

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCUS WASHINGTON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument is unnecessary in this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-5436

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCUS WASHINGTON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This appeal is from the district court’s order denying a pro se motion in a criminal case (Pro Se Motion, R. 148, PageID# 1972-1977),¹ which the district court construed as a motion to modify conditions of supervised release. The district court entered its order denying defendant’s motion on March 12, 2020

¹ “R. ___” refers to the document number assigned on the district court’s docket sheet for case number 3:15-cr-59. “PageID# ___” indicates the page number in the paginated electronic record for case number 3:15-cr-59. “Br. ___” refers to the page number of Washington’s opening brief.

(Order, R. 149, PageID# 1978), and defendant filed a notice of appeal on April 22, 2020 (Notice of Appeal, R. 152, PageID# 1988-2002). The district court had jurisdiction under 18 U.S.C. 3231, and this Court has jurisdiction under 28 U.S.C. 1291.²

INTRODUCTION AND STATEMENT OF THE ISSUES

Defendant-appellant Marcus Washington pled guilty to three counts: one count of violating 18 U.S.C. 1594(c) for conspiring to commit sex trafficking; one count of violating 21 U.S.C. 846 and 841(a)(1) and (b)(1)(C) for conspiring to possess with the intent to distribute Oxycodone, a Schedule II controlled substance; and one count of violating 21 U.S.C. 841(a)(1) and (b)(1)(C) for possessing with the intent to distribute Oxycodone. The district court sentenced Washington to 120 months' imprisonment on each count, to be served concurrently, and three years' supervised release on each count, also to be served concurrently. The court also required Washington to register as a sex offender in the jurisdiction in which he resides—in this case, Tennessee.

On March 11, 2020, two days after he was released from custody, Washington filed a motion in the district court seeking an order exempting him

² See *United States v. Marshall*, 954 F.3d 823, 825-829 (6th Cir. 2020) (explaining that 28 U.S.C. 1291 provides this Court with subject-matter jurisdiction to review the district court's denial of a motion to modify conditions of supervised release).

from the Tennessee sex-offender registration law that prohibits him from residing within 1000 feet of a school. He asserted that this requirement effectively would leave him homeless because the only place he could live was with a family member who lived within 1000 feet of a school. The district court denied the motion.

This appeal presents two questions:

1. Whether this Court should dismiss the appeal because the notice of appeal was untimely.
2. Whether the district court abused its discretion in denying Washington's motion to modify his conditions of supervised release to exempt him from the requirement under Tennessee's sex-offender registration law prohibiting him from living within 1000 feet of a school.

STATEMENT OF THE CASE

1. Underlying Charges And Plea Agreement

In December 2015, defendant Marcus Washington was charged in a superseding indictment on four counts: two counts of sex trafficking in violation of 18 U.S.C. 1591(a)(1) and (b)(1) and 1594(a); one count of conspiracy to possess with the intent to distribute Oxycodone, a Schedule II controlled substance, in violation of 21 U.S.C. 846 and 841(a)(1) and (b)(1)(C); and one count of possession with intent to distribute Oxycodone in violation of 21 U.S.C. 841(a)(1)

and (b)(1)(C). (Superseding Indictment, R. 32, PageID# 206-210). In November 2016, Washington entered into a plea agreement, pleading guilty to the two drug-related counts and to a one-count Information charging him with conspiracy to commit sex trafficking in violation of 18 U.S.C. 1594(c). (Plea Agreement, R. 107, PageID# 1614-1615).

In his plea agreement, Washington admitted to the following facts. In 2013, Washington recruited and coerced two adult women, A.S. and K.C., to engage in commercial sex in exchange for money, knowing both had an Oxycodone addiction. (Plea Agreement, R. 107, PageID# 1616-1618). Although Washington informed A.S. and K.C. that they would make a lot of money prostituting for him, neither did. (Plea Agreement, R. 107, PageID# 1616-1617). All the proceeds from their commercial sexual activity went to Washington, who in turn used a small portion to purchase Oxycodone for A.S. and K.C. to fend off their opiate withdrawals. (Plea Agreement, R. 107, PageID# 1616-1617).

Washington used both women's addictions and fears of opiate withdrawal to compel their continued engagement in commercial sex. (Plea Agreement, R. 107, PageID# 1616-1617). He also threatened physical force to compel K.C. to engage in commercial sex. (Plea Agreement, R. 107, PageID# 1617).

2. *Sentencing And Post-Sentencing Procedural History*

In March 2017, the district court sentenced Washington to 120 months' imprisonment on each of the three counts, to be served concurrently, and three years of supervised release for each count, also to be served concurrently. (Judgment, R. 123, PageID# 1769-1770). Under the terms of supervised release, Washington was required to register with the state sex-offender registration agency in the state where he would reside after he completed his term of imprisonment. (Judgment, R. 123, PageID# 1770). In addition, the district court ordered that his 120-month federal sentence be served *consecutively* to the state sentence he was then serving on unrelated charges. (Presentence Report, R. 120, PageID# 1725-1726; Judgment, R. 123, PageID# 1769). That provision, however, contradicted Washington's plea agreement, which provided that Washington's federal sentence would be served *concurrently* with his state sentence. (Plea Agreement, R. 107, PageID# 1619).

As a result, in July 2017, Washington filed a motion to vacate his sentence under 28 U.S.C. 2255, arguing that the district court erred in imposing his federal sentence to be served consecutively, rather than concurrently, to his state sentence. (Motion to Vacate, R. 126, PageID# 1784-1785). The court granted Washington's motion and ordered that his federal 120-month sentence be served concurrently to his state sentence. (Judgment Order, R. 131, PageID# 1857; see Amended

Judgment, R. 132, PageID# 1859). Subsequently, Washington filed a motion for reconsideration, asking the court to calculate and specify how much time remained on his sentence. (Motion to Reconsider, R. 133, PageID# 1864-1867).³ On February 27, 2020, the district court granted in part Washington's motion for reconsideration, ordering the Federal Bureau of Prisons to credit Washington with the time served on his state sentence and specifying Washington's remaining time on his federal sentence. (Memorandum & Order, R. 147, PageID# 1971).⁴

3. *Current Order On Appeal*

On March 9, 2020, Washington was released from federal custody. (Order, R. 149, PageID# 1978). On March 11, 2020, Washington filed pro se a "Rule 60(A) Mandamus" in the district court, requesting that the court exempt him from Tennessee's sex-offender law prohibiting sex offenders from residing within 1000

³ While his motion for reconsideration was pending in the district court, Washington appealed the district court's order granting his Section 2255 Motion to Vacate. (Notice of Appeal, R. 143, PageID# 1943-1944). On February 21, 2020, this Court dismissed that appeal (No. 19-6468) for lack of jurisdiction because Washington failed to timely file his notice of appeal. (Order, R. 146, PageID# 1963).

⁴ Washington again appealed the court's order denying his Section 2255 Motion to Vacate. (Notice of Appeal, R. 150, PageID# 1982-1983). On August 3, 2020, this Court dismissed that appeal (No. 20-5371) for want of prosecution for Washington's failure to pay filing fees. (Order, R. 157, PageID# 2018).

feet of a school. (Pro Se Motion, R. 148, PageID# 1972-1973).⁵ Washington stated that the only place available for him to live – other than in a hotel room that he represented that he could not afford – was with a family member who lived within 1000 feet of a school, and thus abiding by Tennessee law effectively would leave him homeless. (Pro Se Motion, R. 148, PageID# 1979).

On March 12, 2020, the district court denied the motion. (Order, R. 149, PageID# 1978-1980). The court construed Washington’s “Rule 60(A) Mandamus” as a motion to modify conditions of supervised release. (Order, R. 149, PageID# 1978-1980). In denying the motion, the court explained that the court’s judgment required Washington to register as a sex offender in the state he intended to reside—in this case, Tennessee—and that Tennessee state law places certain residency restrictions upon persons convicted of the types of crimes for which Washington was convicted. (Order, R. 149, PageID# 1979). The court declined to modify Washington’s supervised release and to “override the requirements of Tennessee’s sex-offender registration laws.” (Order, R. 149, PageID# 1980).

Forty days later, on April 22, 2020, Washington appealed the district court’s order. (Notice of Appeal, R. 152, PageID# 1988-2002).

⁵ Presumably, the caption of Washington’s motion referred to Rule 60(a) of the Federal Rules of Civil Procedure, addressing relief from a judgment or order based on clerical mistakes, oversights, and omissions.

SUMMARY OF ARGUMENT

1. This Court should dismiss this appeal because Washington's notice of appeal, filed 26 days after the 14-day deadline set forth in Federal Rule of Appellate Procedure 4(b)(1)(A), was untimely.

2. Should the Court entertain the merits of this appeal, it should affirm. The district court did not abuse its discretion in denying Washington's motion to modify his conditions of supervised release to exempt him from the Tennessee sex-offender registration requirement prohibiting offenders from living within 1000 feet of a school. Washington pled guilty to sex trafficking. That offense qualified as a "sex offense" under the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20911 *et seq.*, subjecting Washington to the statute's mandatory requirement that, as a condition of supervised release, he register as a sex offender in the jurisdiction in which he resides. 34 U.S.C. 20913(a). Because Washington chose to reside in Tennessee, SORNA requires that he register there. But SORNA's federal registration requirement is entirely separate from any obligations Washington has under *Tennessee* law for registering as a sex offender. The district court lacked authority to override Tennessee's requirements, including the prohibition on where sex offenders may live.

ARGUMENT

I

THIS COURT SHOULD DISMISS THE APPEAL BECAUSE THE NOTICE OF APPEAL WAS UNTIMELY

Washington's appeal is untimely and should be dismissed. This appeal is based on the district court's denial of Washington's pro se "Mandamus Pursuant to 60(A)" (Pro Se Motion, R. 148, PageID# 1972-1977), which the court correctly construed as a motion to modify his conditions of supervised release. (See Order, R. 149, PageID# 1978-1980); see *Castro v. United States*, 540 U.S. 375, 381-382 (2003) (explaining that federal courts can "ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion * * * to avoid an unnecessary dismissal * * * or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis"). Such a motion, under 18 U.S.C. 3583(e), "is a criminal motion, which means that the fourteen-day deadline for filing a notice of appeal in a criminal case applies." *United States v. Brown*, 817 F.3d 486, 488 (6th Cir. 2016) (citing Fed. R. App. P. 4(b)(1)(A) and dismissing pro se appeal of district court's order denying an 18 U.S.C. 3582(c) motion to modify sentence that took place after 14-day appeal deadline). Washington filed this appeal on April 22, 2020, 40 days after the district court entered its judgment on March 12, 2020. He fails to explain on appeal his untimeliness or to meet "any of the Appellate Rule 4(b) requirements for

filing a late notice of appeal.” *Id.* at 489. This Court should thus dismiss this appeal.⁶

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING WASHINGTON’S MOTION TO MODIFY HIS CONDITIONS OF SUPERVISED RELEASE TO OVERRIDE TENNESSEE LAW

A. Standard Of Review

This Court reviews the district court’s order denying a motion to modify conditions of supervised relief for an abuse of discretion. See *United States v. Carter*, 463 F.3d 526, 528-530 (6th Cir. 2006). “A district court abuses its discretion when it relies on clearly erroneous findings of fact, applies the law improperly, or uses an erroneous legal standard.” *United States v. Pembroke*, 609 F.3d 381, 383 (6th Cir. 2010), cert. denied, 562 U.S. 1273 (2011).

⁶ In addition to filing untimely his notice of appeal, Washington untimely filed his opening brief as appellant in this Court on October 28, 2020, almost four weeks after it was due. He requests this Court to excuse his untimeliness and accept his brief because, among other things, Washington was arrested on September 26, 2020, and subsequently detained at Hawkins County Jail where he had limited access to resources. Br. 1. The government does not oppose Washington’s request that this Court accept his late brief, should the Court not dismiss the appeal as untimely.

B. Because The District Court Lacks Authority To Waive Tennessee Law Prohibiting Washington From Residing Within 1000 Feet Of A School, The District Court Did Not Abuse Its Discretion In Denying Washington's Motion To Modify His Conditions Of Supervised Release

Washington appeals the district court's March 12, 2020, Order denying his motion to modify conditions of supervised release. In his motion, Washington argued that the court should exempt him from the requirements of Tennessee's sex-offender law that requires him not to live within 1000 feet of a school because it would effectively render him without a home. (Pro Se Motion, R. 148, PageID# 1973). The district court correctly denied the motion because it lacks authority to waive the requirements of Tennessee's sex-offender registration statute.⁷

1. The Sex Offender Registration and Notification Act (SORNA) requires every sex offender convicted of a covered "sex offense" to "register, and keep the registration current, in each jurisdiction where the offender resides." 34 U.S.C. 20911(1), 20913(a). When Washington pled guilty to conspiracy to commit sex

⁷ Washington's pro se brief (captioned "Motion to Substitute for Brief & to Supplement") raises other legal issues. Many of these issues (*e.g.*, challenges to his arrest, detention, conditions of confinement, and proceedings in an unrelated criminal case) relate to reasons for his untimely filing of his pro se brief. See note 6, *supra*. To the extent the brief raises other issues relating to matters other than the untimely filing of his brief (*e.g.*, ineffective assistance of counsel), they are undeveloped and the district court did not address them. Those arguments are therefore waived and this Court should not address them. See *United States v. Pasternak*, 743 F. App'x 612, 614 n.1 (6th Cir. 2018) (noting that issues "adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived" and not addressing those arguments) (citation omitted).

trafficking in violation of 18 U.S.C. 1594, he pled guilty to a “sex offense” under SORNA. 34 U.S.C. 20911(5)(A)(iii) and (v) (“the term ‘sex offense’ means * * * a Federal offense * * * under section 1591 * * * [or] an attempt or conspiracy to commit [such] an offense”). Because he “was convicted of a sex offense,” he is a “sex offender” under SORNA, 34 U.S.C. 20911(1), and is subject to the statute’s registration requirements, 34 U.S.C. 20913(a). And under 18 U.S.C. 3583(d), a district court shall order as a condition of supervised release that a person required to register under SORNA comply with the provisions of that Act. Thus, as this Court has explained, the “requirement to register under SORNA is a mandatory (or so-called ‘explicit’) condition of supervised release, rather than a special condition of it * * * [and] the district court was statutorily required to impose [this requirement].” *United States v. Shannon*, 511 F. App’x 487, 489-490 (6th Cir.), cert. denied, 569 U.S. 954 (2013).

The district court’s amended judgment correctly required Washington to “register with the state sex offender registration agency in the state where [Washington] resides, works, or is a student” as part of his supervised release terms. (Order, R. 149, PageID# 1979-1980; Amended Judgment, R. 132, PageID# 1858-1863). Washington asserts that he presently intends to reside in Tennessee. Br. 3-4.

2. Tennessee law also requires Washington to register as a sex offender. See Tenn. Code Ann. § 40-39-202(19) and (20)(A)(xii) and (xvii) (2004) (defining a sex offender to include a person convicted of committing an act constituting the offense of conspiring to promote prostitution); Tenn. Code Ann. § 40-39-202(3) and (31)(R) and (Y) (defining a violent sex offender to include a person convicted of committing an act constituting the offense of conspiring to traffic for a commercial sex act); see also Tenn. Code Ann. § 40-39-202(1) (defining “conviction” to include not only judgments entered by a Tennessee court but also “a conviction by a federal court”). As such, he is subject to the limitations under Tennessee law that he now challenges. See Tenn. Code Ann. § 40-39-211(a)(1) (prohibiting a sex offender from residing or working within 1000 feet of schools and other facilities). But a sex offender’s obligations under state law are independent of any duties under SORNA. See, e.g., *Willman v. Attorney General of the U.S.*, 972 F.3d 819, 824 (6th Cir. 2020) (“federal SORNA obligations are independent of state-law sex offender duties”), petition for cert. pending, No. 20-765 (filed Nov. 24, 2020); *United States v. Paul*, 718 F. App’x 360, 363-364 (6th Cir. 2017) (“SORNA imposes duties on *all* sex offenders, irrespective of what they may be obliged to do under state law”), cert. denied, 140 S. Ct. 342 (2019); see also 73 Fed. Reg. 38,046 (July 2, 2008) (noting that in setting “minimum national standards,” SORNA establishes a “floor,” not a “ceiling”).

The district court therefore did not have any authority to “override” any requirements imposed under Tennessee—as opposed to federal—law, and certainly did not abuse its discretion in declining Washington’s invitation to do so. Further, Washington does not argue, or cite any case holding, that Tennessee’s law is unlawful, nor does he raise an as-applied constitutional challenge. He complains only that Tennessee’s restrictions will burden him from finding a place of residence.

CONCLUSION

This Court should affirm the district court's denial of Washington's motion to modify the conditions of his supervised release concerning restrictions under Tennessee law on where he can live given his status as a sex offender.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS

APPELLEE:

- (1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2962 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and
- (2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font.

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Attorney

Date: December 22, 2020

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Not all case participants are CM/ECF registered. This brief will be served via United States certified mail to the following addresses:

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ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

Appellee United States designates the following documents from the electronic record in the district court:

Record Entry Number	Description	PageID# Range
32	Superseding Indictment	206-210
107	Plea Agreement	1614-1619
120	Presentence Report	1725-1726
123	Judgment	1769-1770
126	Motion to Vacate	1784-1785
131	Judgment Order	1857
132	Amended Judgment	1858-1863
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