US Sentencing Commission's Annual National Seminar
on the Federal Sentencing Guidelines

2018

National Seminar

Case Law - TSR and Restitution Answers

CASE LAW: SUPERVISED RELEASE CONDITIONS AND RESTITUTION SCENARIOS

1. The defendant was convicted of conspiracy to commit healthcare fraud, conspiracy to distribute controlled substances and conspiracy to receive kickbacks. The defendant, a physician, and his partner physicians, wrote false prescriptions that were filled by pharmacists. The indictment states that the dates of the conspiracy spanned from January 1, 2013 to December 31, 2017. The doctor joined the conspiracy in January 1, 2015.

   The court concluded that the total amount of restitution for the entire five-year conspiracy was $1,500,000 ($300,000 a year in fraudulent billing). The court ordered the defendant to pay the full amount of restitution. The defendant has appealed the restitution order.

   Can the defendant be held liable for the entire amount of restitution?

Answer:

No. A defendant cannot be held liable for the entire amount of restitution of a conspiracy if he was not in the conspiracy for the entire time. Here, as the defendant joined the conspiracy in 2015, he should not be held liable for any restitution amount prior to this date. *See U.S. v. Fowler,* 819 F.3d 298 (6th Cir. 2016), and *U.S. v. Foley*, 783 F.3d 7 (1st Cir. 2015).

2. The defendant was convicted of health care fraud (18 U.S.C. § 1347). Medicare paid the defendant $150,000 based on bills submitted by the defendant. At sentencing, the government asks for $150,000 in restitution for the fraudulent bills submitted to Medicare by the defendant. The defendant argued that $50,000 of the amount paid by Medicare was for bills that involved legitimate services he provided to patients. The defendant did not offer any proof that the bills he submitted to Medicare were for necessary procedures because he believes the government has the burden to introduce into evidence that some of the bills submitted were legitimate. The court orders $150,000 in restitution, concluding that the defendant has the burden to prove that $50,000 were for legitimate work and because he did not offer any evidence, there is no credit against the $150,000 order.

   Will the court's restitution order likely be affirmed on appeal?

Answer:

Yes. To reduce a restitution obligation, the defendant bears the burden of showing that she made payments or completed legitimate work. Here, as the defendant did not offer any evidence that she provided legitimate work on patients, she will not receive any reduction from

the $150,000 restitution order. *See U.S. v. Smathers*, 879 F.3d 453 (2d Cir. 2018) and *U.S. v. Foster*, 878 F.3d 1297 (11th Cir. 2018).

3. The defendant was convicted of wire fraud (18 U.S.C. § 1343) based on a scheme involving vehicle-financing rebates. The court imposed a $160,000 forfeiture award based on the gains from the scheme. Three months after the forfeiture award, the court plans on imposing restitution in the amount of $280,000. The defendant believes the restitution amount should be reduced by the $160,000 forfeiture award.

   Can the court reduce the restitution amount by the forfeiture order?

Answer:

No. Forfeiture funds cannot be used to offset restitution. In *U.S. v. Sanjar*, 876 F.3d 725 (5th Cir. 2017), the Fifth Circuit stated: "[r]estitution and forfeiture serve distinct purposes. Restitution is remedial in nature; its goal is to make the victim whole. Forfeiture is punitive; it seeks to disgorge any profits or property an offender obtains from illicit activity." *See also, U.S. v. Arnold*, 878 F.3d 940 (8th Cir. 2017).

4. The defendant was convicted of Failing to Register as a Sex Offender, under 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2009 Texas conviction for sexual assault. In that case, defendant pleaded guilty to sexually assaulting his 12-year old niece when she was left in his care. He received a 7-year sentence for that offense. The defendant has no other prior sex offense convictions.

   At sentencing, the probation officer has listed in the sentencing recommendation the following special condition during defendant's supervised release term:

   "Defendant must submit to computer filtering software to block sexually oriented websites for any computer the defendant uses or possesses."

   Is this an appropriate supervised release condition in this case?

Answer:

Probably not. Special conditions of supervised release must involve no greater deprivation of liberty than is necessary to serve the purposes of § 3553(a)(2)(B) (deterrence), (A)(2)(C) (protection of the public), and (a)(2)(D) (educational or vocational training, medical care) and must be consistent with any pertinent policy statements issued by the Commission. Here, the defendant's prior sexual conviction was for assaulting his niece and did not involve using a

computer. Imposing a condition involving computer filtering software does not appear to be related to the purposes listed in § 3553(a). *See U.S. v. Fernandez*, 776 F.3d 344 (5th Cir. 2015).

5. The defendant was convicted of drug trafficking (21 U.S.C. § 841) on January 7, 2018 for selling cocaine on October 15, 2017. The defendant has one prior conviction from 2003 for molesting his 11 year-year old niece and he received a 5-year sentence for that conviction. At sentencing for the drug offense, the government requests the court impose the following supervised release condition:

   "Defendant must submit to a psychosexual evaluation upon release from imprisonment."

   Is this a reasonable supervised release condition?

Answer:

Probably not. While a district court can impose "sex offense" supervised release conditions on a defendant whose instant offense is not a sex offense, the conditions must be reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant to impose the condition. Here, as the defendant has only one prior sex offense conviction that occurred 15 years ago and no other convictions, this condition would likely be struck down by the appellate court. *See U.S. v. Del Valle-Cruz,* 785 F.3d 48 (1st Cir. 2015) (similar condition reversed because "[t]he defendant has a single eighteen-year-old sex offense on his record. For the prior twelve years, he had stayed out of trouble, and had no criminal convictions other than failure to register as a sex offender.").

6. The defendant was convicted of drug trafficking (21 U.S.C. § 841) on January 7, 2018 for selling cocaine on October 15, 2017. The defendant has one prior conviction from 2003 for molesting his 11 year-year old niece. He received a 15-year sentence for that conviction and was released from prison on August 5, 2017. At sentencing for the drug trafficking offense, the probation officer recommends the following supervised release condition:

   "Defendant must submit to a psychosexual evaluation upon release from imprisonment."

   The defendant objects to this condition because his prior sexual conviction was over 15 years ago.

   If the judge imposed this condition, will this condition likely be affirmed on appeal?

Answer:

Probably. The difference between this scenario and scenario 5 is that here, while the defendant's prior sex offense was 15 years ago, the defendant was incarcerated for 14 of those years. In *U.S. v. Garcia*, 872 F.3d 52 (1st Cir. 2017), the First Circuit held that conditions requiring sex offender treatment and those restricting contact with minors may be appropriate despite the conviction not being a sex offense ... "where the intervening time between a distant sex offense and the present conviction is marked by substantial criminal activity." *See also*, *U.S. v. Douglas,* 850 F.3d 660 (4th Cir. 2017), *U.S. v. Childress*, 874 F.3d 523 (6th Cir. 2017), and *U.S. v. Ford*, 882 F.3d 1279 (8th Cir. 2018).

7. The defendant was convicted of being a felon in possession of a firearm (18 U.S.C. § 922(g). The defendant has a history of mental illness and the court imposed the following condition of supervised release:

   "The defendant is required to participate in a mental health program as deemed necessary and approved by the probation officer."

   Is this a reasonable condition?

Answer:

Probably not. A district court is not permitted to delegate to a probation officer whether a defendant must participate in a mental health program—the judge must decide whether treatment is mandatory. In *U.S. v. Franklin*, 838 F.3d 564 (5th Cir. 2016), the Fifth Circuit stated:

> If the district court intends that the therapy be mandatory but leaves a variety of details, including the selection of a therapy provider and schedule to the probation officer, such a condition of probation may be imposed. If, on the other hand, the court intends to leave the issue of the defendant's participation in therapy to the discretion of the probation officer, such a condition would constitute an impermissible delegation of judicial authority and should not be included."

Because the condition in the scenario appears to delegate the decision of treatment to the probation officer, this condition likely would be unreasonable.