

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8535

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ELTON LEON POWELL,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
MO 90 CR 039

(June 10, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

I.

In a one-count indictment, the grand jury charged Elton Leon Powell with possession of an unregistered machine gun in violation of 26 U.S.C. § 5861(d). Represented by court-appointed counsel, Powell entered a plea of guilty. The district court sentenced Powell within the guidelines to a term of imprisonment of 15

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

months, a two-year term of supervised release, a fine of \$1,000, and a \$50 special assessment. This court affirmed the judgment of the district court.

During the period that Powell was on supervised release, the probation officer submitted a violation report and a warrant request to the district court. The probation officer alleged that Powell had violated the conditions of supervised release by failing to follow the instructions of the probation officer to remain in his residence during a specified time for a home inspection (condition 3) and by using a controlled substance (condition 7). Based on three urinalyses, which showed positive for cocaine metabolite, and a belief that Powell continued using cocaine, the probation officer recommended that the district court "issue a warrant for arrest requiring the offender to show cause why his supervised release should not be revoked." The government filed a motion for revocation of supervised release. In an amended motion for revocation, the government alleged that Powell had also violated the conditions of release pending voluntary surrender to the Bureau of Prisons by delivering a simulated controlled substance.

The district court held a revocation hearing and heard testimony concerning the three alleged infractions of the conditions of supervised release. The district court revoked Powell's term of supervised release and sentenced him to a term of imprisonment of 15 months with no additional term of supervised release. Counsel was appointed to represent Powell on appeal.

II.

Powell argues that the district court abused its discretion in revoking supervised release based on the alleged offense committed after sentencing, his use of a controlled substance, and his failure to remain in the judicial district.

The district court may revoke supervised release if it finds by a preponderance of the evidence that a condition of release has been violated. See 18 U.S.C. § 3583(e)(3). The following evidence was presented at the revocation hearing. Adam Flores, the probation officer, testified that Pharmchem Laboratories tested Powell's urine samples and reported a positive result for cocaine metabolites. At Powell's request, the lab re-tested the sample; and the result was positive. Eleven days after the first test, Powell submitted a second urine specimen, which also tested positive for cocaine metabolites. On re-testing, the result of the second sample was unchanged. Approximately one week after the second test, a third urine sample also produced a positive result.

Powell allegedly failed to comply with the conditions of release by leaving the district without permission and by being absent from his residence at an appointed time for a home visit with the probation officer. Flores testified that he received information from Powell's wife that Powell had left the district to attend a custody hearing in Live Oak County. The Live Oak County District Clerk's Office verified that Powell was present at the hearing. Powell conceded that he had left the district without permission. As to his failure to remain at home for the probation

officer's visit, Powell told Flores that he had "stepped out briefly to go to the store."

Flores testified that Powell had violated supervised release a third time by delivering a simulated controlled substance, ecstasia, in the period between sentencing for the present offense and surrendering to serve his sentence. A certified copy of the indictment was admitted into evidence.

At the close of the hearing, the district court rendered an oral decision. The district court concluded that negligently leaving the district without permission was a technical violation of supervised release and that his indictment for trying to sell ecstasia was also a consideration. However, the district court relied primarily on "the three dirties" and Powell's failure to admit that he had a problem with drugs. The district court stated:

I find that you violated the terms of your supervised release and that you used cocaine or some other illegal substance. I find this cause to revoke your supervised release.

A.

Generally, the abuse-of-discretion standard applies in reviewing the district court's decision to revoke supervised release. See United States v. Kindred, 918 F.2d 485, 488 (5th Cir. 1990). However, upon a finding by a preponderance of the evidence that Powell possessed¹ a controlled substance, revocation of supervised release was mandatory under 18 U.S.C. § 3583(g). Id. at 487. Section 3583(g) provides:

¹"Knowing use of drugs is akin to possession." United States v. Kindred, 918 F.2d at 487 n.3.

If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

18 U.S.C.A. § 3583(g) (West Supp. 1993) (emphasis added).

Powell does not assert that he did not use a controlled substance or that the test results were not positive. He contends that the district court improperly based its finding that he used a controlled substance on uncorroborated hearsay testimony. Specifically, he argues that there were "no reasonable indicia of reliability" because the only witness who testified to the drug tests was the probation officer. He contends that this violated his right to confront and cross-examine adverse witnesses under the Sixth Amendment.

Due process requires disclosure of the evidence against the defendant at a hearing required by Fed. R. Crim. P. 32.1(a)(2), but there is more flexibility than in an adversary criminal trial. United States v. Ayers, 946 F.2d 1127, 1129 (5th Cir. 1991). "[T]he usual rules of evidence need not be applied." Id. at 1130.

In Kindred, the district court admitted a urinalysis report through the testimony of the probation officer; and this court, citing United States v. Penn, 721 F.2d 762 (11th Cir. 1983) and United States v. Bell, 785 F.2d 640 (8th Cir. 1986), found no Sixth Amendment violation. Kindred, 918 F.2d at 486-87. Powell argues that his case is distinguishable because his laboratory reports were not introduced into evidence; thus, the probation officer's testimony is unreliable double hearsay.

The absence of the laboratory reports is not critical to the reliability of the probation officer's testimony. Powell does not allege that the three drug tests, two of which were re-tested, were inaccurate. Moreover, he presented no evidence to contradict the allegations of drug use or to challenge the accuracy of the lab tests. We find that his confrontation rights were not violated by the admission of the probation officer's testimony alone. See Kindred, 918 F.2d at 487.

Accordingly, revocation of supervised release was mandatory upon the district court's finding that Powell had used a controlled substance. In view of the mandatory revocation, if the district court abused its discretion in revoking probation because Powell left the district without permission or because he was indicted for delivery of a controlled substance, the error was harmless. See Kindred, 918 F.2d at 488.

B.

Powell argues that due process requires the trial court to provide written findings and a statement of the reasons for revocation of supervised release. He asserts that the district court failed to meet this requirement and urges the court to reverse the revocation order.

"A written statement is a requirement of procedural due process in ordinary probation revocation hearings." Kindred, 918 F.2d at 488. The statement provides a basis for review and encourages accurate factfinding. Id.

In this case, although the district court provided no written statement, the basis for the revocation is clear. The district court made a detailed, oral statement expressing its reasons for revoking supervised release, a statement that has been transcribed. The district court specified that, of the alleged infractions of the conditions of supervised release, it was the "three dirties" that caused the most concern. Because the district court found that Powell used cocaine, revocation was mandatory under § 3583(g). There is no need to reverse and remand. See Kindred, 918 F.2d at 488.

AFFIRMED.