

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8425
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ARCHIE LEE GEIGER,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. W-88-CR-126-2
- - - - -

March 18, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

The district court found that Archie Lee Geiger violated the conditions of his supervised release because he possessed cocaine, left the jurisdiction without permission, and violated state law, and sentenced him to 20-months imprisonment under 18 U.S.C. § 3583(g).

Geiger argues that he was denied due process because the district court did not give him notice that he was subject to an enhanced sentence under § 3583(g). The magistrate judge held a preliminary revocation hearing to inform Geiger of the

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

allegations in the petition to revoke supervised release and to appoint counsel to represent him at the final revocation hearing. Fed. R. Crim. P. 32.1(a)(1). Geiger received notice of the allegations in the petition to revoke, and therefore received notice that he was subject to the mandatory minimum sentence under § 3583(g), which requires the district court to sentence a defendant to at least one-third of his supervised release term if the court finds he possessed a controlled substance while on supervised release. United States v. Kindred, 918 F.2d 485, 488 (5th Cir. 1990). At the final revocation hearing Geiger was given an opportunity to question the Government's witnesses and present his own evidence. Fed. R. Crim. P. 32.1(a)(2). Following the presentation of the evidence, including the urinalysis report which indicated that Geiger had cocaine metabolite in his system, the district court found the allegation that Geiger possessed a controlled substance was true. The district court complied with Rule 32.1; Geiger received notice of the allegations and was not denied due process. See also Munquia v. United States Parole Commission, 871 F.2d 517, 519-21 (5th Cir.) (pre-hearing notice that the Parole Commission could apply an earlier conviction to deny the probationer credit for "street time" was not required because a federal statute mandated the denial of credit), cert. denied, 493 U.S. 856 (1989).

This Court has rejected Geiger's argument that evidence of use cannot support a finding of possession under § 3583(g). United States v. Courtney, 979 F.2d 45, 49 (5th Cir. 1992).

"[T]here is no 'use' exception to possession: if one knowingly

and voluntarily exercises dominion and control over a substance-- as by putting it in one's mouth and swallowing it knowing what it is--one possesses it." Id. The urinalysis report established that Geiger "used" cocaine, and he does not argue that this use was unknowing or involuntary. The evidence was sufficient to support the district court's finding that Geiger possessed cocaine.

Geiger also argues that because the positive test was the basis for the petition to modify the conditions of his supervised release term it cannot be used to support the petition to revoke his supervised release term. This argument is factually inaccurate; Geiger's supervised release conditions were modified because of prior drug use and current alcohol abuse, and the positive drug test did not occur until after the conditions of supervised release had been modified. Even assuming that the positive drug test had been the basis for the modification of his supervised release, this Court has approved the use of a pre-modification violation to support revocation. Kindred, 918 F.2d at 487-88. Additionally, any error was harmless because § 3583(g) mandates revocation of supervised release for possession of a controlled substance. Id. at 488.

AFFIRMED.