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Jeff Singdahlsen

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

DAVID F. MOSTELLER,	)	
Petitioner,	)	
v.	)	CR. 88-00081-01-R
	)	C.A. 3:91CV00635
UNITED STATES,	)	
Respondent,	)	

MEMORANDUM OPINION

This matter is before the Court on the government's motion to dismiss the petitioner's motion to vacate, correct, or set aside his sentence. For the reasons discussed below, the government's motion to dismiss will be GRANTED.

FACTS

Petitioner, David F. Mosteller, was originally convicted on two counts of Interstate Transportation in Aid of Racketeering, in connection with an attempt to purchase four kilograms of cocaine. This Court sentenced the petitioner to one year and one day on the first count, and to a concurrent five year term on the second count. All but six months of this second sentence were suspended.

On October 17, 1988, the Court determined that the petitioner had violated several terms of his probation and reinstated the original five year sentence, giving petitioner credit for time

served. Execution of the sentence was suspended, and the petitioner was given until the afternoon of November 16, 1988, to self-surrender.

On the morning of November 16, 1988, this Court denied the petitioner's motion to stay the execution of his sentence and for release pending appeal. The petitioner subsequently failed to surrender, and a warrant was issued for his arrest. The petitioner was arrested in Huntington Valley, Pennsylvania, on December 18, 1988. Upon his arrest, the petitioner denied his identity, claiming to be Charles David Alexander. At the time of his arrest, the petitioner had in his possession a social security card, American Express Card, birth certificate, Pennsylvania operator's license, and title to a truck in this fictitious name.

The petitioner was returned to Richmond, where he pleaded guilty to a charge of failure to surrender, 18 U.S.C. § 3146, and was sentenced pursuant to the Sentencing Guidelines. In calculating the defendant's sentence, the Court found that the petitioner had obstructed justice and increased his offense level by two under Section 3C1.1 of the Sentencing Guidelines. The Court then imposed the maximum term of imprisonment permitted under the Guideline range, 27 months. This sentence was to run consecutive to any other sentence the petitioner was serving. In addition, the Court ordered a term of three years supervised release to commence upon the petitioner's release from imprisonment.

The petitioner filed a direct appeal with the Fourth Circuit Court of Appeals. That court ruled against the petitioner on all

claims. The petitioner has also filed a previous motion under 28 U.S.C. § 2255. This Court determined that those claims were without merit and dismissed his motion with prejudice.

DISCUSSION

In the present motion, the defendant argues that the sentence he received for his conviction under 18 U.S.C. § 3146 (27 months of imprisonment and 36 months of supervised release) exceeds the maximum sentence allowable under the statute. The petitioner bases his argument on his reading of a Fifth Circuit case, United States v. Garcia-Garcia, 939 F.2d 230 (5th Cir. 1991) (holding that the lower court's failure to mention the possibility of supervised release during the Rule 11 hearing was not harmless error because the period of imprisonment coupled with the term of supervised release exceeded the maximum penalty as explained at the Rule 11 hearing). In particular, he claims that Garcia-Garcia stands for the proposition that supervised release is a part of the total sentence. Thus, he argues, he has received a total sentence of 63 months, which exceeds the 60 months maximum sentence permitted under 18 U.S.C. § 3146.

The petitioner's argument is without merit. While the language used in the various sources from which he draws his argument is at times confusing and may even be inconsistent, it is clear from the case law, the plain meaning of the statutes, and congressional intent that this Court was within its power in sentencing the petitioner to three years of supervised release.

Section 3583 provides that the Court "may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. § 3583(a) (emphasis added). The relevant punishment for failure to appear is "imprisonment for not more than five years." 18 U.S.C. § 3146(b)(1)(A)(ii) (emphasis added). Thus, according to the plain language, supervised release is part of the overall sentence but comes after and is separate from the term of imprisonment. Therefore, the imposition of supervised release was not limited by the maximum term of imprisonment allowable under the specific statute governing failure to surrender. See United States v. Montenegro-Rojo, 908 F.2d 425, 431-34 (9th Cir. 1990) (finding, based on the statutory language and the necessary inferences from the congressional purpose in replacing parol with supervised release, that "a sentencing court [has] the option to tack a period of supervised release onto any term of imprisonment authorized by a substantive criminal statute, even a term near or at the maximum"); cf. United States v. Dillard, 910 F.2d 461, 466-67 (7th Cir. 1990) (affirming the imposition of a sentence on revocation of supervised release that was greater than the original sentence that could have been imposed under the Sentencing Guidelines based on congressional intent in replacing parol with supervised release).

Pursuant the Rule 4(a) of the Federal Rules of Appellate Procedure, as adopted by Rule 11 of the Rules Governing Section

2255 Proceedings in the United States District Courts, since the United States is a party to this action, the petitioner has sixty (60) days in which to file a notice of appeal with the Clerk of this Court if he wishes to appeal this decision.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to the pro se petitioner and all counsel of record.

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DATE UNITED STATES DISTRICT JUDGE