IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 7, 2018
Lyle W. Cayce
Clerk

No. 17-40857
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ALEJANDRO REYES,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:15-CR-88-14

Before JONES, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Alejandro Reyes challenges special conditions of supervised release in the sentence imposed after his conviction of conspiracy to possess, with intent to manufacture and distribute cocaine, in violation of 21 U.S.C. § 846. He claims the court violated his constitutional right to be present at sentencing because the court's oral pronouncement omitted those special conditions incorporated in the written judgment.

[*] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

A jury found Reyes, a citizen of Mexico, guilty of conspiracy to possess with the intent to manufacture and distribute cocaine, and he was sentenced to, *inter alia*, 121 months' imprisonment and five years' supervised release. His presentence investigation report (PSR) recommended two special conditions of supervised release:

> As a condition of supervised release, immediately upon release from confinement, you must be surrendered to a duly authorized immigration official for deportation proceedings in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101, et seq. If ordered deported, you must remain outside of the United States. In the event you are not deported, or for any reason re-enter the country after having been deported, you must comply with all conditions of supervised release, to include reporting to the nearest United States Probation Office within 72 hours of release by immigration officials or re-entry into the country.
>
> You must provide the probation officer with access to any requested financial information for purposes of monitoring your efforts to obtain and maintain lawful employment.

At sentencing, Reyes initially answered in the affirmative when asked whether his attorney both read and discussed, in his native Spanish, the PSR with him. Reyes stated his "counsel fully explained the [PSR]", he "fully underst[oo]d" it, and he did not "wish to make any comments, additions, or corrections" to it. Nevertheless, as the proceedings progressed, confusion developed regarding whether the entire PSR had been read to Reyes. The court then called a recess and stated sentencing would resume only "after [the PSR was] read to [Reyes] in Spanish *in its entirety*". (Emphasis added.)

After the PSR was read to Reyes outside the presence of the district judge, Reyes again said his counsel had "fully explained the [PSR]", and he

"fully underst[oo]d" it. When the court asked if "counsel or [Reyes] wish[ed] to make any comments, additions, or corrections to the report", Reyes corrected the PSR's stating he had pled guilty, because a jury had found him guilty. The court asked whether Reyes had any objections, and Reyes replied he did not. Reyes also declined to make any comments or statements.

Then, in orally pronouncing the sentence, the court stated, *inter alia*: based on "the facts and circumstances of th[e] case, as well as the personal history and characteristics of the defendant, . . . [the] imposition of supervised release is warranted in [Reyes'] case". The court stated some of the conditions of supervised release, *inter alia*: Reyes was to report to a probation office within 72 hours or release, not commit any further crimes, and "comply with the standard conditions that have been adopted by [the district court]". Finally, and most importantly for purposes of this appeal, the court stated: "In addition, the defendant must comply with the mandatory and *special conditions* and instructions that have been *set forth in the defendant's [PSR]*". (Emphasis added.)

The parties dispute the standard of review for Reyes' challenge to the special conditions. He contends we should review for abuse of discretion because he "had no opportunity at sentencing to consider, comment on, or object to the special conditions later included in the written judgment". *United States v. Bigelow*, 462 F.3d 378, 381 (5th Cir. 2006). The Government counters that plain-error review applies because, *inter alia*: the PSR provided the two special conditions later incorporated in the judgment; the court recessed the sentencing proceedings to ensure the PSR was read to Reyes in Spanish; Reyes was asked whether he had any comments or objections to the PSR; Reyes corrected an error in an unrelated section of the PSR; and the court's oral pronouncement explicitly incorporated "the mandatory and special conditions

and instructions that have been set forth in the defendant's [PSR]". Reyes did not file a reply brief to dispute the Government's contentions regarding plain-error review.

The court, not the parties, determines the standard of review. *United States v. Torres-Perez*, 777 F.3d 764, 766 (5th Cir. 2015). Challenges raised for the first time on appeal to supervised-release special conditions are reviewed only for plain error. *United States v. Bishop*, 603 F.3d 279, 280 (5th Cir. 2010); *Puckett v. United States*, 556 U.S. 129, 135 (2009). But, such challenges are reviewed for abuse of discretion, even if not preserved in district court, if defendant "had no opportunity at sentencing to consider, comment on, or object to the special conditions later included in the written judgment". *Bigelow*, 462 F.3d at 381.

Resolution of this standard-of-review issue is informed by three decisions by our court: *United States v. Rouland*, 726 F.3d 728 (5th Cir. 2013); *United States v. Cox*, 672 F. App'x 517, 518 (5th Cir. 2017); and *United States v. Hudson*, 625 F. App'x 686 (5th Cir. 2015). In *Rouland*, the Government introduced an exhibit recommending nine special conditions. 726 F.3d at 730. Defendant responded "[n]o objections" when asked whether he had any objections to the exhibit. "The court did not . . . orally pronounce[] any conditions of Rouland's supervised release", but the court's written judgment incorporated those same nine special conditions from the Government's exhibit. *Id.* at 730–31.

This court reviewed defendant's challenge for plain error because defendant "had notice and an opportunity to contest the[] conditions at the sentencing hearing". *Id.* at 733–34. Further, "[t]he sentencing colloquy unequivocally demonstrate[d] that Rouland's counsel had an opportunity *in open court to object* to the admission of the Exhibit, which included the special

conditions". *Id.* at 734 (emphasis in original). Our court reasoned that to apply the abuse-of-discretion standard "would necessarily excuse Rouland's duty to object in the district court, and would permit him a second opportunity to raise this alleged error that could have been presented to the district court". *Id.* Under plain-error review, our court ruled, assuming *arguendo* Rouland could show the error was "plain", he "failed to make a showing under the substantial rights prong". *Id.*; *accord United States v. Moseby*, 689 F. App'x 266, 268 (5th Cir. 2017).

This court reached the opposite conclusion in an unpublished decision. *Hudson*, 625 F. App'x at 689–90. Hudson's PSR recommended special supervised-release conditions, and, at sentencing, "the district court merely asked [defendant] general and routine questions about the PSR, only a small portion of which [was] devoted to recommending supervised-release conditions". *Id.* at 688. The three routine questions and answers were:

> THE COURT: [Defendant,] . . . [h]ave you had an opportunity to review the presentence report in your case?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you read it or had it read to you and discussed it with [your counsel]?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Did you find anything in that report that you'd like to call to my attention as being inaccurate or incorrect?
>
> [DEFENDANT'S COUNSEL]: The only things we originally saw have already been addressed so there's no further issues.

Id. at 689. The court then sentenced Hudson, and "ma[de] no mention of the special conditions that it later included in the written judgment". *Id.*

This court held *Rouland* was distinguishable because the "exclusive function" of the memorandum in *Rouland* was special conditions, and the district court in *Hudson* "never asked any targeted questions about supervised-release conditions". *Id.* at 688. Finally, "unlike in *Rouland*, the district court never gave the defendant a meaningful opportunity to object to the special conditions that it would later impose; it simply asked a few perfunctory questions about the PSR—questions that likely would be asked at any sentencing hearing". *Id.* at 689. This court reviewed for abuse of discretion, concluding "[t]he district court's routine questions about the PSR . . . did not afford [defendant] a meaningful opportunity to object, in open court, to the special conditions that the district court later imposed in its written judgment". *Id.*

The third, more recent unpublished decision by our court weighs in favor of plain-error review. *Cox*, 672 F. App'x at 518. In *Cox*, our court followed *Rouland* in reviewing for plain error a case with facts similar to those at hand. *Cox*, 672 F. App'x at 518. In *Cox*, "the [district] court referred to a list of special conditions . . . in the [PSR], rather than pronouncing each special condition in its oral judgment". *Id.* Because the PSR "included the recommendation of mandatory and special conditions of supervised release" and "[defendant] was aware of the recommended special conditions and bypassed his opportunity to object at sentencing", plain-error review applied. *Id.*

This case is closer to *Rouland* and *Cox* than *Hudson*. First, besides being non-precedential, *Hudson* is distinguishable because, there, the court "ma[de] no mention of the special conditions that it later included in the written judgment". *Hudson*, 625 F. App'x at 689. Here, the court explicitly referenced the special conditions at issue: "In addition, the defendant must comply with the mandatory and *special conditions* and instructions that have been *set forth*

in the defendant's [PSR]". (Emphasis added.) Reyes could not have been mistaken about to which special conditions the court was referring; the special conditions at issue are the only ones in the PSR, and, as discussed *supra*, the PSR was read to Reyes just minutes earlier.

Second, Reyes was given multiple opportunities to object to the special conditions later incorporated in his written judgment. He could have objected to the PSR in writing before sentencing. At sentencing, he was asked whether he had any comments or suggestions to the PSR. He responded with one correction, the PSR erroneously stated he pleaded guilty, but he did not comment on the special conditions. He was also asked whether he had any objections to the PSR, and he said he did not.

Third, and most importantly, the PSR was re-read to Reyes during sentencing, outside the presence of the district judge. This re-reading provided Reyes a unique and "meaningful opportunity to object, in open court, to the special conditions that the district court later imposed in its written judgment". *Id.* at 689. As in *Rouland*, "a result inconsistent with our conclusion would necessarily excuse [Reyes'] duty to object in the district court". *Rouland*, 726 F.3d at 734.

Accordingly, because Reyes did not preserve his challenge to the special conditions in district court, review is only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Reyes must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett*, 556 U.S. at 135. If he makes that showing, we have the discretion to correct such reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.*

"A defendant has a constitutional right to be present at sentencing." *Bigelow*, 462 F.3d at 380–81 (cleaned up). "Accordingly, when a district court's written judgment conflicts with its oral pronouncement of the sentence, the oral pronouncement controls." *United States v. Franklin*, 838 F.3d 564, 566 (5th Cir. 2016). If a condition is included in the written judgment but not the court's oral pronouncement, the defendant's "constitutional right to be *effectively present* [is violated] because he did not receive sufficient notice that th[is] . . . special condition[ ] would be imposed in the written judgment". *Bigelow*, 462 F.3d at 382 (emphasis in original). "If the written judgment broadens the restrictions or requirements of supervised release from an oral pronouncement, a conflict exists." *United States v. Mudd*, 685 F.3d 473, 480 (5th Cir. 2012) (internal quotation omitted).

In determining whether the court plainly erred, we again note Reyes did not file a reply brief. Therefore, Reyes did not dispute the Government's contention plain-error review applies and did not brief the four prongs of the plain-error test. Failure to file a reply brief affects our analysis, especially on plain-error review. *United States v. Rodriguez*, 15 F.3d 408, 414 n.7 (5th Cir. 1994) ("Needless to say, a reply brief . . . should have been filed. . . . [I]t is the best vehicle for narrowing the true issues, and is especially important—and called for—when a new point or issue (such as application of the narrow plain error standard of review) is raised in the appellee's brief.").

Next, because the court required Reyes' counsel to read the PSR to Reyes during sentencing and the court explicitly referenced the special conditions in the PSR during sentencing, it is not "obvious" or "clear" the court erred; error is subject to reasonable dispute. *Puckett*, 556 U.S. at 135. As discussed *infra*, the court's ordering a recess in the middle of the sentencing proceedings in order for the PSR to be read to defendant is a unique circumstance.

Further, the court referenced explicitly the special conditions in sentencing Reyes. In *Cox*, this court ruled there was no conflict between the oral and written judgments, where "the court referred to the special conditions recommended in the PSR, and the written judgment imposed the same recommendations" even though the court did not "pronounc[e] each special condition in its oral judgment". *Cox*, 672 F. App'x at 519.

"The constitutional right to presence [at various stages in criminal proceedings] is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but . . . this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (internal citation omitted). "The right . . . to be present is not all-encompassing, and applies 'to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *United States v. Ferrario-Pozzi*, 368 F.3d 5, 10 (5th Cir. 2004) (quoting *Gagnon*, 470 U.S. at 526). The right to be "effectively present" at sentencing is violated when the written and oral judgments conflict because defendant "d[oes] not receive sufficient notice that . . . special conditions would be imposed in the written judgment". *Bigelow*, 462 F.3d at 382.

There is no plain error because it is not "clear" or "obvious" Reyes's due-process rights were violated because he had notice, provided by the PSR's being read to him during sentencing, and an opportunity to object, provided by the court's asking him to state any objections to the PSR and later explicitly referencing the special supervised-release conditions in its oral pronouncement. In short, Reyes has not shown the requisite plain error regarding whether "a fair and just hearing [was] thwarted" by the court's

failing to orally pronounce, word-for-word, the supervised-release conditions. *Ferrario-Pozzi*, 368 F.3d at 10 (quoting *Gagnon*, 470 U.S. at 526).

AFFIRMED.