

NOT RECOMMENDED FOR PUBLICATION

No. 22-1256

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 19, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL ISAIAH THODY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
MICHIGAN

O R D E R

Before: GUY, SUHRHEINRICH, and STRANCH, Circuit Judges.

Daniel Isaiah Thody, a pro se federal supervisee, appeals the district court's amended judgment extending his term of supervised release from 24 months to 30 months for violating the conditions requiring him to make restitution payments to the government and to provide all requested financial information to his probation officer. Thody moves the court to take judicial notice of an Internal Revenue Service memorandum on the collectability of restitution imposed as a term of supervised release in a federal civil proceeding. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2013, a federal jury in the Western District of Texas convicted Thody of five counts of income tax evasion, in violation of 26 U.S.C. § 7201. The Texas district court sentenced Thody to a total term of 90 months of imprisonment and three years of supervised release. Additionally, as a part of his tax-evasion sentence, the court ordered Thody to pay restitution of \$162,857 (the tax loss in the case). The Fifth Circuit affirmed Thody's convictions and prison term but vacated the district court's restitution order because restitution is not authorized in tax-evasion cases. *See*

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United States v. Thody, 637 F. App'x 790, 793-94 (5th Cir. 2016) per curiam) *Thody I*. The court, however, remanded the case to the district court to determine whether to impose restitution as a term of Thody's supervised release. *See id.* at 794.

On remand, the district court ordered Thody to pay restitution of \$162,037 as a term of his supervised release. Further, the court ordered Thody to pay restitution at the rate of \$500 per month, beginning one month after the commencement of his term of supervised release. The court also ordered Thody to provide his probation officer with any requested financial information. The Fifth Circuit affirmed this restitution order. *See United States v. Thody*, 697 F. App'x 433, 435 (5th Cir. 2017) (per curiam (*Thody II*)).

Thody completed his prison term and started his term of supervised release in September 2019. The Western District of Texas transferred jurisdiction over Thody's supervised release to the Western District of Michigan.¹ After the transfer of jurisdiction, Thody filed motions for early termination of supervised release, a notice stating that he was unilaterally terminating his supervised release and would no longer comply with its conditions, and motions to amend the judgment revoking his first term of supervised release to eliminate his restitution obligation. The themes of these pleadings were similar—Thody argued that the Texas district court's restitution order was unlawful because the Fifth Circuit had ruled that restitution could not be imposed as a part of his sentence and that the imposition of any term of supervised release caused his sentence to exceed the statutory maximum sentence. The district court denied all of these motions.

In May 2020, Thody filed a document in the district court that he claimed was a receipt showing that he had paid the entire amount of restitution outstanding. In this document, Thody

¹ In a separate case, the government filed a civil action under 26 U.S.C. § 7401 to reduce to judgment Thody's outstanding federal tax liability and to enforce its tax lien on certain real property owned by Thody. The district court recently entered a judgment in favor of the government in that case and appointed a receiver to oversee the sale of Thody's property. *See United States v. Thody*, No. 1:19-cv-339, 2022 WL 2230169 (W.D. Mich. June 9, 2022); *United States v. Thody*, No. 1:19-cv-339, 2022 WL 1090603 (W.D. Mich. Apr. 12, 2022).

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asserted that because there is no legal definition of “dollar” in the United States, the Uniform Commercial Code required the government to accept the tendered “instrument” as payment in full.

In March 2021, Thody’s probation officer petitioned the district court to revoke Thody’s supervised release on several grounds, including his failure to comply with the \$500-per-month restitution order and his false report that he had paid restitution in full. During the revocation hearing, the district court found that Thody had committed six violations of his supervised release, including disobeying the restitution order and providing false information to his probation officer. The court revoked Thody’s supervised release and sentenced him to six months of imprisonment and 24 months of supervised release. Additionally, the court continued Thody’s restitution order as a term of supervised release, with further instructions to make his payments to the Internal Revenue Service, and ordered him to provide any financial information requested by his probation officer.

We affirmed the district court’s judgment. *United States v. Thody*, No. 21-1416, 2021 WL 7209316, at *2-4 (6th Cir. Aug. 9, 2021) *Thody III*, *cert. denied*, 142 S. Ct. 1431 (2022). In finding that the evidence supported the district court’s finding that Thody had violated his supervised release by not paying restitution as ordered, we pointed to his tacit admission during the revocation hearing that his purported “payment” to the district court was invalid. Additionally, we concluded that Thody could not make a non-frivolous argument that the district court lacked authority to order him to pay the outstanding balance of his restitution obligation as a term of his supervised release. *See id.* at *2-4.

Thody completed his second term of imprisonment and started his new term of supervised release in October 2021. He almost immediately violated his supervised release by disobeying the district court’s restitution order. In December 2021, Thody informed his probation officer that he had no intention of making restitution payments or providing any requested financial information. On the net-worth statement supplied to him by the probation officer, Thody wrote “5th Amendment Invoked” for each answer. The probation officer therefore petitioned the district court

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to revoke Thody's supervised release. Thody's advisory sentencing range for these Grade C violations was 3 to 9 months of imprisonment.

Thody denied the allegations in the second violation report. During the revocation hearing, Thody's probation officer testified about Thody's failure and ultimate refusal to comply with the district court's restitution order and to provide the financial information necessary to monitor his ability to pay restitution.

Thody elected to proceed without counsel. First, Thody reiterated his position that the district court's restitution order was invalid in view of the Fifth Circuit's decision in his first direct appeal. The district court rejected that argument, pointing out that both this court and the Fifth Circuit had ultimately upheld the validity of the restitution order and therefore that it would not revisit that issue.

Second, Thody argued that the imposition of a term of supervised release caused his sentence to exceed the statutory maximum. He complained further that the district court had failed to provide a statement of reasons for his sentence in the first revocation hearing. Thody proffered additional written submissions in support of these positions that the district court refused to accept. Thody argued further that the district court had not addressed these issues in denying his motions to terminate his term of supervised release. The district court rejected this argument as well, pointing out that it had entered orders denying all of his motions.

Third, Thody argued that his Fifth Amendment right against self-incrimination protected him from having to disclose his financial information to the probation officer and therefore that the court was barred from finding that he violated his supervised release. Thody asserted that he invoked the Fifth Amendment because his belief as to what constitutes "income" differs from the government's definition, and therefore he could not provide the requested information without the risk of being charged with making a false statement. The district court rejected this argument.

The district court concluded that the government had proved the two supervised-release violations, finding by a preponderance of the evidence that Thody had not made any restitution payments since May 2021 and that he had refused or failed to provide the requested financial

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information to his probation officer. Instead of revoking Thody's supervised release and imposing a new term of imprisonment, however, the district court, citing 18 U.S.C. § 3583(e)(3), found that the 18 U.S.C. § 3553(a) sentencing factors weighed in favor of extending Thody's supervised release to the maximum available term of 30 months, with all of the previously imposed terms and conditions to apply. In support of that conclusion, the court found that another prison sentence probably would not compel Thody to comply with his restitution obligation whereas he was working and might ultimately be persuaded to pay restitution as ordered. The court advised Thody of his appellate rights, stating that "you should consider carefully whether you wish to file a claim of appeal" and that he should "be very careful in calculating when you are required to file the claim of appeal." The district court entered its judgment on the case docket on Form AO245C, entitled "Amended Judgment in a Criminal Case."

Thody raises numerous assignments of error in his timely pro se appeal. He argues that the district court (1) lacked authority to impose the sentence it did; 2) erred because its written judgment is inconsistent with its oral pronouncement of his sentence during the revocation hearing; (3) lacked authority to conduct a revocation hearing because the governing revocation statute authorizes only imprisonment upon revocation of supervised release; 4) erred in refusing to accept the documents that he tendered during the revocation hearing; 5) failed to consider prior credits or payments allegedly received by the court; 6) erred by finding a supervised-release violation based on constitutionally protected conduct; (7) erred by disregarding the arguments he raised in the sentencing memorandum he tendered to the court; and (8) attempted to dissuade him from filing a notice of appeal by allegedly using a "menacing tone and language" in advising him of his appellate rights.

As an initial matter, Thody's fourth and seventh assignments of error raise legal challenges to the validity of the Texas district court's restitution order and the Michigan district court's reimposition of the restitution order in his first revocation proceedings. Although these arguments are in fact meritless, *see Thody II*, 697 F. App'x at 435; *Thody III*, 2021 WL 7209316, at *2-4, the district court lacked subject-matter jurisdiction to consider any legal challenges to the terms to

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Thody's supervised release in deciding whether a modification or extension of supervision was warranted., *see United States v. Faber*, 950 F.3d 356, 358-59 (6th Cir. 2020); *see also United States v. McLeod*, 972 F.3d 637, 641-42 (4th Cir. 2020) (collecting cases). This is because "other legal mechanisms allow defendants to challenge the legality of their sentences e.g., direct appeal, [28 U.S.C.] § 2255, Rule 35 [of the Federal Rules of Criminal Procedure]." *Faber*, 950 F.3d at 358. And here, Thody filed appeals challenging—albeit unsuccessfully—the legality of both the Texas district court's restitution order and the Michigan district court's reimposition of the restitution order in his first revocation hearing. The district court therefore correctly refused to consider Thody's repeated arguments that the restitution order is illegal, and the court's refusal to accept his written pleadings on that subject did not affect Thody's substantial rights. *See Fed. R. Crim. P. 52(a)*.

When a defendant commits a non-criminal violation of his supervised release, the district court is authorized to revoke his supervised release and sentence him to a new term of imprisonment; but the court also has discretion to extend or modify the term of supervision. *See* 18 U.S.C. § 3583(e)(2); *see also* USSG § 7B1.3(a)(2)(B); *United States v. Webb*, 30 F.3d 687, 688 (6th Cir. 1994). We review a district court's order modifying or extending a defendant's term of supervised release under the abuse-of-discretion standard for procedural and substantive reasonableness. *United States v. Minor*, 440 F. App'x 479, 482 (6th Cir. 2011); *see United States v. Brogdon*, 503 F.3d 555, 563 (6th Cir. 2007). "Procedural reasonableness simply requires the district court to consider the relevant § 3553(a) factors and explain its sentencing decisions in a way that permits 'reasonable appellate review.'" *United States v. Zabel*, 35 F.4th 493, 509 (6th Cir. 2022) quoting *United States v. Zobel*, 696 F.3d 558, 572 (6th Cir. 2012)). "A claim that a sentence is substantively unreasonable is a claim that a sentence is too long.(if a defendant appeals) . . ." *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). The "touchstone for our review is whether the length of the sentence is reasonable in light of the § 3553(a) factors." *United States v. Recla*, 560 F.3d 539, 549 (6th Cir. 2009) citation omitted); *see also Webb*, 30 F.3d at 689 (stating that a district court's decision to revoke supervised release "must reflect

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consideration of the factors listed in 18 U.S.C. § 3553, and may not be plainly unreasonable” (footnote omitted) .

Among the sentencing factors that the district court must consider in modifying or extending a defendant’s term of supervised release is “the need to provide restitution to any victims of the offense.” 18 U.S.C. § 3553(a)(7); *see* 18 U.S.C. § 3583(e). Here, the district court considered and rejected revoking Thody’s supervised release and imposing another term of imprisonment and decided instead to extend his supervised release in the hope that he would be persuaded to make his restitution payments. In view of Thody’s persistent refusal to pay restitution as ordered and his frivolous objections to the restitution order, the district court’s decision to extend his term of supervised release by six months in an effort to secure compliance with its restitution order was procedurally and substantively reasonable.

Thody’s other objections to district court’s amended judgment are also meritless.

First, Thody argues that the district court lacked authority to extend his term of supervised release because in pronouncing his sentence the court cited § 3583(e)(3), which applies when a district court revokes a defendant’s term of supervised release, instead of § 3583(e)(2), which authorizes a district court to extend a term of supervised release. As the government persuasively argues, in view of the district court’s obvious intention to extend and not revoke Thody’s term of supervised release, district court’s mistake in citing § 3583(e) (3) was a harmless error. *See United States v. Booth*, 551 F.3d 535, 541 (6th Cir. 2009).

Nor did the district court’s extension of Thody’s term of supervised release cause his sentence to exceed the statutory maximum sentence. Because Thody committed Class D felonies, the district court was authorized to sentence Thody to up to three years of supervised release, less the six months of imprisonment that he had already served for his original supervised-release violations, for the total term of 30 months of supervised release that it ultimately imposed. *See* 18 U.S.C. § 3583(b), (h); *United States v. Price*, 901 F.3d 746, 750 (6th Cir. 2018). Consequently, the district court’s judgment extending Thody’s term of supervised release did not exceed the statutory maximum sentence. *See* 18 U.S.C. § 3583(e)(3) (establishing a statutory maximum term

of two years of imprisonment upon revocation of supervised release for a Class D felony); *United States v. Sears*, 32 F.4th 569, 575 (6th Cir. 2022) holding that a defendant is not entitled to “an aggregate credit for previous terms of imprisonment from prior revocations against the statutory maximums outlined in § 3583(e)(3)”.

Second, Thody contends that the district court’s written judgment is inconsistent with its oral pronouncements during the revocation hearing because the court entered its order extending his supervised release on an “Amended Judgment” form. Thody asserts that there is an inconsistency because the court failed to identify the judgment it was amending. “When an oral sentence conflicts with the written sentence, the oral sentence controls.” *United States v. Penson*, 526 F.3d 331, 334 6th Cir. 2008) quoting *United States v. Schultz*, 855 F.2d 1217, 1225 (6th Cir. 1988)) cleaned up). But here, Thody has not identified any inconsistency between the district court’s oral statements and its judgment. Moreover, the amended judgment clearly amended the prior judgment that revoked Thody’s supervised release and imposed a term of 24 months of supervised release, and its use of the amended-judgment form to do so was appropriate.

Third, the district court did not err in refusing to consider any credits towards Thody’s restitution obligation, because there was nothing to credit. Although Thody’s restitution obligation was reduced somewhat through a separate garnishment order, he never made any restitution payments. Thody’s contention that the “receipt” that he filed in the district court in May 2020 was evidence that he completely satisfied his restitution obligation is patently frivolous, as he essentially admitted in his first revocation hearing. *See Thody III*, 2021 WL 7209316, at *2-4.

Fourth, the Fifth Amendment privilege against self-incrimination did not protect Thody from having to provide the probation officer with the financial information she needed to monitor his compliance with the district court’s restitution order. *See Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 1984); *United States v. Smalcer*, 464 F. App’x 469, 473 (6th Cir. 2012) per curiam); *United States v. Ross*, 9 F.3d 1182, 1190-91 (7th Cir. 1993), *vacated on other grounds by Staples v. United States*, 511 U.S. 600 1994); *cf. United States v. Pierce*, 561 F.2d 735, 741-42 (9th Cir. 1977) holding that the district court did not err in revoking the defendant’s probation for violating

the term requiring him to answer under oath questions related to his financial condition because his blanket assertion of privilege did not present a reviewable Fifth Amendment claim). And the record is clear that the district court based its decision to extend Thody's supervised release on his refusal to provide the financial information it needed to administer his restitution obligation and not because he invoked his privilege against self-incrimination, which is a critical distinction. *Cf. Ross*, 9 F.3d at 1191. In any case, the district court's decision to extend Thody's supervised release was based not only on his failure to disclose his financial information, but also his failure to pay restitution as ordered. That violation was sufficient by itself to extend his supervised release. *See United States v. Johnson*, 356 F. App'x 785, 793 6th Cir. 2009) (collecting cases).

Fifth and finally, the record does not support Thody's argument that the district court's comments to him during the revocation hearing demonstrate bias against him and that the court implicitly or explicitly threatened him not to file an appeal. As the government persuasively argues, the district court's statement that Thody should "carefully consider whether to file an appeal" was, in context, not a threat but an admonition to ensure that he understood that he had to make a timely decision about whether to file an appeal. And overall, we are persuaded that the district court's comments and statements to Thody during the revocation hearing do not reflect "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Instead, the record shows that even if the district court was brusque with Thody during the hearing, it was trying to confine his presentation to relevant topics and to conduct the hearing in an efficient manner. *Cf. Gordon v. Lafler*, 710 F. App'x 654, 664-65 (6th Cir. 2017).

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Finding no error or abuse of discretion, we **AFFIRM** the district court's amended judgment extending Thody's term of supervised release to 30 months. We **DENY** Thody's motion to take judicial notice as moot.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

Deborah S. Hunt, Clerk