UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4020
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BEE MIDDLETON, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:89 CR 127)

(June 2, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant, Bee Middleton, Jr., appeals the sentence imposed upon the revocation of his term of supervised release claiming that the district court failed to articulate sufficient reasons for departing upward from the sentencing range recommended by Policy Statement section 7B1.4 of the United States Sentencing Guidelines (USSG) and that the sentence imposed was unreasonable. We conclude that the district court gave sufficient reasons for the departure and we affirm.

Facts and Proceedings Below

In December of 1989, Middleton pleaded guilty to one count of unlawful distribution of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

cocaine base in violation of 21 U.S.C. § 841(a)(1), a class C felony. He was sentenced to forty-one months of incarceration and thirty-six months of supervised release. He served the prison time and began the period of supervised release on July 2, 1992.

As a condition of supervised release, Middleton was prohibited from using illegal drugs and required to submit urine samples weekly as proof that he was not using drugs.

On two occasions, August 10, 1992, and September 18, 1992, Middleton's urine samples tested positive for cocaine. On three other occasions, Middleton failed to submit urine samples. Middleton submitted negative urine samples on three occasions after September 18, 1992.

Middleton pleaded true to the above allegations. He claimed that doctor's appointments following shoulder surgery prevented him from submitting samples on the three occasions he was charged with having failed to do so.

The district court found from a preponderance of the evidence that Middleton violated the conditions of his supervised release. After consideration of the recommended sentence of the USSG Policy Statement and the statutory minimum sentence, the district court sentenced him to the maximum sentence of twenty-four months of incarceration. Middleton appeals.

Discussion

Middleton contends that his sentence was imposed in violation of law because the district court failed to give sufficient consideration to the recommendations of USSG Policy Statement 7B1.4 before departing upward, as evidenced by the fact that the district court's order did not contain specific findings regarding the categories used to determine sentencesSQthe "Grade of Violation" and the "Criminal History Category." Middleton also complains that his sentence was plainly unreasonable.

"We review the district court's interpretation of statutes and the Guidelines de novo, but its application of the Guidelines to the facts for clear error." *United States v. Headrick*, 963 F.2d 777, 779 (5th Cir. 1992). A sentence imposed upon the revocation of supervised release should be upheld on appeal unless it was imposed in violation of law or is plainly unreasonable. *Id.*

Under 18 U.S.C. § 3583(g), a district court is required to revoke a term of supervised release

upon finding that a defendant possessed a controlled substance. *See also Headrick*, 963 F.2d at 779. A urinalysis sample that tests positive for cocaine is sufficient proof of use and possession of a controlled substance to revoke supervised release under section 3583(g) as long as there is no indication that passive inhalation or prescribed medications likely caused the positive test. *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992); *United States v. Smith*, 978 F.2d 181, 182 (5th Cir. 1992). Here, Middleton also admitted his drug use. Section 3583(g) requires the district court to impose a minimum term of incarceration of not less than one-third of the term of supervised release originally imposed, one year in this case. 18 U.S.C. § 3583(e) states that the maximum term of incarceration on revocation of supervised release is two years where the original offense is a class C felony.

Through 18 U.S.C. § 3583(e), a district court is required to consider USSG Policy Statement 7B1.4 when imposing sentence after the revocation of supervised release. 18 U.S.C. § 3553(a)(5) (1988).[1] 18 U.S.C. § 3553(b) states that upward departures from the sentence recommended by the guidelines are allowed where aggravating or mitigating circumstances exist which are not adequately considered in the formulation of the guideline. USSG § PART A§QIntro. 4(b). Neither the statute nor the Policy Statement describe the manner in which the district court must express its consideration of the Policy Statement and reasons for departure. We do not think it is necessary for the district court to engage in an exhaustive discussion of the policy statements or employ their

[1] In *Headrick*, 963 F.2d at 779-782, we recognized that USSG Policy Statement 7 serves as a nonbinding guideline to aid a district court in imposing sentence, although we also acknowledged that other policy statements in the guidelines act as more binding authority. In *Headrick*, 963 F.2d at 781, we distinguished *Williams v. United States*, 112 S.Ct. 1112, 1119 (1992), which held that Policy Statement 4A1.3 was binding authority. The decision in *Headrick* was based on the fact that the introduction to Policy Statement 7 specifically suggests that it is to be considered as a recommendation as opposed to binding authority. Citing *Williams*, the Supreme Court recently said in *Stinson v. United States*, No. 91-8685 (May 3, 1993), "The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements." 61 U.S.L.W. 4449. Since *Stinson* cited *Williams*, which we distinguished in *Headrick*, for this proposition, we do not construe this remark in *Stinson*, a case dealing with the binding effect of guideline commentary, as holding that *all* policy statements are binding authority, and overruling *Headrick*. Also, *Stinson* recognized that commentary is not binding in all instances. Regardless, our case deals with whether an upward departure from a Policy Statement was sufficiently justified by the findings reflected in the district court's order rather than a reconsideration of the effect of the Policy Statement itself.

precise terminology to make valid a departure in every case.

The district court said: "The Sentencing Guidelines recommend a sentence of 6-12 months. U.S.S.G. § 7B1.1(a) (policy statement). However, upon consideration of the Sentencing Commission's recommendation and of those factors set out in 18 U.S.C. § 3553(a), the Court finds that the minimum range of 12 months mandated by § 3583(g) and recommended by § 7B1.1(a) is inadequate in light of the defendant's conduct as it appears on the record before the Court. [citation omitted] Middleton twice used cocaine soon after beginning supervised release, indicating an utter inability to deal with his drug problem and to obey the law while under supervised release. Coupled with the seriousness of the offense, the need for deterrence, and the defendant's flagrant breach of trust, the Court finds that the maximum term of imprisonment should be imposed."

Although the district court did not expressly state its determination of the Grade of Middleton's violation or his Criminal History Category, its opinion clearly reflects that the district court considered the applicable statutes and policy statements in imposing sentence. The district court stated that it considered the recommendation of the Sentencing Commission. The district court expressly recognized that the applicable Policy Statement did not call for a sentence of more than twelve months. Given that the record reflects without dispute that Middleton's Criminal History Category is IV and that his violation was either a Grade B or C, it is clear that the Policy Statement was not misinterpreted to Middleton's detriment. The district court's reasons for departing upward, defendant's utter inability to deal with his drug problem, are sufficiently stated in this order. Because the court sufficiently considered Policy Statement section 7 and because the district court gave a sufficient explanation for its upward departure, Middleton's sentence was not imposed in violation of law.

In light of Middleton's admitted conduct of two positive cocaine tests, actual cocaine use, and three missed drug tests, the sentence imposed, though perhaps severe, was not plainly unreasonable. *See Courtney*, 979 F.2d at 47 (two positive drug tests, twenty-four month sentence on revocation of supervised release); *Headrick*, 963 F.2d at 778-79 (drug violation yielded twenty-four month sentence); *United States v. Thompson*, 976 F.2d 1380, 1381 (11th Cir. 1992) (twenty-four month

sentence imposed upon revocation of supervised release for drug violation). Attending a nonemergency doctor's appointment without notifying his probation officer or attempting to reschedule the time of submission of the urinalysis is not a legitimate excuse for failing to submit the required urine samples. Although the three negative samples which followed the positive sample suggest that defendant may be improving his behavior, they also do not excuse the violation of the conditions of supervised release or make the sentence imposed plainly unreasonable.

Conclusion

Because the district court gave sufficient consideration to USSG Policy Statement 7B1.4 before departing upward and because Middleton's sentence was not plainly unreasonable, Middleton's twenty-four month sentence for violating the conditions of his supervised release is

AFFIRMED.