// United States Court of Appeals
For the Eighth Circuit

No. 23-2355

United States of America

*Plaintiff - Appellee*

v.

Henry Dailey

*Defendant - Appellant*

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: February 16, 2024
Filed: August 27, 2024

Before LOKEN, COLLOTON,[1] and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

Four months after Henry Dailey began a ten-year term of supervised release, his Probation Officer filed a Violation Report alleging numerous violations of his supervised release conditions. At the revocation hearing, Dailey stipulated to the

[1]Judge Colloton became chief judge of the Circuit on March 11, 2024. See 28 U.S.C. § 45(a)(1).

majority of the alleged violations, resulting in an advisory guidelines sentencing range 6 to 12 months imprisonment. Rejecting the parties joint recommendation of 6 months imprisonment followed by a ten-year term of supervised release, the district court[2] revoked supervised release and sentenced Daily to 12 months imprisonment followed by a 240-month term of supervised release. Dailey appeals the new term of supervised release. We affirm.

## I. Background

In 2017, Dailey pleaded guilty to one count of Interstate Transportation for Prostitution in violation of 18 U.S.C. § 2421. The charges arose out of Dailey's involvement in a commercial sex trafficking ring in which he and other leaders used violence and drugs to control victims of the organization. In a binding Plea Agreement, see Fed. R. Crim. P. 11(c)(1)(C), Dailey admitted the victim said in a recorded interview that Dailey and his co-defendant recruited and forced her to have sex with pimps who forced drugs upon her, threatened her with extreme violence, and on one occasion Dailey raped her for making offensive comments. The government dismissed a second Interstate Transportation count involving a second victim and a charge of Conspiracy to Commit Sex Trafficking of an Adult by Force, Fraud or Coercion, see 18 U.S.C. §§ 1591(a) and (b)(1), 1594 (a) and (c).

The Plea Agreement provided that Dailey understood and agreed that the court must impose a sentence of not less than 72 nor more than 84 months imprisonment, must impose a period of supervised release of at least 5 years, and "may impose a term of supervised release of up to life" under 18 U.S.C. § 3583(k). See USSG § 5D1.2(c) ("The term of supervised release imposed shall be not less than any statutorily required term of supervised release."). In April 2018, the district court

[2]The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri.

accepted the Plea Agreement and sentenced Dailey to 84 months imprisonment followed by 120 months of supervised release.

Dailey completed his term of incarceration and began supervised release in November 2022. On March 31, 2023, Probation Officer Laura Kline filed a Violation Report alleging numerous violations of mandatory, special, and standard conditions of his supervised release. All were Grade C violations except violation of the mandatory condition that Dailey "must not commit another federal, state or local crime," a Grade B violation. See USSG § 7B1.1(a). The new law violations were based on allegations that Dailey failed to register two unauthorized, internet-capable devices (a cell phone and tablet) in violation of Missouri law, and that forensic examination of the phone revealed evidence of Dailey's involvement in marijuana and fentanyl sales. The Report concluded:

> Even after being confronted with evidence of his dishonest and high-risk behaviors, and given ample opportunities to be truthful, he has continued to deny, minimize, and justify his high-risk, noncompliant behaviors. . . . It is clear he does not have respect for the conditions of supervision and believes the rules do not apply to him. He is a danger to the community based on his lengthy and violent criminal history and he appears to be fully entrenched in his deviant cycle and possibly engaged in the same behaviors as in the instant offense. He . . . is not amenable to community supervision at this time.

The court ordered that a warrant issue and Dailey was taken into custody. At a preliminary revocation hearing on May 2, the government called Probation Officer Kline and asked the court to accept the Report as her direct testimony. Overruling Dailey's hearsay objections, the magistrate judge[3] accepted the Report as Probation Officer Kline's testimony on direct exam. Dailey's counsel then cross-examined her.

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[3]The Honorable W. Brian Gaddy, United States Magistrate Judge for the Western District of Missouri.

After hearing arguments by both parties, the court concluded there was probable cause to proceed. The final revocation hearing was scheduled for May 25 before the district court.

Two days before the hearing, the government advised the court by email that Dailey's counsel had said Dailey would stipulate (i) that if called, Officer Kline would testify consistent with her Violation Report; (ii) that Dailey would "admit to all of the alleged violations in that report," except for alleged violations of conditions that he must not commit another federal, state or local crime; must not communicate or interact with someone he knew was engaged in criminal activity without the probation officer's permission; and shall comply with all state and federal sex offender registration requirements; and (iii) that the parties agreed to recommend a sentence of 6 months imprisonment to be followed by a ten-year term of supervised release, understanding that their recommendation was not binding on the court. Copied on the email, Dailey's counsel replied, "I have spoken with my client yesterday and he does confirm the information listed in [the government's] email."

At the final hearing, the district court began by asking defense counsel if Dailey "is going to stipulate to some of the violations," as the email had advised. Defense counsel replied, "Yes, Your Honor." Dailey then stipulated to all alleged violations except the three noted in the email.[4] The court confirmed that the advisory guidelines range for the stipulated Grade C violations, coupled with Dailey's Category IV criminal history, was 6 to 12 months imprisonment. The parties confirmed their joint recommendation of 6 months imprisonment to be followed by a ten-year term of supervised release.

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[4]"Where the defendant is 'aware of the stipulation and does not object to the stipulation in court,' we presume that he has acquiesced in his counsel's stipulation." United States v. Robinson, 617 F.3d 984, 989 (8th Cir. 2010) (cleaned up) (quotation omitted).

The district court declined to follow the joint recommendation, instead imposing a revocation sentence of 12 months imprisonment to be followed by 240 months supervised release. Speaking directly to Dailey, the court explained:

> [The] underlying crime here that got you on this supervised release scares me because the things that happened in this underlying case still scare me.
>
> . . . . .
>
> I understand there's a joint recommendation, but I want you to understand this: This is serious and I'm not playing games. So it's the judgment of this court that the defendant is sentenced to the Bureau of Prisons for 12 months and 240 months on supervised release.
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> And I'm saying that because I want you to know we are not giving up. We are going to stay focused, and every time you come back here, it's going to be a worse sentence.

Neither party responded when the court asked for "anything additional." No objections were raised. Dailey appeals the revocation term of supervised release, alleging procedural errors and a substantively unreasonable sentence.[5] "We review the district court's imposition of a revocation sentence for abuse of discretion, first questioning whether the court committed procedural error and then ensuring the sentence was substantively reasonable." United States v. Trung Dang, 907 F.3d 561, 564 (8th Cir. 2018).

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[5]Dailey does not challenge the revocation of his supervised release or the 12-month term of incarceration.

## II. Procedural Error

A district court commits procedural error when it "bas[es] a sentence on unproven, disputed allegations rather than facts." United States v. Richey, 758 F.3d 999, 1002 (8th Cir. 2014), citing Gall v. United States, 552 U.S. 38, 50 (2007). Consequently, "a revocation sentence may not be based on disputed, unproven allegations in the probation officer's reports" because such reports are not evidence. Id. at 1002-03. However, the government may present evidence to the court to prove the existence of those facts. Id. at 1002.

Dailey argues the district court committed procedural error by giving improper weight to allegations of new drug crimes in the Violation Report to which Dailey objected at the Preliminary Revocation Hearing, and "by not allowing Mr. Dailey to defend the unstipulated allegations . . . used to determine [his] sentence." Dailey did not raise these issues before the district court despite being invited to do so. "[I]f counsel does not timely object that the reasons for imposing a [sentence] have not been adequately explained, defendant has voluntarily relinquished the issue" by depriving the appellate court of the district court's response to a timely objection. United States v. Deatherage, 682 F.3d 755, 763 n.4 (8th Cir. 2012). Therefore, we could treat these issues as waived but will consider them forfeited and subject to plain error review, a "formidable" standard of review. "The court's explanation is sufficient if the sentencing record taken as a whole demonstrates that the court considered the relevant factors." United States v. Krzyzaniak, 702 F.3d 1082, 1085 (8th Cir. 2013) (citation omitted).

Here, the sentencing record makes clear there was no plain procedural error. As to the first contention, the court did not "base" Dailey's revocation sentence on the new law violations. At the revocation hearing, Dailey and defense counsel stipulated to multiple Grade C violations but not to Grade B new law violations. The court then adopted the 6-to-12-month guideline range recommended by Probation

Officer Kline. Had the range been "based on" a new law Grade B violation, the range would have been 12 to 18 months imprisonment. See USSG § 7B1.4(a). The Judgment in a Criminal Case confirms that Dailey's revocation sentence was not "based on" new law violations. The Judgment recites that Dailey "is adjudicated guilty" of the four standard condition and four special condition violations he stipulated to committing, without reference to any new law violations.

Dailey stipulated that, if called, Probation Officer Kline's testimony would be consistent with the Violation Report. Thus, disputed facts contained in the Report are properly viewed as Probation Officer Kline's direct testimony, which was subject to cross examination at the Preliminary Revocation Hearing. The district court's consideration of the disputed allegations was not plain error -- Probation Officer Kline's testimony provided evidentiary support for the allegations, Dailey presented no contrary evidence, and the court made no finding resolving Dailey's objection that denied underlying facts. See United States v. Malloy, 343 Fed. App'x 149, 152 (8th Cir. 2009); United States v. Ross-Garner, No. 22-1679, 2022 WL 4490626, at *1 (8th Cir. Sept. 28, 2022).

Dailey argues that statements by the court at the revocation hearing about Dailey's texts that referenced marijuana nonetheless establish this procedural error:

> You are texting people between Daily [sic] and Mille talking about [marijuana]. You're on WhatsApp and there's voicemails.

Read in context, however, the court's reference to evidence of possible drug transactions on Dailey's cell phone did not reflect the court's basis for its revocation sentence. It was a frank warning to Dailey about what would happen if he did commit new law violations in the future:

> And at some point, it's not supervised release violations . . . it's a new crime. . . . I'm just telling you if you pick up another crime, given your

> criminal history category, if you get found with fentanyl, it's a death sentence for you. I don't want you to die in prison, and you don't want to die in prison.

"A court may caution a defendant about the consequences of future violations." United States v. Martin, 757 F.3d 776, 778 (8th Cir. 2014).

As to the second alleged procedural error -- not allowing Dailey to defend unstipulated allegations used to determine his sentence -- it appears he is asserting a violation of his due process right to confront and cross-examine adverse witnesses at a supervised release revocation hearing. See United States v. Timmons, 950 F.3d 1047, 1049-50 (8th Cir. 2020); Fed. R. Crim. P. 32.1(b)(2)(C). The contention is without merit. "[A]t a revocation hearing, admitting [a probation officer's] report of violations when she was available for cross exam did not violate [the defendant's] due process confrontation rights." United States v. Clower, 54 F.4th 1024, 1027 (8th Cir. 2022). The court did not prevent Dailey from calling Probation Officer Kline. She was present and seated at counsel table at the final hearing; Dailey did not call her as a witness or ask the court for permission to cross examine her, as he had at the preliminary hearing. The court was not obligated to raise this issue *sua sponte*. See United States v. Simms, 757 F.3d 728, 732-33 (8th Cir. 2014). Dailey was allowed ample opportunity to defend against the contested violations. A district court may rely on a preliminary-hearing transcript rather than live witness testimony to support a supervised release revocation decision. See United States v. Left Hand, No. 21-2507, 2022 WL 1469478, at *1 (8th Cir. May 10, 2022).

## III. Substantive Reasonableness

Having found no procedural errors, we next address Dailey's challenge to his 240-month term of supervised release as substantively unreasonable. Dailey argues the district court imposed a substantively unreasonable sentence because "supervised

release, prior to the Revocation of Supervised release was 120 months and the violation[s] which Mr. Dailey admitted to were not new crimes and only amounted to a Grade C violation." We review "the substantive reasonableness of the court's revocation sentence under the same deferential abuse-of-discretion standard that applies to initial sentencing proceedings." United States v. Starr, No. 23-3010, 2024 WL 3630084, at *1 (8th Cir. Aug. 2, 2024) (quotation omitted).

At the outset, it is clear the district court was authorized to impose as part of its revocation sentence a new term of supervised release "equal to the maximum term of supervised release authorized for the original conviction offense." United States v. Asalati, 615 F.3d 1001, 1007 (8th Cir. 2010) (quotation omitted); see 18 U.S.C. § 3583(h). Here, in the initial Plea Agreement, Dailey understood and agreed that the court was authorized to impose a term of supervised release of between five years and life for his underlying violation of 18 U.S.C. § 2421, as 18 U.S.C. § 3583(k) expressly authorized. It is well-settled in this circuit that a court imposing a revocation sentence is not "cabined by the supervised release term originally imposed," but only by "the term statutorily authorized for the offense of conviction (minus any revocation terms of imprisonment)." United States v. Palmer, 380 F.3d 395, 398 (8th Cir. 2004) (en banc); see Trung Dang, 907 F.3d at 567 (rejecting percentage-based sentencing arguments).

In determining the appropriate term of supervised release, a district court must consider the § 3553(a) sentencing factors cited in § 3583(e). The court abuses its discretion when it "gives significant weight to an improper or irrelevant factor." United States v. Barber, 4 F.4th 689, 692 (8th Cir. 2021) (quotation omitted). Dailey argues the district court erred by giving weight to his contentious relationship with Probation Officer Kline because that is an improper or irrelevant factor. He points to statements at the revocation hearing which show the court relied on "animosity" between Dailey and Probation Officer Kline:

> This officer is my representative in the field. She does everything I've asked her to do. I really like her. If you want to avoid coming to see me, you need to understand that she's my representative. She's just as good as being the judge, and if you want to stay away from me, you need to do everything she asks you to do.
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> . . . . .
>
> The only way you're going to avoid [a new crime prison sentence] is if you treat this PO just like you treat me, and everything she says, you make sure that's the biggest priority in your life and you don't skip one sexual offender counseling. You register everything you've got, you're fully honest . . . .
>
> I hope you decide you want to die on the outside, that you want to live a life, you want to have a job, you want to have your own place, you don't want to be involved in texting people about fentanyl or marijuana or other things that will get you in enormous trouble.

Contrary to Dailey's assertion, these statements were a warning to Dailey personally to follow the terms of his supervised release, which include standard conditions that he "must follow the instructions of the probation officer related to the conditions of supervision" and "answer truthfully the questions asked by [his] probation officer," requirements he stipulated to violating numerous times in his first four months on release, or risk future revocation proceedings.

At a revocation hearing, the court may caution the defendant that future violations may result in harsher terms of imprisonment. See Martin, 757 F.3d at 778. Here, the court, having sentenced Dailey for the underlying Interstate Transportation for Prostitution offense, was well aware of Dailey's criminal history. The court knew from the Violation Report and the Grade C violations Dailey admitted that he had ignored Probation Officer Kline's compliance instructions and treated her with disrespect. The court's statements "demonstrate a consideration of [Dailey's] history

and characteristics and a concern for protecting the public, both proper [§ 3553(a)] factors." Asalati, 615 F.3d at 1007. They do not show the court erred, much less plainly erred, by relying on an improper factor.

The district court did not abuse its discretion in imposing an authorized term of supervised release substantially longer than the original term. See United States v. DeMarrias, 895 F.3d 570, 575 (8th Cir. 2018) (lifetime term not substantively unreasonable when repeat violent offender's original term was ten years); Asalati, 615 F.3d at 1007 (lifetime term not substantively unreasonable when original term was five years but repeat offender "has demonstrated himself capable of committing crimes with such violent force").

The judgment of the district court is affirmed.

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