

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-20628
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
August 13, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

TAMNY DENISE WESTBROOKS, also known as Tammy Westbrooks, also known as Tammy Westbrook,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CR-355-1

Before BARKSDALE, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Having been convicted for filing false tax returns, Tamny Denise Westbrooks, on resentencing, was sentenced to 38 months' imprisonment and one year of supervised release. She challenges the imposition of a condition of supervised release—also imposed at the original sentencing—requiring her to participate in a mental-health program. Because Westbrooks objected to the

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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imposition of the condition, review is for abuse of discretion. *United States v. Fernandez*, 776 F.3d 344, 345 (5th Cir. 2015).

For resentencing, the probation officer included the following in the presentence investigation report (PSR), under the heading “Mental and Emotional Health”: Westbrook “advised that although she has been anxious and stressed since agents arrived at the tax service business in preparation for charging her with the instant offense, she has managed by relaxation and exercise”; she had “strong feelings about the facts that were presented in her trial, and believe[d] that the agent fabricated a lot of the evidence against her”; “she believe[d] that her home phone [was] ‘tapped’ and that the agent who handled her case [was] ‘out to get her’”; and, when the probation officer asked her about attending counseling services, she advised she did not feel she needed professional counseling, and was able to manage her anxiety. The probation officer recommended participation in a mental-health program as a special condition of supervised release, and justified it by explaining Westbrook “displayed signs of mental and emotional issues during a discussion with this probation officer”.

At the resentencing hearing, when the district court ordered Westbrook participate in a mental-health program, she objected that the requirement of a mental-health treatment condition was not supported by any evidence. The court considered the objection and denied it, explaining that, at some point in the future, it might reconsider how much more mental help Westbrook needed. But, “given [her] history of complete defiance of the truth, the lying, cheating, and dissembling and [her] other conduct”, the court found the condition appropriate.

In contesting the imposition of the special condition, Westbrook contends: the need for mental-health treatment was not supported by the

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evidence; and the court did not explain how the special condition reasonably related to the sentencing factors in 18 U.S.C. § 3553(a). Along that line, a district court's broad discretion to impose special conditions of supervised release at sentencing is limited by three requirements. 18 U.S.C. § 3583(d); *Fernandez*, 776 F.3d at 346.

First, the special condition is required to be “reasonably related” to certain factors in 18 U.S.C. § 3553(a) including: “the nature and circumstances of the offense and the history and characteristics of . . . defendant”; deterrence of criminal conduct; protection of the public; and providing defendant “with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”. 18 U.S.C. § 3553(a)(1), (2)(B)–(D); *United States v. Alvarez*, 880 F.3d 236, 239–40 (5th Cir. 2018).

Second, a special condition must cause “no greater deprivation of liberty than is reasonably necessary” to advance the goals of deterrence, public protection, or needed corrective treatment. 18 U.S.C. § 3583(d)(2).

Third, a special condition must be “consistent with any pertinent policy statements” in the Sentencing Guidelines. 18 U.S.C. § 3583(d)(3). The policy statement involving special conditions of supervised release recommends a sentencing court impose a condition requiring defendant to participate in a mental-health program approved by the United States Probation Office “[i]f the court has reason to believe . . . defendant is in need of psychological or psychiatric treatment”. U.S.S.G. § 5D1.3(d)(5).

In addition to the three above statutory requirements, a district court must “set forth factual findings to justify special probation conditions”. *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014) (internal quotation marks and citation omitted). The court commits error by failing to explain its reasons for imposing a special condition. *Alvarez*, 880 F.3d at 240–41.

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“[A]bsent evidence that . . . defendant ‘has ever been *diagnosed* with or *treated* for a mental health condition,’ a mental-health-treatment special condition does not meet the three statutory requirements”. *United States v. Garrido*, 751 F. App’x 479, 481–82 (5th Cir. 2018) (quoting *Alvarez*, 880 F.3d at 240) (emphasis in original); *see also United States v. Bree*, 927 F.3d 856, 2019 WL 2520061, at *2–3 (5th Cir. 19 June 2019). The PSR does not contain any evidence that Westbrook had a diagnosis requiring mental-health treatment, had ever been treated for a mental-health condition, or even had a questionable mental-health history.

“Our precedent requires specific record facts demonstrating mental instability before a mental-health special condition may be imposed.” *Bree*, 2019 WL 2520061, at *3. The probation officer’s conclusion does not meet the “clear requirement of an evinced pattern of ‘a questionable mental health history or a particular diagnosis requiring mental health treatment’”. *Id.* (quoting *United States v. Gordon*, 838 F.3d 597, 604 (5th Cir. 2016).

Westbrook was released in early April 2019, and has begun her one-year term of supervised release. For the foregoing reasons, the judgment is MODIFIED by striking the mental-health special condition. In all other respects, the judgment is AFFIRMED.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

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August 13, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 18-20628 USA v. Tamny Westbrooks
USDC No. 4:14-CR-355-1

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

Enclosure(s)

Ms. Yolanda Evette Jarmon
Mr. Gregory S. Knapp
Mr. Samuel Robert Lyons
Ms. Carmen Castillo Mitchell
Mr. Alexander Patrick Robbins