NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-10834

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALLEN J. PENDERGRASS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:17-cr-00224-AT-CMS-1

Before JORDAN, ROSENBAUM, and LAGOA, Circuit Judges.

PER CURIAM:

Allen Pendergrass appeals his 30-month sentence for mail fraud, money laundering conspiracy, and aggravated identity theft. He argues that the district court erred in determining that it could not impose a sentence of home detention to satisfy the mandatory minimum sentence required by the aggravated identity theft statute. Reviewing for plain error, we affirm.

I. BACKGROUND

Mr. Pendergrass and his co-defendant Terrell McQueen were indicted on five counts of mail fraud (counts 1-5), one count of conspiracy to commit money laundering (count 6), and four counts of aggravated identity theft (counts 7-10). The indictment alleged that Messrs. Pendergrass and McQueen contacted local, county, and state government offices seeking lists of unclaimed funds. The two then mailed fraudulent documents claiming that they were representatives of the funds' rightful owners and collected the funds for themselves.

Mr. Pendergrass pleaded not guilty and proceeded to trial. A jury found him guilty of mail fraud, conspiracy to commit money laundering, and aggravated identity theft. At sentencing, the district court calculated Mr. Pendergrass' advisory guidelines range as 63 to 78 months, noting that it was required to impose a consecutive 24-month sentence for the aggravated identity theft counts. *See* 18 U.S.C. § 1028A(a)(1). Based on these considerations and the 18 U.S.C. § 3553(a) sentencing factors, the court imposed a total sentence of 46 months' imprisonment. Mr. Pendergrass appealed his convictions and sentence. We affirmed the convictions but remanded for resentencing because Mr. Pendergrass was not given the opportunity to allocute at his sentencing hearing. *See United States v. Pendergrass*, No. 22-13018, 2025 WL 78172, at *11 (11th Cir. Jan. 13, 2025) (unpublished).

At his resentencing hearing, Mr. Pendergrass, who was 70 years old at the time, addressed the district court. He began by apologizing and accepting responsibility for his actions. Mr. Pendergrass, who had been released on bond pending his trial and during his appeal, told the court that he had held full-time employment and had not had any encounters with law enforcement while on bond. He also discussed a project to build tiny homes for people facing homelessness in Atlanta for which he had recently received funding. He concluded by asking the court to consider "a plea or partial reduction of [his] sentence with the remainder to be served" under home detention. *See* Doc. 348 at 8.[1]

The district court acknowledged Mr. Pendergrass' desire to serve his sentence "at home." *Id*. at 12. But it noted that he faced a two-year mandatory consecutive sentence for the aggravated identity theft conviction. The court stated its belief "that the mandatory minimum doesn't authorize [the court] to" order home detention. *See id*. The court noted that Mr. Pendergrass had not provided any authority suggesting that it could impose home detention when a statute requires a mandatory minimum sentence. Mr. Pendergrass' counsel stated her belief that, given the limited remand to allow allocution only, she could not raise the issue of home confinement at the resentencing. She nevertheless indicated that "there might be some authority" that home detention can be a "substitute for a prison sentence." *Id*. The court responded that it did not know that

[1] "Doc." numbers refer to the district court's docket entries.

to be true for mandatory sentences. The court concluded that it "had to impose the mandatory minimum." *Id*. at 12.

Considering Mr. Pendergrass' age, his contributions to the community, and the length of time the case had been pending—thirteen years—the district court imposed a total sentence of 30 months' imprisonment: a 24-month sentence for the aggravated identity theft conviction and a consecutive six-month sentence for the other convictions. The court explained: "I don't have any way of getting around the reality of the fact that there is a mandatory sentence here. And the other six months I have to really address but are not greater than necessary indeed still to punish you for the crimes committed." *Id*. at 16. Mr. Pendergrass did not object to the sentence.

This is his appeal.

II. STANDARD OF REVIEW

"We review a district court's interpretation of the Sentencing Guidelines and application of the Guidelines to the facts de novo, and we review the district court's findings of fact for clear error." *United States v. Dimitrovski*, 782 F.3d 622, 628 (11th Cir. 2015).

Issues raised for the first time on appeal are reviewed for plain error. *See United States v. Corbett*, 921 F.3d 1032, 1037 (11th Cir. 2019). To establish plain error, a defendant must show: (1) an error, (2) that is "plain," (3) that "affects substantial rights," and

(4) that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Lejarde-Rada*, 319 F.3d 1288, 1290 (11th Cir. 2003) (citation modified). Mr. Pendergrass agrees that our review is for plain error.

III. DISCUSSION

The aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), provides that a defendant convicted of using a stolen identity during another felony "shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." The statute also specifies that probation may not satisfy this minimum sentence. *See* 18 U.S.C. § 1028A(b)(1) ("[A] court shall not place on probation any person convicted of a violation of this section.").

On appeal, Mr. Pendergrass argues that the district court plainly erred in determining that home detention cannot be used to satisfy the mandatory minimum sentence for aggravated identity theft. The Sentencing Guidelines permit home detention "as a condition of probation or supervised release, but only as a substitute for imprisonment." U.S.S.G. § 5F1.2. Relying on the language that home detention may be a "substitute" for imprisonment, Mr. Pendergrass argues that home detention is a form of imprisonment and therefore it can satisfy the mandatory minimum sentence in § 1028A. He cites two cases from this Court in support of his argument: *Herrera v. U.S. Attorney General*, 811 F.3d 1298 (11th Cir. 2016), and *United States v. Taylor*, 550 F. App'x 819 (11th Cir. 2013) (unpublished).

We need not decide whether the district court erred in concluding that it could not impose home detention to satisfy § 1028A. Because Mr. Pendergrass did not object at his resentencing hearing to the sentence imposed, he must show not only that the district court erred, but also that its error was plain. *See Corbett*, 921 F.3d at 1037. Even assuming he is correct that there was error, he has not shown that the error was plain. "An error is plain if the explicit language of a statute or rule or precedent from the Supreme Court or this Court directly resolves the issue and establishes that an error has occurred." *United States v. Boone*, 97 F.4th 1331, 1339 (11th Cir. 2024). Mr. Pendergrass has cited no controlling authority directly stating that home detention may satisfy the 24-month mandatory minimum required by § 1028A(a)(1) or that home confinement may satisfy mandatory minimum requirements generally. In fact, he concedes that this Court has not "specifically addressed whether the 24-month sentence required by § 1028A could be satisfied by home detention." Appellant's Br. 11.

The cases Mr. Pendergrass cites in support of his argument neither provide "explicit language" that "directly resolves the issue" nor "establish[] that an error has occurred" here. *See Boone*, 97 F.4th at 1339.

First, Mr. Pendergrass relies on *Herrera*. In that case, a noncitizen challenged the Board of Immigration Appeals' decision that he was not eligible for cancellation of removal because he had a previous conviction for an aggravated felony. *See Herrera*, 811 F.3d at 1299. He argued that his previous burglary conviction did not qualify as an aggravated felony because he was sentenced to house arrest, not incarceration, for the offense. *See id*. We held that it was reasonable for the Board of Immigration Appeals to conclude that the noncitizen's home detention constituted "confinement that qualified as a term of imprisonment" under the Immigration and Nationality Act. *See id*. at 1300 (citation modified).

Herrera does not directly control the issue before us. Even if it was reasonable for the BIA to determine that home detention could constitute a term of imprisonment under the Immigration and Nationality Act's definition of an aggravated felony, it does not follow that home detention necessarily satisfies a mandatory minimum requirement under a different statute in a different (criminal) context. *Herrera* therefore does not resolve whether Mr. Pendergrass could have been sentenced to home detention.

Second, Mr. Pendergrass cites *Taylor*. In that case, we rejected a defendant's argument that a home-detention condition imposed upon revocation of his supervised release was illegal because it caused his sentence to exceed the relevant statutory maximum. *Taylor*, 550 F. App'x at 820–21. We cited a Fifth Circuit decision, noting that it stood for the proposition that a district court "erred by imposing a term of incarceration as well as a term of home detention that combine to exceed the statutory maximum term of incarceration." *Id.* at 821 (quoting *United States v. Ferguson*, 369 F.3d 847, 852 (5th Cir. 2004)).[2]

Mr. Pendergrass argues that our statement in *Taylor* quoting *Ferguson* made it plain that the district court erred here. We are not persuaded. As an initial matter, *Taylor* was unpublished and therefore "do[es] not constitute binding authority and may be relied on only to the extent" that it is "persuasive." *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1355 n.5 (11th Cir. 2018). In addition, in *Taylor* we did not explicitly adopt the Fifth Circuit's reasoning in *Ferguson*. Instead, we clarified that "[h]ome detention can be imposed as a condition of supervised release." *Taylor*, 550 F. App'x at 821. And even if home detention may not be used to exceed statutory *maximums*, it does not follow that a sentence of home detention necessarily satisfies a statutory mandatory *minimum*. Even as mere persuasive authority, *Taylor* does not explicitly support Mr.

[2] In *Taylor*, the defendant was sentenced to 41 months of imprisonment and 19 months of supervised release, with the first six months of supervised release to be served on home detention. *See Taylor*, 550 F. App'x at 821. We stated that the "sum of 41 months of imprisonment and 19 months of supervised release is 60 months and thus permissible under his 5 year (60 month) limit imposed by § 3583(e)(3)." *Id.* The defendant argued that the imposition of home detention resulted in a total term of 66 months, exceeding the statutory limit. *Id.* We rejected this argument because it double counted the six months of home detention as both imprisonment and supervised release. *Id.* at 821–22. Because the defendant had "not shown" that his "sentence exceeded the statutory maximum," we affirmed the sentence. *See id.* at 822.

Pendergrass' argument that he could have been sentenced to home detention in satisfaction of § 1028A's mandatory minimum.

Indeed, our precedent cuts against Mr. Pendergrass' argument that home detention may satisfy a mandatory minimum sentence. In *United States v. Mangaroo*, 504 F.3d 1350 (11th Cir. 2007), we held that a district court plainly erred when it sentenced defendants to four years of probation, which included as a condition one year of home detention, in satisfaction of a seven-year mandatory minimum sentence for a firearm offense. *See id*. at 1353–54. Pointing to the provision in the firearm offense statute prohibiting probation, the Court reasoned that sentences of home detention are "specific conditions of probation, and probation is an impermissible sentence for the firearm offenses." *Id*. at 1354. We further said that home detention "is not incarceration." *Id*.

The aggravated identity theft statute under which Mr. Pendergrass was sentenced similarly prohibits probation. *See* 18 U.S.C. § 1028A(b)(1). Because this Court held in *Mangaroo* that home detention is a "specific condition[ ] of probation," which is unavailable to Mr. Pendergrass, and is "not incarceration," it is far from clear that the district court could order Mr. Pendergrass to serve his mandatory two-year sentence of imprisonment on home detention. *See Mangaroo*, 504 F.3d at 1354. This is particularly so given the six-month sentence the district court imposed for the other counts of conviction. *See* 18 U.S.C. § 3561(a)(3) ("A defendant who has been found guilty of an offense may be sentenced to a term of probation unless . . . the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.").

Mr. Pendergrass points to no controlling precedent directly resolving the issue of whether he could have been sentenced to home detention in satisfaction of § 1028A's mandatory minimum sentence. He therefore has failed to show that the district court plainly erred.

IV. CONCLUSION

For the above reasons, we affirm the sentence the district court imposed.

AFFIRMED.