

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

UNITED STATES OF AMERICA :
 :
 v. : Criminal No. 90-201-26
 :
 GILBERTO MATOS :

MEMORANDUM ORDER

Presently before the court is defendant's motion to terminate his supervised release.

Defendant pled guilty in 1990 to participating in a conspiracy during which it was reasonably foreseeable to him that 798 kilograms of cocaine would be distributed. The crime was and is a class A felony. See 18 U.S.C. § 3559; 21 U.S.C. §§ 841(b)(1)(A) & 846. Absent a government motion for departure pursuant to 18 U.S.C. § 3553(e), defendant would have faced a maximum statutory sentence of life imprisonment with a mandatory ten year minimum and a lifetime of supervised release with a five year minimum. Absent a government motion for departure pursuant to U.S.S.G. § 5K1.1, defendant would have faced a maximum guidelines sentence of 293 months of imprisonment and a minimum sentence of 235 months. The government filed and the court granted motions under §§ 3553(e) and 5K1.1. On July 17, 1991, the court sentenced defendant to 100 months of incarceration, to be followed by five years of supervised release.

Defendant was originally released from prison on October 25, 1996. During the first year of his supervised release, he committed another drug offense and absconded from supervision. He was ultimately apprehended. On January 5, 1998 the court revoked defendant's supervised release and sentenced him to two years of imprisonment, to be followed by three years of supervised release. Defendant argues that the imposition of this supervised release term violated the constitutional prohibition on ex post facto laws.

A statute is an unconstitutional "ex post facto law" if it "inflict[s]" upon a defendant "a greater punishment" than did the law "annexed to" his "crime" when he "committed" it. See Lynce v. Mathes, 519 U.S. 443, 441 (1997).

Under the version of the supervised probation statute in effect in 1990, as construed by the Third Circuit, the court could have imprisoned defendant for five years for violating the terms of his supervised release but could not have imposed a combination of incarceration and supervised release. See 18 U.S.C. § 3583(e) (1990); United States v. Malesic, 18 F.3d 205, 207-08 (3d Cir. 1994). By 1998, when defendant's supervised release was revoked, the statute had been amended to allow the court to impose such a combination. See 18 U.S.C. § 3583(h) (1998).

Defendant argues that imposing a new term of supervised release to follow his reincarceration was an unconstitutional ex post facto application of § 3583(h) because, at least in this Circuit, the combination of reincarceration and supervised release was not permitted when he committed the crime.

Supervised release is a restraint on a convict's liberty as is imprisonment. United States v. Brown, 117 F.3d 471, 475 (11th Cir. 1997). Compared to imprisonment, however, "the conditions of supervised release impose a very minor infringement on a defendant's liberty." United States v. Crea, 968 F. Supp. 826, 829 (E.D.N.Y. 1997), aff'd sub nom United States v. Truscello, 168 F.3d 61 (2d Cir. 1999). Punishment for a violation of supervised release is considered punishment for the original crime of conviction because it subjects persons to reincarceration for activities which would not be crimes if committed by persons not under supervision and because violations need only be proved by a preponderance of the evidence. United States v. Meeks, 25 F.3d 1117, 1123 (2d Cir. 1994).

Imposing on a supervised release violator a combination of incarceration and supervised release, even if impermissible under § 3583 when defendant committed his original crime of conviction, does not violate the ex post facto clause if his original crime at the time he committed it carried a possible supervised release term equal to or greater than the combination

of imprisonment and supervised release to which he was sentenced at the time his original supervised release was revoked. See United States v. Brady, 88 F.3d 225 (3d Cir. 1996), cert. denied, 519 U.S. 1094 (1997).

Defendant argues that under United States v. Dozier, 119 F.3d 239 (3d Cir. 1997), § 3583 violates the ex post facto clause as applied to him because it potentially subjected him to a greater punishment than the maximum authorized at the time he committed his crime. Dozier is inapposite. The defendant in Dozier was convicted of a class D felony and was sentenced upon revocation of supervised release to six months of imprisonment and a new 24 month supervised release term. At the time he committed his crime, and at the time he was sentenced for violating supervised release, he was subject to a maximum of two years of imprisonment for violating the terms of supervised release. See 18 U.S.C. § 3583(e) (1992) & (1996). The defendant in Dozier was sentenced upon revocation to a punishment package of 30 months, a deprivation of liberty exceeding 24 months.

Defendant attempts to distinguish Brady by arguing that the five-year maximum supervised release term for violating supervised release imposed for a class A felony does not apply when the underlying criminal statute, in this case 21 U.S.C. § 841(b)(1)(A), provides for a longer term. At all relevant times,

however, § 841(b)(1)(A) permitted imposition of a supervised release term of "at least five years."

At all relevant times, defendant's crime of conviction exposed him to a deprivation of liberty for life. See 21 U.S.C. 841(b)(1)(A) (1990) & (1998). The version of § 3583 in effect when defendant's supervised release was revoked obviously did not permit any greater deprivation of liberty. See United States v. Shorty, 159 F.3d 312, 316 (7th Cir. 1998) (relevant point for ex post facto purposes is that § 841(b)(1)(C), which provides for a supervised release term of "at least three years," always permitted a permanent deprivation of liberty in the form of lifetime supervised release term and § 3583(h) did not impose new burden on defendant for original offense as he was subject to same total amount of restraint for life before its enactment), cert. denied, 119 S. Ct. 2024 (1999).

In Brady, the defendant was originally subject to a supervised release term of "at least three years." See 21 U.S.C. § 841(b)(1)(A). When Brady's supervised release was revoked, § 3583 limited to five years the amount of time for which a class A felon could be reincarcerated. See 18 U.S.C. § 3583(e)(3) (1995). The same was true for defendant in the instant case. See 18 U.S.C. § 3583(e)(3) (1998). This five-year cap on reincarceration was not in effect when either Brady or defendant in the instant case committed their crimes. See 18 U.S.C. §

3583(e) (1990) & (1991). As with Brady, however, the court could not permissibly have sentenced defendant to more than five years of supervised release. See U.S.S.G. § 5D1.2 (1990). Thus, defendant never faced a potential supervised release term of more than five years.

The Eighth Circuit has held that even under the new version of § 3583, the maximum amount of time a defendant's liberty can be restrained on revocation is capped at the amount of time for which he actually was sentenced to supervised release. See United States v. St. John, 92 F.3d 761, 766 (8th Cir. 1996) ("the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release" means term of supervised release actually imposed at original sentencing). Accord Brady, 88 F.3d at 228 (assuming that defendant subject at time of commission of crime to "at least" three years of supervised release by statute always faced maximum five year reincarceration term for supervised release violation although when defendant committed crime five-year statutory cap on reincarceration for class A felonies had not yet been enacted). The only difference between St. John and Brady is that since the Eighth Circuit had permitted combinations of reincarceration and supervised release even under the previous version of § 3583, the Court in St. John was able to conclude that the amendments to § 3583 were not retrospective while the

Third Circuit in Brady had to conclude that they made a retrospective change, albeit one which could only benefit criminal defendants who committed their crimes before § 3583(h) became effective. Defendant was thus never subject to total potential punishment upon revocation in excess of five years.

Defendant recognizes that the court could have reincarcerated him for five years and is careful not to ask for resentencing, the typical relief for a sentence truly imposed in violation of the ex post facto clause. See U.S. v. Comstock, 154 F.3d 845, 850 (8th Cir. 1998) (remanding for resentencing under law in effect when defendant committed his offense when sentence imposed constituted ex post facto violation); Dozier, 119 F.3d at 245 (same). See also State v. Miller, 512 So.2d 198 (Fla. 1987) (upon finding by U.S. Supreme Court of ex post facto violation remanding for resentencing pursuant to law in effect when defendant's offense was committed); State v. Lindsey, 77 P.2d 596, 597 (Wash. 1938) (holding on remand from U.S. Supreme Court that proper remedy when sentence violates ex post facto clause is remand for resentencing pursuant to law as it existed when crime was committed), cert. denied, 305 U.S. 637 (1938). Rather, he asks that the term of supervised release simply be terminated.

Under the law when defendant committed his crime and when he was sentenced he faced a five year supervised release term, violation of which could subject him to five years of

imprisonment. He violated his supervised release and was sentenced to two years of imprisonment and three years of supervised release, a significantly less onerous restraint on his liberty than the one to which he was subject when he committed his crime.

Defendant was not subject to any greater deprivation of liberty when his supervised release was revoked than when he committed his crime, and the total restraint on his liberty is for an amount of time authorized both when he committed his crime and when his supervised release was revoked.

ACCORDINGLY, this day of August, 1999, upon consideration of defendant's Motion for Termination of Supervised Release (Doc. #30), **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.