

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11289
Non-Argument Calendar

D.C. Docket No. 4:17-cr-00006-CDL-MSH-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER DELGESSO,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(December 15, 2020)

Before BRANCH, GRANT, and EDMONDSON, Circuit Judges.

PER CURIAM:

Christopher Delgesso, a federal prisoner proceeding pro se,¹ appeals the district court's denial of his pro se motion -- under 18 U.S.C. § 3583(e)(2) -- to modify the conditions of his supervised release. No reversible error has been shown; we affirm.

In 2017, Delgesso pleaded guilty to one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), (b)(2). Delgesso was sentenced to 78 months' imprisonment, followed by 25 years' supervised release. We affirmed Delgesso's conviction and sentence on direct appeal. See United States v. Delgesso, 769 F. App'x 861 (11th Cir. 2019) (unpublished).

At the sentencing hearing, the sentencing court asked Delgesso whether he had reviewed the Presentence Investigation Report ("PSI"), including specifically the recommended conditions of supervised release. Delgesso testified he had read the PSI and understood the recommended supervised release conditions. The sentencing court then announced that Delgesso's "supervision shall include the mandatory, standard, and special conditions as noted in the [PSI] and the Court's standing order 2017-02." Delgesso never challenged -- in his objections to the PSI,

¹ We construe liberally pro se pleadings. See Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

during the sentencing hearing, or on direct appeal -- the special conditions of his supervised release.

In February 2020, Delgesso moved to modify the conditions of his supervised release under section 3583(e)(2). Delgesso sought (for the first time) to remove the special conditions requiring him to participate in a substance abuse program, prohibiting him from possessing or using alcohol, and prohibiting him from viewing, purchasing, or possessing pornographic or sexually explicit materials or entertainment.

The district court denied the motion. The district court first concluded that it lacked jurisdiction to consider Delgesso's challenges to the legality or constitutionality of his supervised release conditions. The district court also determined that no relief was warranted in the light of the record and the pertinent 18 U.S.C. § 3553(a) factors.

We review for abuse of discretion the denial of a motion to modify the conditions of supervised release. Cf. United States v. Serrapio, 754 F.3d 1312, 1318 (11th Cir. 2014) (applying an abuse-of-discretion standard to decisions involving 18 U.S.C. § 3563(c): an analogous statutory provision allowing for modification of the conditions of probation). We review de novo questions about a

district court's subject matter jurisdiction. See United States v. Al-Arian, 514 F.3d 1184, 1189 (11th Cir. 2008).

Under section 3583(e)(2), a district court has discretion to “modify, reduce, or enlarge the conditions of supervised release” after considering certain factors set forth in 18 U.S.C. § 3553(a). See 18 U.S.C. § 3583(e)(2). The pertinent section 3553(a) factors include (1) the nature and circumstances of the offense and the defendant's history and characteristics; (2) the need for the sentence to reflect the seriousness of the offense, afford adequate deterrence, protect the public, and provide the defendant with educational training, medical care, or other correctional treatment; (3) the guideline range; (4) the pertinent policy statements of the Sentencing Commission; (5) the need to avoid unwarranted sentencing disparities; and (6) the need to provide restitution. See 18 U.S.C. §§ 3583(e); 3553(a)(1)-(2), (a)(4)-(7).

Most circuit courts that have addressed the issue have concluded that section 3583(e)(2) cannot be used to challenge supervised release conditions on legal or constitutional grounds. See United States v. Lussier, 104 F.3d 32, 34 (2d Cir. 1997); United States v. Hatten, 167 F.3d 884, 886 (5th Cir. 1999); United States v. Gross, 307 F.3d 1043, 1044 (9th Cir. 2002); see also United States v. McClamma, 676 F. App'x 944, 947-48 (11th Cir. 2017) (unpublished) (joining the Second,

Fifth, and Ninth Circuits in concluding that “§ 3583(e)(2) cannot be used as a means to challenge the legality or constitutionality of supervised release conditions.”); but see United States v. Neal, 810 F.3d 512, 518-20 (7th Cir. 2016) (concluding a defendant may use section 3583(e)(2) to “bring substantive challenges to the current legality of conditions of supervised release”).

In addressing the proper scope of section 3583(e)(2), the Ninth Circuit provided this explanation:

Congress, by enacting the Sentencing Reform Act of 1984, limited the manner in which a defendant may challenge the legality of a supervised release condition to: (1) direct appeal, (2) § 2255 habeas corpus relief, and (3) within [fourteen] days of the district court’s decision, [Fed. R. Crim. P.] 35[(a)] motion. It would frustrate Congress’s intent if this court were to interpret § 3583(e)(2) to authorize a district court to modify or rescind an allegedly illegal condition.

Gross, 307 F.3d at 1044 (cited with approval by McClamma, 676 F. App’x at 948).

Guided by the persuasive authority, the district court concluded correctly that it lacked jurisdiction to consider the legal or constitutional challenges raised in Delgesso’s section 3583(e)(2) motion.

In his motion, Delgesso sought to challenge the legality and constitutionality of the sentencing court’s original sentencing decision. Delgesso’s chief argument was that the sentencing court failed to explain adequately its decision to impose the complained-of special conditions. Delgesso also challenged the special conditions

as unsupported by the facts of his case, inconsistent with the pertinent section 3553(a) factors and the policy statements of the Sentencing Commission, and not narrowly tailored to his situation.

To the extent Delgesso sought to challenge the original imposition of his supervised release conditions, we agree with the government that Delgesso could have and should have raised these challenges earlier -- either at his sentencing hearing, in a Rule 35(a) motion to correct, or in his direct criminal appeal. Section 3583(e)(2) is not a proper vehicle to seek review of issues which could have been raised in earlier criminal proceedings or in a motion for post-conviction collateral relief.²

To the extent Delgesso requested that the district court modify the conditions of his supervised release based on the general punishment goals set forth in section 3553(a), the district court abused no discretion in denying Delgesso relief. On appeal, Delgesso says the district court abused its discretion by failing to consider

² We note that Delgesso has filed in the district court a 28 U.S.C. § 2255 motion in which he challenges the conditions of his supervised release. That motion remains pending in the district court.

Delgesso requests an order from this Court adding the issues raised in his section 3583(e)(2) motion to his pending section 2255 motion; we deny the requested order. Delgesso must, instead, move to amend his section 2255 motion in the district court.

the section 3553(a) factors and by failing to explain adequately its decision. We disagree.

In ruling on Delgesso's section 3583(e)(2) motion, the district court summarized Delgesso's arguments and identified the applicable legal standards, including the court's obligation to consider the pertinent section 3553(a) factors. The district court then said that it denied Delgesso's motion "[b]ased on the Court's review of the record and after taking into account the factors set forth in 18 U.S.C. § 3553(a)." This language demonstrates that the district court considered the section 3553(a) factors and explains adequately the district court's ruling. See United States v. Dorman, 488 F.3d 936, 938 (11th Cir. 2007) ("The district court need not state on the record that it has explicitly considered each [section 3553(a)] factor and need not discuss each factor. . . . Rather, an acknowledgement by the district court that it has considered the defendant's arguments and the § 3553(a) factors will suffice.").

AFFIRMED.