

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

LONNIE WHITAKER,

Defendant.

OPINION AND ORDER

07-cr-123-bbc

Defendant Lonnie Whitaker was arrested in January 2014 and incarcerated awaiting resolution of his case from January until October 9, 2014, when he was sentenced. He was convicted in this court of illegally possessing with intent to distribute heroin and cocaine and use of a firearm in furtherance of drug trafficking crime and sentenced to a term of imprisonment of 72 months. He was also charged with violation of the supervised release term imposed on him in 2008, following his conviction in this court of being a felon in possession of a firearm. He was scheduled to have a hearing on the government's motion for judicial review of his supervised release, on the same day of his sentencing but his counsel asked for and was granted additional time to prepare for the hearing.

On October 14, 2014, defendant's counsel wrote to the court, saying that it was defendant's position that his supervised release term had expired. He argued that the term of supervised release had not been tolled under 18 U.S.C. § 3624(e) because, although he

had been in custody, he was not imprisoned in connection with a conviction for another crime, but was merely awaiting the outcome of the charges against him. Although defendant did not file a formal motion to dismiss the probation office's petition for judicial review of the supervised release term, I am construing counsel's letter as such a motion and denying it.

18 U.S.C. § 3624 provides in subsection (e) that a “[t]erm of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for less than 30 consecutive days.” Defendant was imprisoned for more than 30 consecutive days awaiting the disposition of the 2014 charges brought against him; the only question is whether his imprisonment was “in connection with a conviction for a Federal crime.” The government argues that he was, saying that time spent in custody awaiting disposition of criminal charges resulting in a conviction is time that fits within the meaning of § 3624.

Defendant relies on Morales-Alejo, 193 F.3d 1102, 1105 (9th Cir. 1999), in which the court of appeals read the statute as distinguishing between “imprisonment” and “detention.” It concluded that the plain reading of the language in § 3624(e) is that there must be an imprisonment triggered by a criminal conviction and pretrial detention did not fit that definition because a person in pretrial detention has not been convicted and might never be. The court observed that Congress used the terms “imprisonment” and “detention” very differently in federal criminal statutes, using the former term to refer to a penalty or sentence and the latter as referring to a mechanism to insure a person's appearance for legal

proceedings or the safety of the community. Id.

Other circuits have not agreed with the holding in Morales-Alejo, but have read the phrase “in connection with a conviction for a Federal, State or local crime” as including the period of time in which a defendant might be awaiting the disposition of charges against him. In other words, the term of supervised release is tolled while the defendant is held in pretrial detention awaiting trial on charges for which he is later convicted. E.g., United States v. Johnson, 581 F.3d 1310, 1311-12 (11th Cir. 2009) (holding that court acted properly in revoking defendant’s supervised release term; term was tolled while defendant served term of imprisonment on state court charges); United States v. Molina-Gazca, 571 F.3d 470 (5th Cir. 2009) (“3624(e) makes no distinction between pre-trial or post-trial periods of imprisonment, but instead requires that ‘any period’ of imprisonment be ‘in connection with a conviction’ for tolling [of the term of supervised release] to apply.”); United States v. Goins, 516 F.3d 416, 422 (6th Cir. 2008) (phrase “imprisoned in connection with a conviction” includes “persons whose pretrial detentions are later connected to a conviction”); United States v. Ide, 624 F.3d 666, 669 (4th Cir. 2001) (person held in pretrial detention is “imprisoned” “in connection with a conviction” within meaning of 18 U.S.C. § 3624). The statute’s use of the words “in connection with” suggests that Congress intended to make the statute’s coverage expansive, rather than limited to those situations in which a defendant is convicted of a new offense before his term of supervised release has run. Had it intended a different result, it would have been easy to make its intent explicit. Defendant has not cited any courts outside the Ninth Circuit that followed

Morales-Alejo.

In Morales-Alejo, 193 F.3d 1102, the court of appeals was concerned that a judge would be unable to determine whether a period of time in confinement awaiting a criminal trial should be tolled if no judgment of conviction had been entered before the revocation proceeding had taken place. That might be a reason not to find tolling in a particular case; it is not a reason in this case. Defendant has been both convicted and sentenced.

Accordingly, I conclude that defendant's supervised release term has been tolled from the time of his January 15, 2014 arrest on the charges in 14-cr-17-bbc "in connection with a Federal crime." Therefore, this court retains jurisdiction to entertain the probation office's petition for judicial review of defendant's supervised release.

ORDER

IT IS ORDERED that defendant Lonnie Whitaker's motion for dismissal of the probation office's petition for judicial review of the supervised release term imposed upon him in this court on January 29, 2009 is DENIED.

Entered this 3d day of November, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge