

09-4691-cr

To Be Argued By:
SANDRA S. GLOVER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-4691-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

TYREE ROBINSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231, and authority to issue the contempt judgment under 18 U.S.C. § 401. The order of contempt entered on November 2, 2009, and the judgment entered November 9, 2009. JA 235. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on November 3, 2009. JA 114, 235. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issue
Presented for Review**

The district court found the defendant in contempt of court under Federal Rule of Criminal Procedure 42(b), after confirming with counsel that there was no objection to proceeding under that rule. On appeal, the defendant now argues that the court should not have used the “summary” procedures of Rule 42(b), but rather should have used the “notice-and-hearing” procedures of Rule 42(a).

Did the defendant waive his objection to proceeding under Rule 42(b) and, if not, was it plain error to proceed under that rule when the defendant has not even alleged that he was prejudiced by the proceeding?

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TYREE ROBINSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

At a supervised release violation hearing, the district court ordered the defendant detained, and the defendant responded by launching into an offensive and expletive-laced tirade directed primarily against the judge. For this behavior, the court found him in contempt under Federal Rule of Criminal Procedure 42(b) and sentenced him to 4 months' imprisonment.

On appeal, the defendant does not contest that his behavior was in contempt of court. He argues only that the court should not have proceeded under the “summary disposition” procedures of Rule 42(b), but rather should have followed the “notice-and-hearing” procedures outlined in Rule 42(a). This precise issue was raised in the district court, however, and the defendant expressly consented to proceeding under Rule 42(b). Accordingly, the defendant has waived any challenge to the procedure below and the judgment should be affirmed.

In any event, the judgment should be affirmed because it was not plain error for the district court to sanction the defendant for contempt under Rule 42(b). Even if the district court proceeded under the wrong subsection, the defendant can show no prejudice and fails to articulate how the alleged error affected the fairness, integrity or public reputation of the proceedings.

Statement of the Case

On February 6, 2001, a federal grand jury returned an indictment charging the defendant with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). JA 247. On July 20, 2001, a jury found him guilty of this offense, JA 243, and on November 5, 2001, the district court (Janet C. Hall, J.) sentenced him to ninety-six months’ imprisonment, to be followed by three years of supervised release, JA 243.

The defendant began his supervised release in June 2008. JA 67. That same month, the United States

Probation Office filed a petition alleging that the defendant had violated the terms of his supervised release. JA 241. On January 22, 2009, after a hearing, the court revoked the defendant's supervised release and sentenced him to eight months in prison, to be followed by a further two years and four months of supervised release. JA 68, 238. The defendant was released from custody and began his supervised release on February 20, 2009. JA 68.

On June 26, 2009, the Probation Office filed a new petition alleging again that the defendant had violated terms of his supervised release. JA 64, 237-38. The Probation Office submitted an amended petition on August 26, 2009,¹ JA 67, and the defendant's initial appearance on the petition was the next day, August 27, 2009. JA 73-101, 237. Near the conclusion of this hearing, and after being ordered detained, the defendant directed an emotional – and expletive-laced – outburst at the district judge. In response to this outburst, on September 8, 2009, the government filed a motion to hold the defendant in contempt. JA 102, 236.

In a hearing held October 27, 2009, the court revoked the defendant's supervised release and sentenced him to sixteen months' imprisonment. JA 116-18. In addition, the court found that the defendant's abusive outburst was in contempt of court and sentenced the defendant to four months' imprisonment, to be served consecutively to the supervised release violation sentence. JA 116-18, 222-27.

¹ The amended petition was never docketed, although it was submitted to the parties and the court. *See* JA 74-76, 78.

The court issued a written order finding the defendant in contempt on October 30, 2009. JA 112-13, 235.

The court's judgment entered November 9, 2009, JA 235, and the defendant filed a timely notice of appeal on November 3, 2009, JA 114, 235.

The defendant is currently serving his sentence.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The defendant's conviction and initial term of supervised release

On November 5, 2001, the district court sentenced the defendant to ninety-six months in prison, to be followed by three years of supervised release, for his conviction on the charge of possession of a firearm by a convicted felon. JA 243. The defendant completed his prison term and began serving his term of supervised release in June 2008. JA 67. Almost immediately, the Probation Office encountered problems supervising the defendant, and therefore filed a petition alleging a violation of supervised release that same month. JA 241.

In January 2009, after a hearing, the district court revoked the defendant's supervised release and sentenced him to eight months in prison, to be followed by twenty-eight months of supervised release. JA 68, 238-39. The defendant was released from custody and began his new supervised release term on February 20, 2009. JA 68.

B. The defendant's second term of supervised release and the August 27, 2009 hearing on alleged violations of supervised release

The defendant's second attempt to comply with the conditions of supervised release was no more successful than his first.² In the months following his release from custody, the defendant was arrested three times by the New Haven Police Department. JA 68-70. In addition, according to the Probation Office, the defendant lied to his probation officer about where he was living, failed to notify the Probation Office after he was arrested, and refused to follow his probation officer's instruction to report on a weekly basis. *Id.* The Probation Office documented these failings in a report of violation of supervised release, filed June 26, 2009. JA 64, 237-38. After receiving additional information about one of the defendant's arrests, the Probation Office submitted an amended report on August 26, 2009. JA 67-72.

The district court held an initial hearing on the Probation Office's petition on August 27, 2009. JA 73-101. The defendant's lawyer asked for a continuance, noting that he had just recently received the amended violation report and had not been able to review the police

² The defendant does not challenge the district court's finding that he violated conditions of his supervised release or the sixteen-month sentence imposed for those violations. Accordingly, the government recites the facts relating to those violations only as necessary to understand the context of the contempt proceedings.

reports. JA 78. The district judge agreed to grant a continuance, JA 81-82, and turned her attention to the question of detention, noting that the defendant's conduct since release from prison raised serious questions about whether he was a danger to the community, JA 82-84. To consider these questions, the judge engaged in a colloquy with the parties and the probation officer about the defendant's conduct. JA 84-97. At the end of this colloquy, the court found that the defendant was a danger to the community, and announced that he would be taken into custody. JA 97. The defendant's reaction to this announcement was recorded in the transcript as follows:

THE COURT: For these reasons, it is this court's intention to take Mr. Robinson into custody today. We'll continue the hearing for a month at which time –

THE DEFENDANT: We can get this shit over today, bitch. Fuck that bitch. Suck my dick. Fuck all of you mother fuckers. Take me in. Let's go. Lock me up. All you can suck my dick. Fuck all this shit. Stupid mother fuckers. Suck my dick, bitch. Suck my diiiick. Fuck you mother fucker. You are a lying bitch mother fucker. You go to court mother fucker. All you can suck my dick. Fuck all ya mother fuckers. (Spits on carpet.) Bitch suck my diiiick. White bitch. Fuck all ya bitch. Suck my dick bitch. Fuck all ya bitch. Bitch. Bitch. Fat bitch. Fuck you, bitch. Suck my dick, bitch.

(In the absence of the defendant.)

THE COURT: I assume, [AUSA] Nardini, you will prepare an action for contempt.

[AUSA] NARDINI: That seems like it would be in order, your Honor.

THE COURT: It does to me.

JA 97-98.

As requested by the court, on September 8, 2009, the government filed a motion to hold the defendant in contempt. JA 102-108, 236.

C. The continued supervised release hearing and the finding of contempt

The court reconvened the hearing on the defendant's supervised release violations on October 27, 2009. JA 120-21, 235. At the outset of the hearing, the court noted that it also had before it the government's motion to hold the defendant in contempt. JA 122. On this topic, the court raised an "initial question":

[T]hat is whether because I did not take any action at the time it occurred which was my judgment that it was better off not to and have Mr. Robinson removed because the proceeding had ended, we might have done more things. I don't know. It was sufficiently at an end. I made my ruling that it could end. Therefore, I wonder if under Rule 42, I'm past

the point of summarily addressing contempt and therefore, should the matter go to another judge.

JA 122.

This question prompted a lengthy discussion between the court and counsel about the appropriate procedures for the contempt proceeding. The government argued that “summary” contempt was not a “temporal limitation so much as a question of procedure.” JA 122. The court agreed, noting that to read the rule as requiring instantaneous action “would encourage judges to act as the conduct is occurring, in effect which may not be the best time for a judge to act.” JA 124. The court continued by noting that the particular circumstances of this case effectively precluded instantaneous action:

In addition, the nature of the conduct here, I’m not sure how I could have acted summarily. I would have had to have done it without the presence of the defendant. I couldn’t have done it while in his presence while he was doing what would be the subject of my action. He didn’t stop his action until he was removed from the court. It continued as he was being removed so it would have been difficult for me to summarily dispose of that at that time. That doesn’t mean the rule wasn’t written in a way to mean I should transfer it.

JA 124.

In response to the questions raised by the court, defense counsel explained that he had searched and had found no cases on the issue. JA 124. He named a few cases supporting the conclusion that the “[e]xercise of summary contempt power need not be immediate,” JA 124-25, and concluded his description of the law with the following sentence: “While I do not find any cases to the contrary, it is a rather gray area but the court may act on itself in the summary in this action.” JA 125.

The following colloquy then took place:

THE COURT: What I should do for the record, I’m not certain that the government’s motion – did you limit your motion to the summary, to the petty offense level particularly?

[AUSA] NARDINI: Yes, your Honor.

THE COURT: I have no problem with that. I think the only question as a matter of the record is does the defendant raise the issue? In other words, is it the defendant’s position even though it is going to be treated as a petty offense without a right to trial by jury, is there any objection to it being before me? I suppose under Rule 42 would have to be the basis. I’m not sure there is a basis but I’m asking. If there’s no objection, it seems to me then we can proceed.

MR. RASILE: If I may have one moment, your Honor.

THE COURT: You need to take your time. You may be waiving something. I'm not sure you are but you might be. I'm sorry to interrupt you. I will give you more time. I have to discuss something in the rule that I hadn't looked at. I had been looking at B. Attorney Nardini, if you look at A1(3) the second sentence. I think the defendant has the right to have it transferred unless he waives it.

[AUSA] NARDINI: Are you looking at A3?

THE COURT: A3, if the criminal contempt involves the court or the judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents.

[AUSA] NARDINI: That's only if you are falling under paragraph A.

THE COURT: Which is a full trial of a misdemeanor.

[AUSA] NARDINI: Correct, under paragraph B, you have a different set of rules. To give your Honor an example, the Marshall case that we cite, that was summarily disposed of by the judge.

THE COURT: But how do I know that A only applies to a trial by jury, not summarily in contrast to be being called B?

[AUSA] NARDINI: Notwithstanding any other provision of the rule, you may ignore A. If you satisfy the conditions of B, you may proceed as follows.

THE COURT: That's fine. Then we're giving more time to Attorney Rasile to confer with his client. Whenever he's ready. No rush.

(Counsel speaking with the defendant)

MR. RASILE: Your Honor, after discussions with Mr. Robinson, we're going to proceed today.

THE COURT: I'm not sure he had a right to object but if he wanted to, I wanted to be certain that we got it right. I don't want to have him go through it twice or wouldn't be me going through it twice if I do it today or somebody else is supposed to do it. As long as he's okay, we'll proceed.

JA 125-28.

With this procedural issue resolved, the court moved to consideration of the alleged violations of supervised release. The court heard testimony on the alleged violations, as well as argument from counsel about that testimony and the appropriate punishment. JA 128-206.

Defense counsel then addressed the court on the summary contempt issue, beginning with the concession that the defendant's conduct was "egregious." JA 207.

Nevertheless, counsel argued that the defendant's outburst was prompted by frustration, and noted that the defendant wanted to apologize to the court almost immediately after the incident. JA 206-207. He identified positive aspects of the defendant's character, including the defendant's work with children in an outreach program and his efforts to find a job through education. JA 207-208. Based on these factors, and on the family support shown for the defendant, counsel asked the court to give the defendant a "second chance." JA 208-210. Finally, as relevant here, counsel argued that the defendant's outburst was directed at the probation officer and not the court, and that the defendant "could have done much worse," but he "had his hands behind his back . . . [and] never made an approach towards myself or the court or the U.S. Attorney or [the probation officer]." JA 210.

After defense counsel spoke, the defendant addressed the court personally. He apologized for his emotional outburst, and told the court he wanted to be with his mother in North Carolina and to be a better role model for his children. JA 212. After this presentation, the government responded to the remarks of counsel and the defendant. JA 212-14.

At the conclusion of these remarks, the court first considered the petition for violation of supervised release, finding that the defendant had violated three conditions of supervised release. JA 214-18. The court then considered the factors under 18 U.S.C. § 3553(a) as they bore on the appropriate sentence for the three violations. JA 218-22.

After this analysis, the court turned to the motion for contempt. The court found that the defendant was in contempt based on the conduct witnessed by the judge. JA 222. The judge rejected defense counsel's argument that the defendant's outburst was directed at the probation officer, noting that "I felt that most of it was directed at me personally." JA 222-23. She did credit, however, defense counsel's argument that the defendant had not been violent during his verbal outburst, and noted that she had never felt threatened, although she had been concerned about the safety of defense counsel, the person closest to the defendant during the outburst. JA 223-24. The judge did note, however, as an additional fact about the nature of the offense, that the defendant had spat upon the floor which the court "view[ed] . . . as an act of defiance and disrespect to this court." JA 226. Finally, the court considered the purposes of the contempt sanction, JA 224-25, and the potential penalties, which were capped at six months' imprisonment or a fine, JA 225.

The court sentenced the defendant to sixteen months' incarceration on the supervised release violations and four months' incarceration on the contempt finding, to be served consecutively to the supervised release sentence. JA 226-27. On the sentence for the contempt finding, the court explained that it balanced the defendant's "extremely disrespectful" language, which made it a "serious offense," with the mitigating fact that the defendant did not physically harm anyone during his verbal outburst. JA 227.

In compliance with Rule 42(b), the court issued its contempt order in writing on October 30, 2009. JA 112-13, 235. The district court's judgment entered November 9, 2009, JA 116-18, 235, and the defendant filed a timely notice of appeal on November 3, 2009, JA 114, 235.

Summary of Argument

The district court properly held the defendant in contempt using the summary disposition procedures of Rule 42(b). Although the defendant now argues that the court should not have proceeded under that rule because it did not act *immediately* after the contemptuous conduct, the defendant expressly waived this argument in the district court. The court raised this precise question with counsel, and after a colloquy that included defense counsel conferring with his client, defense counsel told the court that he wanted to proceed. Accordingly, the defendant waived any challenge to the procedure used by the district court and he should not be heard to complain to this Court.

In any event, the district court's use of summary disposition procedures was not error, much less plain error. Federal law authorizes a district court to hold a defendant summarily in contempt, and while this power is not unbounded, it fully authorized the court's discretionary exercise of power here. The district court acted at the first available opportunity and took steps to ensure that the defendant was afforded notice and a meaningful opportunity to be heard before being held in contempt. Moreover, even if this procedure was error, it was certainly not "plain." The defendant has identified no

binding precedent that would preclude the court's chosen procedure.

Similarly, and significantly, the defendant has made no attempt to show that any error by the district court affected his substantial rights. He has not argued that he was denied any particular procedure, much less explained how the denial of that procedure affected his substantial rights. He argues for a remand for a "full hearing," without offering any basis for the Court to conclude that a hearing would serve any purpose.

And finally, even assuming error, the defendant does not argue that the fairness, integrity or public reputation of judicial proceedings was impaired because of it; on the record in this case, such an argument would be futile. The defendant did not contest that his conduct was contemptuous and warranted punishment, and he did not contest the court's use of summary procedures below. On these facts, it would be the *reversal* of his contempt conviction that would undermine the integrity and public reputation of judicial proceedings.

Argument

I. The district court properly held the defendant in contempt under Federal Rule of Criminal Procedure 42(b).

A. Governing law and standard of review

1. Governing law

Federal law grants a district court the power to hold an individual in criminal contempt and to punish that contempt with imprisonment or fine. As relevant here, a district court may hold an individual in contempt for “[m]isbehavior . . . in its presence or so near thereto as to obstruct the administration of justice.” 18 U.S.C. § 401(1). Under this statute, a court may punish “egregious misconduct in the court’s presence whether or not a literal obstruction of justice occurs.” *United States v. Marshall*, 371 F.3d 42, 48 (2d Cir. 2004).

Federal Rule of Criminal Procedure 42 sets forth the procedures governing a criminal contempt proceeding, establishing both a general “notice-and-hearing” procedure for contempt proceedings (Rule 42(a)), and a “summary” procedure for specific cases (Rule 42(b)). The notice-and-hearing procedure in Rule 42(a) provides that a “person who commits criminal contempt may be punished for that contempt after prosecution on notice.” The Rule sets out standards for the “notice,” and directs the court to appoint a prosecutor for the proceeding. Fed. R. Crim. P. 42(a)(1), (2). Rule 42(a) further provides that “[a] person being

prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides.” Fed. R. Crim. P. 42(a)(3). In addition, in contempt cases involving “disrespect toward or criticism of a judge,” the Rule provides that “that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents.” *Id.*

Subsection (b) of Rule 42 establishes a summary procedure for certain contempt proceedings:

(b) Summary Disposition. Notwithstanding any other provision of these rules, the court . . . may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

Fed. R. Crim. P. 42(b).

2. Standard of review

Ordinarily, this Court conducts an especially rigorous review of contempt orders for abuse of discretion. *Doral Produce Corp. v. Paul Steinberg Assoc., Inc.*, 347 F.3d 36, 38 (2d Cir. 2003). A different standard, however, applies where a defendant has procedurally defaulted a claim of error before the district court.

To properly preserve an issue for appellate review, a litigant must contemporaneously object and raise the issue

before the district court. *Puckett v. United States*, 129 S. Ct. 1423, 1428-29 (2009). The rule has important practical underpinnings, namely, to encourage litigants to identify only those errors that truly “matter,” to afford the court in the “best position” to correct the errors a timely opportunity to do so, and to discourage “sandbagging.” *Id.* at 1428. “If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed.” *Id.*

On the one hand, a defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in “plain error” review pursuant to Fed. R. Crim. P. 52(b). “Plain error review allows (but does not require) vacatur if the defendant proves: (1) error; (2) that is ‘clear or obvious, rather than subject to reasonable dispute’; (3) that affected substantial rights, ‘which in the ordinary case means . . . that it affected the outcome of the district court proceedings’; and (4) that ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir. 2010) (quoting *Puckett*, 129 S. Ct. at 1429 (internal quotation marks and citations omitted)). *See also United States v. Cotton*, 535 U.S. 625, 631-32 (2002) (outlining “plain error” factors).

On the other hand, a defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a

claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 252 (2008); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

B. Discussion

There is no dispute that the defendant's conduct met the standard for criminal contempt. *See* Defendant's Br. at 6 n.4; *see also* JA 207 (defense counsel describing defendant's conduct as "egregious"); JA 210 (defense counsel stating that "[h]e's got to spend time for what he did. He knows that."). His conduct – egregious, outrageous, and directed at the court – was specifically intended to show contempt for the court. Indeed, given the defendant's conduct, it "would . . . show contempt for the institution to hold that [the defendant] was *not* in contempt of court." *Marshall*, 371 F.3d at 46 (emphasis added).

The defendant's only claim on appeal is that the district court should have used the procedures outlined in Rule 42(a), instead of the summary procedures set out in Rule 42(b). Specifically, the defendant argues that the district court was not authorized to use the summary contempt procedures because the finding of criminal contempt was made over two months after the contemptuous conduct. The defendant waived this argument, however, by expressly agreeing to the district court's proposed

procedure. But even if he had not waived his claim, the district court did not commit plain error by proceeding under Rule 42(b).

1. The defendant waived any challenge to proceeding under Rule 42(b) by expressly agreeing to that procedure.

This Court should not review the defendant's claim that the district court employed the wrong procedures because the defendant affirmatively waived any challenge to the district court's decision to proceed summarily under Rule 42(b). "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Here, there is no doubt that the defendant intentionally abandoned a known right.

First, the record reflects that the defendant knew about the distinction between the procedures outlined in Rule 42(a) and Rule 42(b). The government's motion for contempt specifically referenced Rule 42(b), and asserted that the court may "summarily hold the defendant in criminal contempt." JA 106. Although the defendant did not file a written response to this motion, defense counsel researched whether the court could proceed under Rule 42(b), or whether that Rule was foreclosed by the court's failure to act in the immediate aftermath of the defendant's outburst. *See* JA 122 (in response to court's question on whether summary procedures of Rule 42(b) were appropriate in this context, government counsel noting that defense counsel "raised that question with me in between

the two hearings”); JA 124-25 (defense counsel reciting the results of his research).

Moreover, the district court raised this precise question at the October 27 hearing. The district judge specifically asked whether her failure to act immediately on the defendant’s conduct meant that “under Rule 42, I’m past the point of summarily addressing contempt” JA 122. The court then engaged in a lengthy colloquy with counsel, during which both parties presented their views on this question. JA 122-28. Significantly, in the course of this colloquy, at no point did defense counsel argue that the court could not impose contempt summarily under Rule 42(b). Rather, counsel outlined the results of his research on the question, concluding that “it is a rather gray area but the court may act on itself in the summary in this action.” JA 124-25. In other words, defense counsel had researched the question and identified no legal authority that would preclude summary disposition of the contempt motion.

The colloquy did not end there, though. The court specifically asked whether the defendant objected to proceeding under Rule 42(b):

[D]oes the defendant raise the issue? In other words, is it the defendant’s position even though it is going to be treated as a petty offense without a right to trial by jury, is there an objection to it being before me? I suppose under Rule 42 would have to be the basis. I’m not sure there is a basis but I’m

asking. If there's no objection, it seems to me then we can proceed.

JA 126. When defense counsel asked for a moment to consider the question, the court responded by stating “[y]ou need to take your time. You may be waiving something.” JA 126.

After more discussion, and defense counsel's discussion with the defendant, counsel stated to the court, “Your Honor, after discussions with Mr. Robinson, we're going to proceed today.” JA 127. The court confirmed that it understood this statement as a waiver of any objection to the procedure:

I'm not sure he had a right to object but if he wanted to, I wanted to be certain that we got it right. I don't want to have him go through it twice or wouldn't be me going through it twice if I do it today or somebody else is supposed to do it. As long as he's okay, we'll proceed.

JA 127-28. In short, as the district court understood, and as the record fully reflects, the defendant intentionally and knowingly abandoned any objection he might have raised to summary disposition of the contempt motion.

Indeed, the record reflects a nearly textbook example of waiver. The defendant knew about the question at issue, understood the right he was waiving, and upon express questioning by the judge, affirmatively waived that right. Because the defendant affirmatively waived his challenge

to the court's use of summary procedures in Rule 42(b), he should not be heard to complain about those procedures now. *See Polouizzi*, 564 F.3d at 153 (declining to consider challenge to a jury instruction when, after the parties submitted competing jury instructions on an issue, the court drafted a third option, and the defendant "indicated that the [court's proposed] instruction was satisfactory").

The defendant argues – without explanation or relevant citation of authority – that notwithstanding the record below, his waiver should only extend to the district judge's failure to recuse herself from the contempt proceeding. *See* Defendant's Br. at 11 n.6. To be sure, Rule 42(a)(3) specifically requires the defendant's consent to a contempt proceeding before a judge when the contemptuous conduct was directed toward that same judge. But the rule's express requirement of a waiver of one provision does not thereby preclude a waiver of other provisions.

Moreover, there is no basis for interpreting the defendant's waiver below as limited to the identity of the presiding judge. The parties and the court certainly discussed the potential for transfer to another judge, *see* JA 122, 126, but their discussion was not limited to that topic. The broader question was whether the court could proceed summarily when it had not acted immediately upon the contemptuous conduct. The court framed the discussion in this way, *see* JA 122 (asking "whether because I did not take any action at the time it occurred . . . if under Rule 42, I'm past the point of summarily addressing contempt . . ."), and counsel for both parties addressed this larger question, *see e.g.*, JA 122-24 (counsel

for the government arguing that “summarily” is not a temporal limitation, but rather a description of procedures, and that court did not lose its power to act summarily by waiting to hold the defendant in contempt); JA 124-25 (counsel for the defendant describing his research on whether the court can act summarily after a passage of time from the contemptuous conduct).

In light of this broad discussion of summary procedures under Rule 42(b), the defendant’s decision to go forward is most reasonably understood as a waiver of *all* challenges to those procedures. The defendant did not limit his waiver in any way, or preserve an objection to any particular procedure or decision. For example, he did not say that while he waived his right to transfer to another judge, he objected to the court’s use of Rule 42(b)’s summary disposition procedures. He said merely, “after discussions with Mr. Robinson, we’re going to proceed today.” JA 127. In the absence of some reason in the record to understand his waiver as more limited than the parties were discussing, the defendant should be held to the position he took below: no objection to the court’s summary disposition of the contempt motion.

In sum, because the defendant expressly agreed to the district court’s proposal to proceed using the summary disposition procedures outlined in Rule 42(b), as opposed to the notice-and-hearing procedures in Rule 42(a), he should not be heard to complain about those procedures now.

2. The district court did not commit plain error by proceeding under Rule 42(b) as opposed to Rule 42(a).

If the Court elects to review the defendant's challenge to the district court's procedure, notwithstanding his waiver, that review should be for plain error. *See* Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). A review of the record reveals no plain error here.

a. The district court did not lose authority to act summarily under Rule 42(b) when it did not act in the immediate aftermath of the contemptuous conduct.

Rule 42(b) provides that "[n]otwithstanding any other provision of these rules, the court . . . may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies" This rule codifies a judge's long-held authority to act upon disruptions in the courtroom when necessary to protect the dignity and authority of the court, and to maintain public respect for the court and its orders. *See United States v. Stratton*, 779 F.2d 820, 835 (2d Cir. 1985); *United States v. Giovanelli*, 897 F.2d 1227, 1230 (2d Cir. 1990).³

³ At the time of the *Stratton* and *Giovanelli* decisions (and of other decisions cited in this brief), the summary (continued...)

To be sure, a federal judge’s authority to punish contempt summarily under Rule 42(b) is not unbounded. For example, although the Rule authorizes a district court to punish contempt summarily, basic principles of due process require that, ordinarily, the defendant be given a meaningful opportunity to speak in his own defense before being held in contempt. *Doral Produce Corp.*, 347 F.3d at 44-45. Moreover, in light of the unusual nature of summary proceedings, and the absence of the typical procedural safeguards of a trial, “the power [to summarily punish for contempt] must be sparingly and carefully used ‘with the utmost sense of responsibility and circumspection.’” *United States v. Galante*, 298 F.2d 72, 75 (2d Cir. 1962) (quoting *Brown v. United States*, 359 U.S. 41, 52 (1959)). To this end, the rule has been described as a “rule of necessity, reserved for exceptional circumstances and a narrow category of contempt.” *Marshall*, 371 F.3d at 45 (internal citations and quotations omitted); see also *Stratton*, 779 F.2d at 835 (“Although Rule [42(b)] seems to suggest that summary contempt is permissible whenever the trial judge witnesses the contemptuous conduct, the rule has been given a more limited scope. The summary contempt power may be used

³ (...continued)

contempt rule was found in Rule 42(a). In 2002, Rule 42 was revised in part by reversing the order of the two sections of the rule. See *Doral Produce Corp.*, 347 F.3d at 38 n.1 (describing revision to the rule). To avoid confusion, this brief will uniformly refer to Rule 42(b) as the rule governing summary contempt proceedings, noting alterations in case quotations with brackets.

only when necessary to preserve the authority of the court.”).

From the principle that the power of summary contempt should be invoked sparingly, the defendant deduces two limitations on a court’s power to act under Rule 42(b). As the defendant reads the cases, summary disposition of contempt charges is not authorized unless (1) the contempt order would have some prophylactic effect on the defendant, and (2) there is still a need for summary procedures. Defendant’s Br. at 15. On both points, the defendant over-reads the case law.

First, as this Court has recognized, a contempt sanction imposed on a disruptive party or lawyer can serve as a specific deterrent to further disruptive conduct by that individual. *See Stratton*, 779 F.2d at 836 (noting that trial judge entitled to cite defendant for contempt to deter him from further disruptive behavior during balance of trial); *United States v. Martin-Trigona*, 759 F.2d 1017, 1024-25 (2d Cir. 1985) (upholding summary contempt order when it was necessary to prevent unusually disruptive party from “reducing the hearing . . . to a shambles”).

Nevertheless, the power to summarily punish contempt is not limited to those cases where a specific deterrent effect is assured, because a court’s authority to summarily punish contempt serves the purposes of general deterrence as well. This Court’s decision in *Marshall* is a case in point. There, the defendant directed a vulgar and offensive tirade at the district judge during a hearing on violations of supervised release. 371 F.3d at 44-45. The district court

sentenced the defendant on the supervised release violations, and summarily found him in contempt for his outburst. *Id.* at 45. In that case, there was no suggestion that the order could have a “prophylactic” effect on the defendant because, as here, the proceedings were over soon after the court imposed punishment for the criminal contempt. As this Court noted, however, the potential for a *general* deterrent effect justified the district court’s exercise of summary contempt powers. *See id.* at 46 (“The availability of a swift response both stops the misconduct at hand and deters similar behavior in other cases by insuring that those tempted to engage in such behavior know that deliberate outbursts or disruption will not be allowed to go on for more than the briefest period of time.”); *see also Galante*, 298 F.2d at 76 (upholding contempt sanction and noting that punishment for obstreperous conduct “may help to prevent recurrence of this conduct in this or other trials in the future”).

Second, as the defendant notes, courts have stated – often in dicta – a preference that a district court, faced with contemptuous conduct, ordinarily use the notice-and-hearing procedures of Rule 42(a) instead of the summary procedures of Rule 42(b). In *Harris v. United States*, 382 U.S. 162, 164-65 (1965), the Supreme Court held that summary contempt procedures were improper for a grand jury witness who refused to testify because they were unnecessary; the grand jury could turn to other cases while the court resolved the contempt proceedings under the notice-and-hearing procedures of Rule 42(a). Ten years later, in a case upholding the use of summary contempt procedures for trial witnesses who refused to testify, the

Supreme Court stated, albeit in dicta, that “[w]here time is not of the essence, . . . the provisions of Rule [42(a)] may be more appropriate to deal with contemptuous conduct.” *United States v. Wilson*, 421 U.S. 309, 319 (1975); see also *United States v. Lumumba*, 741 F.2d 12, 15-17 (2d Cir. 1984) (expressing disapproval of contempt sanction, summarily imposed at the conclusion of a trial, for conduct during the course of the five-month trial, although the Court’s decision reversing the contempt sanction rested largely on fact that sanctioned lawyer had been denied the opportunity to defend himself before being held in contempt); *Giovanelli*, 897 F.2d at 1231 (noting in dicta that “Rule [42(a)] may in some circumstances be a more appropriate procedure for contempt in the court’s presence”).

Despite these repeated admonitions to district courts to use the notice-and-hearing procedures when possible, this Court has approved the summary imposition of contempt even when it was not imposed contemporaneously with the contemptuous conduct. In other words, “summary” disposition is not a temporal limitation on the court’s power to act, but rather a description of the procedural process afforded by the rule. See *Galante*, 298 F.2d at 78 (Friendly, J., dissenting in part) (“‘Summary Disposition’ and ‘summarily’ mean only that certain usual procedural requirements may be dispensed with . . .”). In *Galante*, this Court upheld a summary contempt order entered six weeks after the contemptuous conduct, and expressly rejected the argument that the district court lost power to act summarily by delaying action on the contempt. As the Court explained, “[i]t was permissible to postpone action

until the end of the trial in progress, rather than risk prejudicing the completion of trial of the main issue.” 298 F.2d at 76; *see also Stratton*, 779 F.2d at 836 (upholding contempt sanction imposed summarily even though the trial judge did not “impose sentence the instant her authority was challenged”). And although Judge Friendly dissented in *Galante*, his dissent objected only to the approval of a contempt order entered without first allowing the defendant the opportunity to speak in his defense; Judge Friendly expressly approved the district court’s use of summary procedures in that case. *Id.* at 76 (Friendly, J., dissenting) (“I agree that the judge was not required to utilize the full-scale procedures of [Rule 42(a)].”).⁴

As *Galante* illustrates, this Court has not categorically prohibited the use of Rule 42(b)’s summary contempt procedures after a delay because, as explained in a slightly different context, “[e]ach case turns on its particular facts,” *Doral Produce Corp.*, 347 F.3d at 45. And because the facts of each case will be different, the measured and responsible use of Rule 42(b) procedures is committed to

⁴ In *Doral Produce Corp.*, this Court criticized the *Galante* decision for the same reason identified by Judge Friendly in dissent, namely the majority’s approval of a contempt sanction that was imposed without giving the defendant the opportunity to speak in his own defense. *See Doral Produce Corp.*, 347 F.2d at 41-42. The *Doral Produce Corp.* Court noted that the *Galante* majority had upheld the use of summary contempt procedures even though there was a six-week delay between conduct and sanction, *id.* at 41, but offered no criticism of the *Galante* decision on that ground.

the sound discretion of the trial judge. This Court has identified several factors that bear on the exercise of this discretion, including the need for immediate action, the potential disruption of trial or other proceedings, the court's ability to provide the contemnor with notice and a hearing, the "extent and clarity of the contemnor's acts of disrespect or obstruction," and "the obvious justification for the ruling." *Doral Produce Corp.*, 347 F.3d at 45; *Stratton*, 779 F.2d at 835-36; *Galante*, 298 F.2d at 75-76. And once "a trial judge makes the determination on sufficient grounds that [summary] action is necessary, the sentence is within the discretion of the court, and is open to review only for arbitrary use of the power in abuse of discretion." *Galante*, 298 F.2d at 75.

Applying these principles to this case, the district court did not abuse its discretion when it summarily held the defendant in contempt two months after his contemptuous conduct. The court did not act immediately on the defendant's conduct because it could not: the defendant's verbal outburst interrupted the supervised release hearing and continued until he was physically removed, in handcuffs, from the courtroom. *See* JA 103-104, 124. The court acted instead at the next available opportunity, namely the continuation of the hearing that was eventually held two months later. Thus, like the court in *Galante*, the court's action was removed temporally from the contemptuous conduct, but still within the proceeding.

Moreover, the district court ensured that the defendant received due process within the framework of the summary proceedings. The court invited the government

to file a contempt motion, JA 98, 102-108, thereby providing the defendant with notice of the pending contempt charges. And consistent with the rule established in *Doral Produce Corp.*, the district court provided the defendant with a meaningful opportunity to be heard, both personally and through counsel, before it held him in contempt. JA 124-25, 206-212.

And finally, the nature of the defendant's contemptuous conduct further supported the court's summary action. The defendant's outburst was blatantly contemptuous and disrespectful, and the need for a contempt ruling was accordingly obvious. Indeed, it would have undermined respect for the court and "show[n] contempt for the institution," *see Marshall*, 371 F.3d at 46, to *not* hold the defendant in contempt for his conduct.

On these facts, the district court did not abuse its discretion by summarily holding the defendant in contempt. In response to the defendant's offensive and egregious tirade against the court, the experienced district judge gave the defendant notice and the opportunity to be heard, and then imposed a sanction at the next available opportunity. There was no error in this ruling.

b. Any error committed by the district court was not plain.

Even if the court committed error by proceeding under Rule 42(b), in this case, any such error was not “plain.” An error is generally not plain under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court, except “in the rare case” where it is “so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant’s failure to object.” *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted); *see also United States v. Davila*, 461 F.3d 298, 308-309 (2d Cir. 2006) (finding no plain error when there was no binding precedent on the question and other courts were split on the question).

As described above, there is no binding precedent on the question presented here, namely whether the district court lost authority to act summarily by waiting. The defendant cites a number of cases from which he deduces that summary disposition under Rule 42(b) may only be used *immediately* upon contemptuous conduct. *See, e.g.*, Defendant’s Br. at 3-4, 6-9. The binding nature of such a rule is undermined, however, by other cases that have approved summary contempt orders when the court has not acted immediately. *See, e.g., Galante*, 298 F.2d at 76; *Stratton*, 779 F.2d at 835-36. In any event, the defendant has not identified any precedent that would bar the action taken by the district court on the facts presented here.

Nor can it be said that the error was so egregious that the court and prosecutor were “derelict” in failing to notice it. *Whab*, 355 F.3d at 158. In an uncertain area of the law, where cases are driven very much by their facts, the district court’s action was hardly plainly wrong. Indeed, even defense counsel conceded that the law was somewhat “gray” in this area. JA 125. In the absence of any demonstration that the court’s actions were obviously wrong in this “gray” area of the law, any alleged error cannot be classified as plain.

c. The defendant has not alleged – much less shown – that any error affected his substantial rights.

Conspicuously absent from the defendant’s brief is any mention of how the district court’s use of summary contempt procedures prejudiced him. *See Deandrade*, 600 F.3d at 119 (to obtain reversal based on plain error, the defendant must prove that the error affected his substantial rights). Thus, while he asks this Court to vacate the contempt judgment and remand for “a full hearing” under Rule 42(a), *see* Defendant’s Br. at 15, he does not explain what procedural protections were lacking or how their absence in the Rule 42(b) proceeding prejudiced him.

The defendant’s silence is telling. He does not identify any procedural infirmities that caused him prejudice because there are none. The defendant was given notice and the opportunity to be heard in the contempt proceeding. The government filed a motion to hold him in contempt one and one-half months before the hearing,

thereby alerting him to the potential contempt sanction. JA 102-108. With more than month before the hearing, the defendant had ample opportunity to object to the proceeding, or to offer any objections or response to the motion. Moreover, at the hearing itself, before the court ruled on the contempt motion, the court heard from both defense counsel and the defendant himself. JA 124-25, 206-12. The defendant makes no argument that these opportunities were inadequate or ineffective.

The defendant now asks for a “full hearing,” Defendant’s Br. at 15, but does not explain the purpose for such a hearing. He does not dispute that his conduct was egregious or that it warranted a contempt sanction. *See id.* at 6 n.4. He does not dispute the accuracy of the transcript or any of the facts relied upon by the district court in ruling on the contempt motion. He does not contend that the district court should have considered additional facts or evidence, or that the district court refused to consider the arguments made by him or his lawyer. With no showing that a hearing would serve *any* purpose, the defendant cannot show that the court’s failure to afford him one affected his substantial rights.

Nor can the absence of any other procedural protections be shown to have affected his substantial rights. Rule 42(a)(3) provides that a defendant charged with contempt “is entitled to a jury trial in any case in which federal law so provides,” but federal law does not require a jury trial when, as here, the district court agreed to limit the defendant’s potential sentence to six months’ imprisonment. JA 125-26; *see Marshall*, 371 F.3d at 48-49

(holding that defendant has right to jury trial before being sentenced to more than six months' imprisonment on criminal contempt charge). And while Rule 42(a)(3) also requires the transfer of a contempt case to a new judge when the contempt was directed to the judge personally, the defendant expressly consented to the contempt proceedings before Judge Hall, as permitted by the rule. Defendant's Br. at 11 n.6 (conceding that the defendant had consented to proceedings before Judge Hall).

Aside from these stated procedures in Rule 42(a), the federal rules identify other procedures that might apply to the defendant if the court had proceeded under that rule, *see, e.g.*, Rule 32 (rules governing sentencing procedures), but again, the defendant does not explain how the absence of any particular procedure prejudiced him. Indeed, given the relative simplicity of the facts of this case, the defendant's concession that his conduct was contemptuous, and the court's provision of notice and opportunity to be heard, it is difficult to identify any prejudice to the defendant from the absence of any hypothetical procedures.

Because the defendant has not shown any prejudice from the court's alleged error in summarily disposing of the contempt motion, this Court should not reverse for plain error.

d. Reversal is not warranted because any alleged error would not seriously affect the fairness, integrity or public reputation of judicial proceedings.

As with the third prong of plain error review, the defendant fails to address the fourth prong of that standard; he makes no argument that the alleged error in this case seriously affects the fairness, integrity or public reputation of judicial proceedings. *Deandrade*, 600 F.3d at 119.

Even if the defendant attempted such an argument, however, it would fail. The defendant's conduct was egregious. He launched an abusive, expletive-laden, and vulgar tirade at the judge during a judicial proceeding, unlike anything ever heard by the experienced trial judge. JA 223. And although he did not physically assault anyone, that is hardly a fact to be considered in mitigation. He did not stop his verbal tirade until he was handcuffed and physically removed from the courtroom. JA 103-104, 124. Under these circumstances, there is no doubt that punishment was warranted, and in fact, the defendant himself understood that he faced imprisonment for his actions. JA 210. *See Marshall*, 371 F.3d at 46 (considering contempt sanction for similar conduct, court stated that “[w]e would ourselves show contempt for the institution to hold that [the defendant] was not in contempt of court”).

Moreover, the district court afforded the defendant significant procedural protections, granting him notice and the opportunity to be heard, and capping his potential

sentence at six months to ensure that it was a petty offense. The defendant has identified no additional procedures that he believes were warranted, nor explains how those potential procedures could have affected the judgment in his case. And finally, the district court gave the defendant every opportunity to object to the proceeding before moving forward on the contempt motion, but instead of objecting, his lawyer expressly agreed to the procedure.

On these facts, any error in the district court's decision would not affect the integrity, fairness, or public reputation of judicial proceedings. Indeed, when the defendant has not identified any prejudice from the procedure, and in fact expressly agreed to the procedure, it would be the reversal of the district court's judgment that would seriously affect the fairness, integrity or public reputation of judicial proceedings. The Supreme Court made this very point in *Johnson v. United States*, 520 U.S. 461 (1997). The forfeited error in that case was the failure to submit materiality to the jury. When the Court came to the fourth prong of the plain error inquiry, it reviewed the evidence of materiality and found it "overwhelming." 520 U.S. at 470. The Court continued:

On this record there is no basis for concluding that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Indeed, it would be the reversal of a conviction such as this which would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."

. . . No “miscarriage of justice” will result here if we do not notice the error, . . . and we decline to do so.

Id. (citations omitted).

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 4, 2010

Respectfully submitted,

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UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in cursive script, appearing to read "Sandra S. Glover".

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,233 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, reading "Sandra S. Glover". The signature is written in a cursive style with a large initial 'S'.

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 401

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as--

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42. Criminal Contempt

(a) Disposition After Notice. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

- (1) Notice. The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:
 - (A) state the time and place of the trial;
 - (B) allow the defendant a reasonable time to prepare a defense; and
 - (C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) Appointing a Prosecutor. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

(3) Trial and Disposition. A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

(b) Summary Disposition. Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

Rule 52(b). Plain Error

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Robinson

Docket Number: 09-4691-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/4/2010) and found to be VIRUS FREE.

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Dated: August 4, 2010

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Notary Public:

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August 4, 2010

RAMIRO A. HONEYWELL
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Qualified in Kings County
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