

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8443  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO JAVIER ORTIZ-RUIZ,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Western District of Texas

(EP-87-CR-180)

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( June 7, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:\*

Defendant-Appellant Francisco Javier Ortiz-Ruiz appeals from orders of the district court revoking his parole and resentencing him to a term of special parole rather than supervised release. Finding no reversible error in the actions of the district court, we affirm.

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\*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## FACTS AND PROCEEDINGS

Ortiz-Ruiz originally pleaded guilty to one count of possessing with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). He was sentenced to serve three years in prison, followed by a five-year special parole term, and a special assessment of \$50. His sentence was later modified: His prison term was suspended after 179 days, and he was placed on a five-year term of supervised probation, subject to specified conditions.

The government later filed a motion to revoke Ortiz-Ruiz's probation, alleging that he had violated its conditions. The district court held an evidentiary hearing, after which it granted the government's motion and revoked Ortiz-Ruiz's probation. The court then sentenced Ortiz-Ruiz to a two-year term of imprisonment, followed by five years of supervised release.

Ortiz-Ruiz filed a Motion to Consider Correctness of Sentence, which the district court granted, modifying the sentence to impose an unspecified parole term instead of the five-year term of supervised release. The district court's order appears to have imposed a five-year special parole term, but on the order the specific length of the sentence is "whited over" with typing correction fluid and is therefore unclear.

## II

### ANALYSIS

#### A. Revocation of Probation

Ortiz-Ruiz first challenges the district court's decision to revoke his probation. We review a district court's decision to revoke probation for abuse of discretion. Ortiz-Ruiz must present clear and convincing evidence that the district court abused its discretion by revoking his probation. United States v. Fryar, 920 F.2d 252, 258 (5th Cir. 1990), cert. denied, 111 S.Ct. 1635 (1991) (citation and internal quotations omitted).

Ortiz-Ruiz contends that, although he did violate conditions of his probation, there were mitigating circumstances that justified the violations. The government alleged that Ortiz-Ruiz committed six separate violations of his probation: (1) he was arrested by the El Paso Police Department for assault; (2) he failed to report to his probation officer after July 12, 1991, and remained an absconder until his arrest 11 months later in Washington; (3) he failed to report to his probation officer on July 22, 1991, as ordered, despite his acknowledgment that he received his probation officer's message to report; (4) he submitted three urine samples each of which tested positive for cocaine metabolite; (5) he acknowledged that he had visited a residence where he used cocaine; and (6) he violated the conditions of the Alternative House in El Paso, where he resided pursuant to the conditions of his probation until he absconded in July of 1991.

Following the hearing, the district court determined only that

Ortiz-Ruiz had violated his probation by leaving the Alternative House and moving to Washington without notifying or contacting his probation officer. The district court concluded that by itself this violation mandated that the government's motion be granted. The court made no further findings regarding the other five allegations by the government.

Ortiz-Ruiz argues that there were mitigating circumstances for his flight and that he remained "clean" while in Washington, working several different jobs to support his family. He was allowed to testify as to these mitigating circumstances at the revocation hearing. He stated that he left the Alternative House because his roommate there was using heroin and hiding it in the room. Ortiz-Ruiz had informed his probation officer and the Alternative House authorities of this, but no action was taken. His roommate then threatened Ortiz-Ruiz and, according to Ortiz-Ruiz, set his car on fire. Ortiz-Ruiz stated that he felt he had no choice but to flee with his family.

No one disputes, however, that Ortiz-Ruiz violated his probation by leaving the Alternative House and going to Washington. Moreover, even though Ortiz-Ruiz offered an explanation for his decision to abscond from the Alternative House, he proffered no justification for his total failure to contact his probation officer in the ensuing eleven months. As the violation of any condition of probation is grounds for revoking probation, United States v. Clark, 741 F.2d 699, 706 (5th Cir. 1984); see also Fryar, 920 F.2d at 257 (citation and internal quotations omitted), the

district court did not abuse its discretion by revoking Ortiz-Ruiz's probation.

B. Modification of Post-Revocation Sentence

Ortiz-Ruiz also argues that the district court erroneously modified its original post-revocation sentence. This issue, however, is not properly before us on appeal. Following its determination that Ortiz-Ruiz's probation should be revoked, the district court sentenced Ortiz-Ruiz to a two-year term of imprisonment followed by five years of supervised release. Ortiz-Ruiz then filed a Motion to Consider the Correctness of Sentence. He followed this motion with a notice of appeal from the district court's order revoking his probation.

The district court then granted Ortiz-Ruiz's motion to correct the sentence, modifying the sentence to impose a term of special parole. Ortiz-Ruiz, represented by new counsel, now argues that his prior motion was a mistake, and that the district court's original term of supervised release was proper. His notice of appeal, however, only relates to the order revoking his probation. The record is devoid of any notice of appeal from the district court's subsequent order resentencing Ortiz-Ruiz to the special parole term which Ortiz-Ruiz now challenges. Timely notice of appeal, however, is a prerequisite to the exercise of appellate jurisdiction. United States v. Merrifield, 764 F.2d 436, 437 (5th Cir. 1985).

Nonetheless, this determination should not be viewed as precluding Ortiz-Ruiz from challenging his sentence in the district

court, particularly in light of the typographical error in the district court's order sentencing Ortiz-Ruiz to an undetermined special parole term.

AFFIRMED.