disclose the names of persons with criminal records with whom Simone comes into contact through his work as a paralegal. Simone is currently serving a four year period of supervised release as a result of his conviction in criminal case No. 91-569, and a concurrent term of two years' supervised release in consequence of his guilty plea in this case.

In determining the conditions of supervised release, the United States Sentencing Guidelines (hereinafter "U.S.S.G.")

grants us broad discretion. The current version of § 5D1.3 of the U.S.S.G. states:

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

U.S.S.G. § 5D1.3(b)(1997). Our inquiry is thus necessarily a fact-intensive one.

First, regarding Simone's desire to remove his current probation officers from supervising his case, Simone implies that Hipple and Purcell are biased against him because of his prior interactions with them when Simone practiced as a criminal defense attorney. See Simone Motion at ¶¶ 4-9. Other than raising the history of professional disagreements with Hipple and Purcell, and complaining about the tight restrictions imposed on his ability to travel, Simone has not shown sufficient cause to remove either Hipple or Purcell from his case. Accordingly, we will deny Simone's request to remove these probation officers from responsibility for his case.

Second, with respect to Simone's request to amend the travel restrictions beyond the ten-county area of the Eastern District of Pennsylvania to a radius of 100 miles from Philadelphia, or, alternatively, to allow travel in southern New Jersey, Simone cites the reality that his employer has an office in Haddon Heights, New Jersey, and that Simone also has friends and family in southern New Jersey. See Simone Motion ¶¶ 10-14. Before Simone filed this motion, the Probation Office has without exception denied Simone's requests to leave the Eastern District of Pennsylvania. See Simone Motion ¶ 12.

In response, the Government argues that a request for travel outside the district is evaluated "on the basis of community safety, compliance with special conditions and routine conditions of supervision, and consideration of whether it was an emergency, job-related, a family function, or recreational." See Government Response ¶ 9. The Government implies that Simone's prior travel requests were denied either because they did not have sufficiently specific information supporting his request, or because his probation officers did not find that his requests were job-related or due to an emergency. See id. at ¶¶ 9-14.

The Government has not made a sufficient showing to preclude Simone's travel outside the Eastern District of Pennsylvania without permission.¹ For both family and business

1. It is noteworthy that Simone's co-defendant in criminal case No. 91-569 has been granted permission to travel to Europe at least twice, and has also been granted permission for trips to
(continued...)

purposes, Simone has shown legitimate reasons for extending his ability to travel into southern New Jersey. We further find that easing Simone's travel restrictions would advance Simone's earning capacity because to do so will enhance his ability to serve his employer. There is also no reason at all to believe that such travel would pose a threat of further crimes. We will therefore amend the travel restrictions to allow Simone to travel in all ten counties of the Eastern District of Pennsylvania as well as in southern New Jersey, south of Interstate 195 in that state, without the permission of the Probation Office.

Finally, Simone's most serious request is that we eliminate the Probation Office's requirement that he disclose the names of people with criminal records with whom he comes into contact through his employment as a paralegal in a law office that specializes in criminal defense work. At his sentencing on October 21, 1994, we imposed a condition that during the period of Simone's supervised release "the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer." See United States v. Robert F. Simone, Crim. No. 92-35 (E.D. Pa. October 21, 1994) (Supervised Release Condition No. 9). The Sentencing Guidelines did not mandate this condition, but we nevertheless imposed it in the exercise of our discretion.

1. (...continued)
Aspen, Colorado and Miami, Florida. See Simone Reply ¶ 15.

The Probation Office insists that Simone disclose the names of everyone with whom he comes into contact who has a criminal record, including the names of clients and prospective clients of Simone's employer, A. Charles Peruto, Jr., Esquire. See Government's Response ¶ 15. The Government defends this position as necessary to enforce the long-standing policy of the Probation Office and the United States Parole Commission. Id.

As mentioned, we imposed this "association" condition in the exercise of our discretion at sentencing. It was never our intention that this condition prevent Simone from doing the work necessary to pay his substantial restitutionary obligation to the Internal Revenue Service.

Moreover, there is an obvious distinction between Simone's business and non-business associations for purposes of his supervised release. Indeed, the Supreme Court over a quarter century ago recognized this distinction between business and non-business associations. See Arciniega v. Freeman, 404 U.S. 4 (1971) (per curiam). In Arciniega, the Court held that evidence that a parolee worked at a restaurant-nightclub that employed other ex-convicts was not sufficient evidence to revoke his parole for associating with ex-convicts; as the Court put it, "We do not believe that the parole condition restricting association was intended to apply to incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer . . . [n]or is such occupational association, standing alone,

satisfactory evidence of nonbusiness association violative of the parole restriction." Id.

It has also not escaped our attention that if we failed to make such a distinction between business and non-business associations, we would by our Order risk impairment of the attorney-client privilege rights of the Peruto firm's clients and prospective clients. See Pennsylvania Rule of Professional Conduct 1.6; Disciplinary Rule 4-101(B)(1) ("a lawyer shall not knowingly: [r]eveal a confidence or secret of his client, including his identity"). Notably, none of the cases the Government cites addresses the implications of this condition on the attorney-client relationship.²

Finally, the specific facts of this case compel our decision to ease Simone's reporting requirements. Simone is a former criminal defense attorney who has been disbarred from practicing law in Pennsylvania. See Simone Motion ¶ 3. In order to meet his restitutionary obligation of over \$160,000, Simone now works as a paralegal in a criminal defense firm. There is nothing extravagant or extraordinary about a former criminal defense attorney lawfully turning to the field that he knows best to meet the heavy financial burden now upon him. It would indeed be contrary to our restitutionary judgment, to say nothing of the

2. The cases the Government cites forbidding associations between convicted felons are distinguishable because they merely illustrate the fact-specific inquiry that is needed in each case, and which we make here.

goals of the Sentencing Reform Act,³ for us to countenance any interpretation of our judgment that would consign Simone to jobs for which he has no experience. We therefore will not take such a step.

An Order follows.

3. 28 U.S.C. § 994(d)(3) calls upon the Sentencing Commission to "consider" a defendant's "vocational skills" in fashioning, inter alia, Guidelines regarding supervised release, although of course "only to the extent that they do have relevance". 28 U.S.C. § 994(d). In promulgating U.S.S.G. § 5D1.3(b), the Sentencing Commission entrusts to our discretion "other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) . . . the history and characteristics of the defendant . . . [and which] (2) involve no greater deprivation of liberty than is reasonably necessary". We are at a loss to see how, in view of Simone's professional lifetime in the criminal defense field, it would serve any rational purpose effectively to bar him from earning as much value as the market will award him in the face of the fetters now on that professional experience.

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : :
 : :
 : :
ROBERT F. SIMONE : NO. 92-35-1

ORDER

AND NOW, this 19th day of November, 1997, upon consideration of Simone's motion to remove the probation officer and supervisor from his case, amend travel restrictions, and cease reporting requirements, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. Simone's motion is GRANTED IN PART and DENIED IN PART in accordance with the following paragraphs;
2. Simone's request to remove Probation Officer Jay Purcell and Probation Supervisor Elwood Hipple from his case is DENIED;
3. Simone's request to amend the travel restrictions is GRANTED in that Simone will be allowed to travel in all ten counties of the Eastern District of Pennsylvania as well as in southern New Jersey, south of Interstate 195 in that state, without the permission of the Probation Office; and
4. Simone's request to eliminate the Probation Office's requirement that he disclose the names of persons with criminal records with whom he comes into contact through his employment as a paralegal is GRANTED in that he shall not be required to disclose the names of the clients and prospective clients of his current employer, A. Charles Peruto, Jr., Esquire,

who have criminal records and who come into contact with Simone as long as those contacts are legitimately connected to Simone's lawful work as a paralegal in the Peruto firm.

BY THE COURT:

Stewart Dalzell, J.