

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

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

v.

04-cr-127-bbc-1

MARK F. BRUMMITT,

Defendant.

A hearing on the probation office's petition for judicial review of Mark F. Brummitt's supervised release began on June 17, 2016, before U.S. District Judge Barbara B. Crabb. The government appeared by U.S. Attorney John Vaudreuil. Defendant was present in person and by counsel Mark Maciolek. Also present was U.S. Probation Officer Nicholas A. Tuma. After defendant contested some aspects of the government's proposed justification for revocation of his supervised release, the hearing was continued until June 21, 2016, with the same appearances. At the continued hearing, the government presented the testimony of defendant's therapist, Susan Spieker, and his probation officer, Nicholas Tuma.

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

FACTS

Defendant was sentenced in the Western District of Wisconsin on January 13, 2005, following his conviction for possession of CD-ROM disks that had been transported in interstate and foreign commerce and contained visual depictions of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(b). This offense is a Class C felony. Defendant was committed to the custody of the Bureau of Prisons for a term of 162 months' imprisonment, to run consecutively to the probation revocation term imposed on him by the Circuit Court for Oneida County, Wisconsin, in case no. 01CF167. A 36-month term of supervised release was also imposed. On September 6, 2006, defendant's term of imprisonment was amended from 162 months to 125 months. The 36-month term of supervised release was unchanged. Defendant began his term of supervised release on November 10, 2014.

On February 12, 2016, I found that defendant had violated Special Condition No. 1 of his conditions of supervised release, requiring him to provide his supervising probation officer advance notification of any devices associated with or falling within the general category of information technology that produces, manipulates, stores, communicates or disseminates information. The probation office was authorized to install any application as necessary on any such device owned or operated by defendant and to randomly monitor those media. Defendant was required to consent to and cooperate with unannounced examinations

of any technological equipment owned or used by him, including but not limited to retrieval and copying of all data from all information technology devices and any internal or external peripherals. The examinations could involve removal of such equipment for the purpose of conducting an examination.

Defendant was found to be in possession of two unauthorized cell phones, four USB storage devices, several movies and hundreds of CDs used for data storage. He admitted using search engines on his monitored computer to search juvenile literature, anime and movies depicting lost and troubled young boys. He also admitted possessing CDs containing “family pictures,” which included his victims posing in staged, seductive positions. Defendant admitted he staged and took the pictures for the purpose of sexual gratification. He also admitted on several occasions to his treatment provider and to his probation officer that he used unmonitored computers without permission from the probation office.

Defendant was also found to be in violation of Special Condition No. 4, prohibiting him from associating with any person under the age of 18 or having verbal, written, telephonic or electronic communications with any such person, except with the express permission of the minor’s parent or legal guardian and the supervising U.S. probation officer. Defendant admitted talking to persons under the age of 18 along a bike path on at least two occasions without permission from the probation officer.

In addition, defendant was found to have violated Special Condition No. 7, requiring him to undergo a psychosexual evaluation that could involve use of Abel Screen and polygraph or plethysmograph examinations or similar technology, as approved by the supervising U.S. probation officer. Defendant was to participate in and successfully complete an outpatient sex offender counseling program if recommended by the evaluator, as approved by the supervising U.S. probation officer and the treatment provider. Defendant has been resistant to treatment and his compliance with the sex offender counseling program requirements has been desultory.

Defendant was also found to be in violation of Standard Condition No. 9, prohibiting him from associating with any persons engaged in criminal activity. In addition, he was not to associate with any person convicted of a felony unless granted permission to do so by the probation office. Defendant admitted sending books and magazine clippings to several inmates without permission from the probation officer.

In February 2016, I continued defendant's period of supervised release for 90 days to afford him the opportunity to improve his treatment efforts and to demonstrate that he could follow the court-ordered conditions of his supervised release. Defendant is now back before the court as a result of his continued lack of compliance, as evidenced by his additional violations.

On May 30, 2016, defendant violated Special Condition No. 1 when he upgraded his computer to Windows 10, without permission from his supervising probation officer. This upgrade had the effect of eliminating any monitoring of his computer by the specially-installed computer monitoring equipment. On June 9, 2016, defendant admitted using search engines on unmonitored computers to view materials containing sexually explicit conduct involving minors. He also admitted to his treatment provider and to his probation officer that he had used unmonitored computers on several occasions without permission from the probation office.

Defendant violated Special Condition No. 2, prohibiting him from possessing any material containing sexually explicit conduct as defined in 18 U.S.C. § 2256(2), including pictures, photographs, books, writings, drawings, videos, video games and child pornography, as defined in 18 U.S.C. § 2256(8). On June 9, 2016, defendant was found to be in possession of two bound booklets containing graphic and violent written descriptions of minors engaging in sexually explicit conduct.

Defendant violated Special Condition No. 4, when he talked with persons under the age of 18 on four separate occasions: once at school, once at a friend's residence and twice on a bike path. He did not have permission from the probation office to do so.

Defendant's violation of Special Condition No. 7 has continued. He resists treatment efforts and has failed to complete sex offender therapy homework assignments.

Defendant violated Standard Condition No. 9 on June 9, 2016, when he spoke by cell phone with other felons who are still in custody and sent them text messages.

Under U.S.S.G. ss 7B1.1(a)(3), defendant's conduct falls into the category of Grade C violations. Section 7B1.3(a)(2) of the advisory guidelines provides that upon the finding of a Grade C violation, the court may revoke supervised release, extend the term of supervised release or modify the conditions of supervision.

CONCLUSIONS

Defendant's violations warrant revocation. His sustained noncompliance demonstrates his blatant disregard for the opportunities afforded to him to engage fully in correctional and rehabilitative treatment. After carefully considering the nature of his violations, I have decided to revoke the term of supervised release to protect the community from further crimes perpetrated by defendant.

Defendant's criminal history category is IV. With a Grade C violation, defendant has an advisory guideline range of imprisonment of 8 to 14 months. The statutory maximum to which defendant can be sentenced upon revocation is two years under 18 U.S.C. § 3583(e)(3), because the offense of conviction is a Class C felony. 18 U.S.C. § 3583(h) authorizes another term of supervised release to follow imprisonment.

After reviewing the non-binding policy statements of Chapter 7 of the Guidelines

Manual, I have selected a sentence at the top of the advisory guideline range to hold defendant accountable for his numerous violations by promoting respect for the law, which includes the court-ordered conditions of his supervision, to deter him from similar conduct in the future and to protect the community.

ORDER

IT IS ORDERED that the period of supervised release imposed on defendant Mark F. Brummitt on January 13, 2005 and reimposed on September 6, 2006, is REVOKED. Defendant is committed to the custody of the Bureau of Prisons for a term of 14 months. It is recommended that defendant be designated to a facility with a Sex Offender Management Program (SOMP) and offered the opportunity to participate in non-residential sex offender treatment programming. The term of imprisonment is to be followed by a 22-month term of supervised release. This term of supervision is justified to provide an opportunity to address defendant's correctional and rehabilitative needs and the risks associated with his personal history and characteristics. The conditions imposed at the time of sentencing were reasonably related to defendant's offense of conviction, as well as his personal history and characteristics. The Petition For Warrant For Offender Under Supervision provided justification for the standard and special conditions of supervised release. The conditions set forth below were not objected to by defendant and are adopted

by the court:

STANDARD CONDITIONS OF SUPERVISION	JUSTIFICATION
<p>1) Defendant shall not leave the judicial district in which defendant is being supervised without the permission of the Court or probation officer.</p>	<p>To provide community protection, rehabilitation for defendant, and to enable the supervising probation officer's statutory duty to keep informed of defendant's location, conduct, condition, and compliance. 18 U.S.C. § 3553(a)(1), (a)(2)(B) and (C); 18 U.S.C. § 3563(b)(14); 18 U.S.C. § 3603(2) and (7); USSG §5B1.3(b)(1)(A), (C), (D) and (b)(2); USSG §5D1.3(b)(1)(A), (B), (C) and (b)(2).</p>
<p>2) Defendant is to report to the probation office as directed by the Court or probation officer and shall submit a complete written report within the first five days of each month, answer inquiries by the probation officer, and follow the officer's instructions. The monthly report and the answer to inquiries shall be truthful in all respects unless a fully truthful statement would tend to incriminate defendant, in violation of defendant's constitutional rights, in which case defendant has the right to remain silent.</p>	<p>To provide community protection, rehabilitation for defendant, to ensure officer and defendant safety, and to enable the supervising probation officer's statutory duty to keep informed of defendant's location, conduct, condition, and compliance. 18 U.S.C. § 3553(a)(1), (a)(2)(B), (C) and (D); 18 U.S.C. § 3563(b)(15) and (17); 18 U.S.C. § 3603(2), (3), (4) and (7); USSG §5B1.3(b)(1)(B)(C), (D), (E) and (b)(2); USSG §5D1.3(b)(1)(B), (C), (D) and (b)(2).</p>

<p>3) Defendant shall maintain lawful employment, seek lawful employment, or enroll and participate in a course of study or vocational training that will equip defendant for suitable employment, unless excused by the probation officer or the Court.</p>	<p>Evidence based practice research indicates that lawful, stable employment and education are pro-social activities that reinforce the rehabilitation of defendant. Employment and education have been identified as risk factors for recidivism. 18 U.S.C. § 3553(a)(2)(B), (C) and (D); 18 U.S.C. § 3563(b)(4) and (5); 18 U.S.C. § 3603(2), (3), (4) and (7); USSG §5B1.3(b)(1)(C), (D) and (E); USSG §5D1.3(b)(1)(B), (C) and (D).</p>
<p>4) Defendant shall notify the probation officer within seventy-two hours of any change in residence, employer, or any change in job classification.</p>	<p>To provide community protection, rehabilitation for defendant, to ensure officer and defendant safety, and to enable the supervising probation officer's statutory duty to keep informed of defendant's location, conduct, condition, and compliance. 18 U.S.C. § 3553(a)(2)(C); 18 U.S.C. § 3563(b)(13), (15), (16) and (19); 18 U.S.C. § 3603(2), (3), (4) and (7); USSG §5B1.3(b)(1)(D) and (b)(2); USSG §5D1.3(b)(1)(C).</p>
<p>5) Defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.</p>	<p>Evidence based practice research indicates the use of illicit chemicals is a risk factor for recidivism. This condition is recommended to assist with defendant's rehabilitation, officer and defendant safety, and to protect the public. 18 U.S.C. § 3553(a)(1), (a)(2)(A), (B) and (C); 18 U.S.C. § 3563(b)(7); 18 U.S.C. § 3603(3); USSG §5B1.3(b)(1)(A), (B), (C) and (D); USSG §5D1.3(b)(1)(A), (B) and (C).</p>

<p>6) Defendant shall not visit places where defendant knows or has reason to believe controlled substances are illegally sold, used, distributed, or administered.</p>	<p>Evidence based practice research indicates that frequenting places where illicit chemicals are sold, used, distributed or administered increases the risk that defendant will purchase, use or possess illicit chemicals. Individuals involved in the distribution of illicit chemicals present a risk of peer association as identified in the research. This condition supports rehabilitation of defendant and promotes public safety. 18 U.S.C. § 3553(a)(1), (a)(2)(B) and (C); 18 U.S.C. § 3563(b)(6); 18 U.S.C. § 3603(3); USSG §5B1.3(b)(1)(A), (B), (C), (D) and (b)(2); USSG §5D1.3(b)(1)(A), (B) and (C).</p>
<p>7) Defendant shall not meet, communicate, or spend time with any persons defendant knows to be engaged in criminal activity or planning to engage in criminal activity.</p>	<p>Evidence based practice research indicates that association with peers involved in criminal activity increases the risk of recidivism. This condition promotes and encourages pro-social relationships that are conducive to a law-abiding lifestyle. 18 U.S.C. § 3553(a)(1), (a)(2)(A), (B) and (C); 18 U.S.C. § 3563(b)(6); 18 U.S.C. § 3603(3); USSG §5B1.3(b)(1)(B), (C) and (D); USSG §5D1.3(b)(1)(B) and (C).</p>

<p>8) Defendant shall permit a probation officer to visit defendant at home, work, or elsewhere at any reasonable time and shall permit confiscation of any contraband observed in plain view by the probation officer.</p>	<p>Community contacts ensure compliance with court-ordered conditions and assist defendant in maintaining a law-abiding lifestyle. 18 U.S.C. § 3553(a)(1), (a)(2)(A), (B), and (C); 18 U.S.C. § 3563(b)(13), (15), (16) and (17); 18 U.S.C. § 3603(2), (3), (4) and (7); USSG § 5B1.3(b)(1)(A), (B), (C), (D) and (b)(2); USSG § 5D1.3(b)(1)(A), (B), (C) and (b)(2).</p>
<p>9) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.</p>	<p>To provide for community safety and rehabilitation of defendant. 18 U.S.C. § 3553(a)(1), (a)(2)(A), (B) and (C); 18 U.S.C. § 3563(b)(18); 18 U.S.C. § 3603(2), (3), (4) and (7); USSG § 5B1.3 (b)(1)(A), (B), (C) and (D); USSG § 5D1.3 (b)(1)(A), (B) and (C).</p>

<p>10) Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.</p>	<p>Evidence based practice research indicates contact with criminals and potential involvement in facilitating other crimes sanctioned by law enforcement officers directly contradicts the condition of no new offenses and criminal associations, which are risk factors for recidivism. Therefore, strict monitoring by the Court/probation office is necessary for the safety of the community, defendant, and the supervising probation officer.</p> <p>18 U.S.C. § 3553(a)(1), (a)(2)(A), (B) and (C); 18 U.S.C. § 3563(b)(5), (6), (15), (17) and (18); 18 U.S.C. § 3603(2), (3), (4) and (7); USSG §5B1.3(b)(1)(A), (B), (C) and (D); USSG §5D1.3(b)(1)(A), (B) and (C).</p>
<p>11) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics. The probation officer may also take steps to confirm defendant's compliance with this notification requirement or provide such notifications directly to third parties.</p>	<p>To protect the public from further crimes perpetrated by defendant.</p> <p>18 U.S.C. § 3553(a)(1), (b)(2)(A), (B) and (C); 18 U.S.C. § 3563(b)(3), (4), (5), (6), (13) and (16); in a case of crimes against property 18 U.S.C. § 3555; 18 U.S.C. § 3603(2), (3), (4) and (7); USSG §5B1.3(b)(1)(A), (B), (C) and (D) and (b)(2); USSG §5D1.3(b)(1)(A), (B), (C) and (b)(2).</p>

	SPECIAL CONDITIONS OF SUPERVISION	JUSTIFICATION
1)	Provide the supervising U.S. probation officer advance notification of any devices associated with or falling within the general category of information technology (IT) that produce, manipulate, store, communicate or disseminate information and that he will use during the term of supervision. The probation office is authorized to install any application as necessary on any such devices owned or operated by defendant and shall randomly monitor those media. Defendant shall consent to and cooperate with unannounced examinations of any technological equipment owned or used by him, including but not limited to retrieval and copying of all data from all information technology devices and any internal or external peripherals. The examinations may involve removal of such equipment for the purpose of conducting examination.	Based on the offense of conviction and the need to protect the public from further criminal activity perpetrated by the defendant, as evidenced by his noncompliance.
2)	Not possess any material containing sexually explicit conduct as defined in 18 U.S.C. § 2256(2), including pictures, photographs, books, writings, drawings, videos, video games and child pornography, as defined in 18 U.S.C. § 2256(8).	Based on the offense of conviction and the need to protect the public from further criminal activity perpetrated by the defendant.
3)	Defendant shall not own, use or have access to the services of any commercial mail receiving agency and he shall not open or maintain a post office box without the prior approval of the supervising probation officer.	Based on the offense of conviction and the need to protect the public from further criminal activity perpetrated by the defendant.
4)	Not associate with any person under the age of 18 or have verbal, written, telephonic or electronic communication with any such person, except with the express permission of the minor's parent or legal guardian and the supervising U.S. probation officer. This provision does not include persons	Based on the offense of conviction and the need to protect the public from further criminal activity perpetrated by the defendant.

	under the age of 18, such as waiters, cashiers, ticket vendors, etc., with whom defendant must deal with in order to obtain ordinary and usual commercial services.	
5)	Defendant shall register with local law enforcement authorities, the state attorney general and the state's sex offender registry as directed by the supervising probation officer	Based on the offense of conviction and the need to monitor defendant's compliance with local, state and federal laws.
6)	Defendant shall submit his person, residence, office or vehicle to a search conducted by a U.S. Probation officer at a reasonable time and in a reasonable manner whenever the probation officer has reasonable suspicion of contraband or of the violation of a condition of release; failure to submit to a search may be a ground for revocation; defendant shall advise any other residents that the premises he is occupying may be subject to searches pursuant to this condition.	Based on the nature of the offense of conviction, the need to protect the public from further criminal activity perpetrated by the defendant as suggested by his criminal history and the need to ensure the safety of the supervising U.S. probation officer. It is noted several items of contraband have been seized during the term of supervision.
7)	Undergo a psychosexual evaluation, which may involve use of Abel Screen and polygraph or plethysmograph examinations, or similar technology, as approved by the supervising U.S. probation officer. Defendant shall participate in and successfully complete an outpatient sex offender counseling program if recommended by the evaluator, as approved by the supervising U.S. probation officer and the treatment provider.	Based on the offense of conviction and the need to protect the public from further criminal activity perpetrated by the defendant.
8)	Spend 120 days in a residential reentry center, as approved by the supervising U.S. probation officer, with admission upon the first available vacancy. Defendant may be absent from the center for employment purposes, for mental health counseling and treatment, and for passes consistent with program rules. Defendant is to pay his own medical expenses, if any, and is to pay 25% of this gross income toward the daily cost of his residence. Defendant may be discharged early	Based on defendant's lack of ties to the community and the need for stability.

	from the facility upon the approval of both the facility administrator and the supervising U.S. probation officer.	
9)	Submit to electronic monitoring, for the first 360 days of supervised release using the Global Positioning Satellite (GPS) monitoring or similar technology.	Based on the defendant's risk of danger to the community as evidenced by his conviction in the instant offense and his prior record.
10)	Not work in an occupation, business or profession, or participate in a volunteer activity where he has access to children under the age of 18 without prior approval of the supervising U.S. probation officer.	Based on the offense of conviction and the need to protect the public from further criminal activity perpetrated by the defendant.

Defendant does not have the financial means or earning capacity to pay the cost of his incarceration. Defendant is to be registered with local law enforcement agencies and the state attorney general upon his release from confinement.

Entered this 22d day of June 2016.

BY THE COURT:

/s/

BARBARA B. CRABB
DISTRICT JUDGE