

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAVERLY C. BURNS,

Defendant.

ORDER

99-CR-40-C-01

A hearing on the revocation of Waverly Burns's supervised release was held in this case on January 6, 2003, before United States District Judge Barbara B. Crabb. The government appeared by Assistant United States Attorney Laura Przybylinski Finn. Defendant was present in person and by counsel, Toni Laitsch. Also present was Senior United States Probation Officer Michael D. Harper.

From the record and defendant's stipulation, I make the following findings of fact.

FACTS

Defendant was sentenced in the Western District of Wisconsin on September 24, 1999, following his conviction for unlawful use of identification to commit theft, in violation

of 18 U.S.C. § 1028(a)(7). This crime is classified as a Class C felony. Defendant was committed to the custody of the Bureau of Prisons to serve a term of imprisonment of 21 months, with a 36-month term of supervised release to follow, and ordered to pay restitution in the amount of \$62,849.43.

A special condition of supervised release requires the defendant to abstain from the use of alcohol and illegal drugs and from association with drug users and sellers and participate in substance abuse treatment and testing, as directed by supervising probation officer.

Defendant began his term of supervised release on November 2, 2000. On August 15, 2002, and again on November 10, 2002, defendant provided urine specimens that tested positive for the use of cocaine. On August 30, 2002, defendant tested positive for the use of alcohol on a breath test administered by the Wisconsin Capitol police.

Defendant's positive drug tests for cocaine use are evidence of his illegal possession of cocaine. Defendant has a prior felony conviction for a drug offense. He was sentenced on March 25, 1988, in Cook County, Illinois, for illegal manufacture and delivery of a controlled substance and ordered to serve a term of two years in prison. Policy Statement § 7B1.1(a)(2) says that any offense punishable by a term of imprisonment of more than one year constitutes a Grade B violation. Defendant's possession of cocaine would constitute such conduct if his previous drug conviction is taken into consideration. See § 4A1.2(e)(1).

The government suggests that the court retains discretion to determine whether a prior drug conviction should be taken into consideration in deciding whether to categorize an offense as Grade B or Grade C, using factors such as those that the government would rely upon in deciding whether to file a sentence enhancement. In this instance, defendant's prior conviction is almost 15 years old; defendant has exhibited a sincere desire to change his life and to stop using drugs; he has been working steadily and has made regular payments on his restitution obligation; and he has been fully cooperative with his supervising United States Probation Officer. Under these unusual circumstances, I will exercise such discretion as I have to call defendant's offense a Grade C offense. When a court finds that a defendant has committed a Grade C violation, guideline §7B1.3 (a)(2) authorizes the court to revoke supervised release, extend it or modify it.

CONCLUSION

Defendant's violations do not require revocation but they do require modification of his conditions of supervised release to insure that he has an opportunity for drug treatment and counseling. Accordingly, the 36-month term of supervised release imposed on defendant on September 24, 1999, is modified to provide that defendant serve five months of supervision in a federally contracted community corrections center.

ORDER

IT IS ORDERED that the period of supervised release imposed on defendant on September 24, 1999, is MODIFIED to provide that defendant is to reside in a federally contracted community corrections center for up to 150 days, with work release privileges. Defendant is to provide for his own medical treatment and apply 25% of his adjusted gross income for subsistence. He will be eligible for social passes and furloughs under the rules and regulations of the community corrections center. Defendant is to participate in and successfully complete the center's treatment programs.

Defendant does not have the financial means or earning capacity to pay the cost of supervision without impairing his ability to support himself and pay his restitution obligation.

Entered this 6th day of January, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge