

10-4817-cr
United States v. Carthen

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: August 24, 2011 Decided: May 23, 2012)

Docket No. 10-4817-cr

UNITED STATES OF AMERICA,

Appellee,

v.

TYRONE L. CARTHEN,

Defendant-Appellant.

B e f o r e: WINTER, McLAUGHLIN, and CABRANES, Circuit Judges.

Appeal from the adoption by the United States District Court for the Eastern District of New York (Dora L. Irizarry, Judge) of a magistrate judge's (John M. Azrack, Magistrate Judge) report and recommendation to revoke appellant's supervised release for violating a mandatory condition of supervision that he "shall not commit another federal, state, or local crime." Appellant principally disputes the district court's determination that, under Federal Rule of Criminal Procedure 32.1, good cause existed to allow the government to introduce hearsay evidence during his Violation of Supervised Release hearing. We affirm.

1 EDWARD S. ZAS, of counsel, Federal
2 Defenders of New York, Inc., New
3 York, New York, for Defendant-
4 Appellant.
5

6 TYLER J. SMITH, Assistant United
7 States Attorney, of counsel (Susan
8 Corkery, Assistant United States
9 Attorney, of counsel) on the brief
10 for Loretta E. Lynch, United States
11 Attorney for the Eastern District
12 of New York, Brooklyn, New York,
13 for Defendant-Appellee.
14

15 WINTER, Circuit Judge:

16 Tyrone L. Carthen appeals from Judge Irizarry's adoption of
17 Magistrate Judge Azrack's report and recommendation ("R & R").
18 The R & R recommended revocation of appellant's supervised
19 release because he violated a mandatory condition of his
20 supervision, namely that he "shall not commit another federal,
21 state or local crime." The revocation stems from appellant's
22 actions against Marquita Cox ("Marquita"), appellant's ex-
23 girlfriend and the mother of three of his children. Appellant
24 primarily claims a violation of the Confrontation Clause and
25 challenges the district court's determination that, under Federal
26 Rule of Criminal Procedure 32.1, good cause existed to allow the
27 government to rely principally upon hearsay evidence in his
28 Violation of Supervised Release ("VOSR") hearing. We affirm.

29 BACKGROUND

30 On February 26, 2010, after serving a twenty-two month
31 prison sentence for the possession of a firearm by a convicted
32 felon under 18 U.S.C. §§ 922(g)(1) and 924(a)(2), appellant was

1 released from a halfway house in Brooklyn, New York to begin a
2 three-year term of supervised release. On April 5, 2010, Senior
3 Probation Officer Darcy A. Zavatsky learned that appellant might
4 have violated the conditions of his supervised release when
5 appellant reported to the probation department with a Temporary
6 Order of Protection and Family Offense Petition that Marquita had
7 filed against him.

8 Zavatsky conducted an investigation and was the sole witness
9 at appellant's VOSR hearing. Zavatsky's testimony described
10 statements made to her in a series of interviews with various
11 individuals, statements in various police or court documents, and
12 other corroborating evidence.

13 On April 27, 2010, the government filed the VOSR Report
14 charging appellant with two counts of violating the mandatory
15 condition of supervision that he "not commit another federal,
16 state or local crime": (i) conduct constituting felony assault
17 and/or attempted assault (a felony crime of violence), and (ii)
18 conduct constituting assault, attempted assault, aggravated
19 harassment, menacing, reckless endangerment and/or harassment (a
20 misdemeanor offense).

21 Based on interviews conducted with Marquita, Zavatsky
22 testified that, on the date of his release, appellant arrived at
23 the apartment in which Marquita was staying with her then
24 boyfriend, Manuel Joyner. Appellant grabbed Marquita's throat
25 and threw her against a wall, choking her until she nearly lost

1 consciousness. Appellant demanded to know the whereabouts of
2 Joyner, who was hiding in the bathroom. Appellant stated that he
3 wanted to "put a bird cage over [Marquita's] head," which she
4 interpreted to mean that he wanted to "break her face." Marquita
5 ran to the bathroom in which Joyner was hiding and held the door
6 closed from the outside. Appellant jabbed at Marquita's hands
7 with a pair of scissors and, in the process, punctured her skin,
8 ultimately causing a small scar that was observed by Zavatsky.
9 Marquita was able to diffuse the situation by convincing
10 appellant she was no longer in a relationship with Joyner.
11 Marquita recounted the stabbing in a sworn Family Offense
12 Petition later filed in Family Court.

13 Zavatsky testified further about events that took place on
14 March 15, 2010, based on interviews with Marquita, Joyner, their
15 friend Takima Booker ("Booker"), and Marquita's mother Nancy Cox
16 ("Nancy"), who were at Nancy's home that day. Appellant, lurking
17 outside, began calling Marquita continuously on her cell phone to
18 ask her to go outside to speak to him. Nancy and Booker, out of
19 concern that appellant would harm Marquita, convinced her to stay
20 inside. Nancy then went into the hallway of her residence to ask
21 appellant to leave and remind him that he was not welcome at her
22 home. When appellant refused to leave, Nancy called the police,
23 who responded to the scene and filed a Domestic Incident Report
24 with the 71st precinct recounting Marquita's statement that
25 appellant "verbally harassed her by means of yelling and
26 screaming and knocking on [her mother's] door."

1 Based on interviews with Marquita and Booker about events
2 that took place on March 21, 2010, Zavatsky testified, and stated
3 in the VOSR Report, that appellant called Marquita repeatedly and
4 waited for her at her apartment building, confronting her and
5 Booker as they returned. Appellant seized both Booker's and
6 Marquita's cell phones to prevent them from calling anyone,
7 yelled and cursed at Marquita, accused Marquita of lying about
8 where she had been all day, grabbed Marquita around the throat
9 with one hand, choked her, and forced her head into a door.
10 Appellant also slapped Marquita in the face, ripped off her wig,
11 and knocked her pocketbook out of her hands.

12 Appellant convinced Marquita to return to her apartment with
13 him. Marquita, frightened, asked Booker to accompany them.
14 Zavatsky testified that once in the apartment, appellant again
15 grabbed Marquita around the throat tightly and pressed his fist
16 up against her cheek with force. Booker, who was in a different
17 room at the time, did not witness this attack firsthand, but she
18 confirmed that Marquita told her about it and that she had
19 observed additional red marks on Marquita's face and neck.

20 When Booker's father called her cell phone later that
21 evening, appellant returned it to her. Booker and Marquita asked
22 to leave the apartment to meet Booker's father. Appellant,
23 concerned Marquita was actually planning to meet Joyner, refused
24 to let them leave alone, and insisted on accompanying them.
25 Appellant repeatedly stated that he would beat Marquita "like
26 [she] was a man" if he saw Joyner on the street.

1 After about an hour, appellant, Marquita, and Booker
2 returned to the apartment and the women began to plan an escape
3 from appellant. Early the next morning, Marquita and Booker left
4 the apartment to take Marquita's children to school, after which
5 they met Nancy and recounted to her the events from the prior
6 evening. Nancy called Victim Services and reported the assault
7 on Marquita. Marquita willingly went to a shelter for battered
8 women.

9 On March 23, 2010, Marquita filed a sworn Family Offense
10 Petition in Kings County Family Court and was issued a temporary
11 order of protection, which was followed by a two-year permanent
12 order of protection on April 13, 2010. Appellant has not
13 violated the order of protection or otherwise bothered Marquita
14 since its entry.

15 As noted, Zavatsky gave the testimony described above based
16 on: (i) the interviews conducted with Marquita, Booker, and
17 Nancy; (ii) Marquita's Family Offense Petition; (iii) the police
18 Domestic Incident Report; and (iv) Zavatsky's observation of a
19 scar on Marquita's right hand. The government called no other
20 witnesses.

21 We turn now to the evidence regarding the absence of
22 witnesses with personal knowledge of relevant events. Zavatsky
23 testified that on April 8, 2010, Marquita recounted appellant's
24 abusive behavior as described above and agreed to testify at the
25 VOSR hearing. However, during subsequent interviews, Marquita
26 informed Zavatsky that she no longer wished to cooperate because

1 she did not want to be responsible for sending appellant back to
2 jail. On the day of the hearing Marquita stated to Zavatsky and
3 an Assistant United States Attorney that she would not testify
4 and that she would "risk going to jail if she were called to
5 testify and refused." In these statements, she sought to
6 minimize appellant's conduct by stating that she had exaggerated
7 some of the details in the Family Offense Petition. She also
8 expressed the wish that she had just "taken the ass whipping and
9 not reported what happened."

10 The R & R rejected appellant's Confrontation Clause
11 arguments and recommended revocation of appellant's supervised
12 release. On October 25, 2010, after explicitly considering: (i)
13 appellant's interest in cross-examining the hearsay declarants;
14 (ii) the government's reasons for not producing witnesses with
15 personal knowledge of relevant events; and (iii) the reliability
16 of the proffered hearsay, see United States v. Williams, 443 F.3d
17 35, 45 (2d Cir. 2006), the district court adopted the R & R and
18 determined that "good cause" existed under Rule 32.1(b)(2) to
19 allow the hearsay testimony, United States v. Carthen, No. 10-CR-
20 319, 2010 WL 4313384 (E.D.N.Y. Oct. 25, 2010).

21 On October 28, 2010, Marquita submitted a letter to the
22 court stating that she "lied on Mr. Tyrone Carthen," that
23 appellant "never put his hands on [her]," and that she "just
24 [does not] want Mr. Carthen to have to spend any more time in
25 jail because of [her]." Based on this letter, appellant filed a

1 motion to reopen the VOSR hearing, which the district court
2 denied.

3 On November 5, 2010, the district court sentenced appellant,
4 on each count (concurrently), to eighteen months' imprisonment,
5 followed by eighteen months of supervised release. The sentence
6 was based on a Grade "A" violation of supervised release and a
7 Criminal History Category of III.

8 On appeal, appellant argues that the district court erred
9 in: (i) admitting unreliable hearsay without good cause; (ii)
10 finding that appellant engaged in felonious conduct that
11 constitutes a Grade "A" violation of supervised release; and
12 (iii) failing to reopen the hearing in light of Marquita's
13 recantation.

14 DISCUSSION

15 a) Good Cause for Admitting Hearsay

16 Revocation proceedings are not deemed part of a criminal
17 prosecution, and, therefore, defendants in such proceedings are
18 not entitled to "the full panoply of rights" that criminal
19 defendants generally enjoy. Morrissey v. Brewer, 408 U.S. 471,
20 480 (1972). The Confrontation Clause prohibitions against
21 hearsay evidence do not strictly apply, see, e.g., Williams, 443
22 F.3d at 45; United States v. Aspinall, 389 F.3d 332, 342-43 (2d
23 Cir. 2004), abrogation on other grounds recognized by United
24 States v. Fleming, 397 F.3d 95, 99 n.5 (2d Cir. 2005); United
25 States v. Chin, 224 F.3d 121, 124 (2d Cir. 2000), and at a VOSR
26 hearing, the alleged violation of supervised-release need only be

1 proven by a preponderance of the evidence, not beyond a
2 reasonable doubt, see United States v. McNeil, 415 F.3d 273, 277
3 (2d Cir. 2005). In a VOSR hearing, a defendant has "the right to
4 confront and cross-examine adverse witnesses (unless the [court]
5 specifically finds good cause for not allowing confrontation)."
6 Morrissey, 408 U.S. at 489; see also Fed. R. Crim. P.
7 32.1(b)(2)(C) (defendants must have an opportunity to question
8 adverse witnesses "unless the court determines that the interest
9 of justice does not require the witness to appear").

10 A proffered hearsay statement that falls within an
11 established exception is of course admissible in a VOSR hearing.
12 For statements that would be inadmissible under the Federal Rules
13 of Evidence, a determination of "good cause" requires the court
14 to balance "the defendant's interest in confronting the
15 declarant[] against[] . . . the government's reasons for not
16 producing the witness and the reliability of the proffered
17 hearsay." Williams, 443 F.3d at 45. The defendant's interest is
18 entitled to little weight if the defendant caused the declarant's
19 absence by way of intimidation. Id.

20 We review a district court's balancing of the Rule 32.1
21 factors for abuse of discretion. Id. at 46. "[A] district court
22 'abuses' or 'exceeds' the discretion accorded to it when (1) its
23 decision rests on an error of law (such as application of the
24 wrong legal principle) or a clearly erroneous factual finding, or
25 (2) its decision . . . cannot be located within the range of
26 permissible decisions." United States v. Jones, 299 F.3d 103,

1 112 (2d Cir. 2002) (quoting Zervos v. Verizon N.Y., Inc., 252
2 F.3d 163, 169 (2d Cir. 2001)(internal quotation marks
3 omitted)(omission in original)).

4 In balancing the various interests under Rule 32.1, the
5 district court acknowledged appellant's strong interest in
6 confronting Marquita. However, the court also concluded that the
7 government's reason for not calling her was reasonable in that
8 she repeatedly refused to testify. Finally, the district court
9 found that the hearsay evidence was reliable as a whole. We
10 conclude that the finding of good cause for the admission of the
11 hearsay statements was amply supported.

12 For purposes of analysis, the reasonableness of the
13 government's not calling Marquita at the VOSR hearing turns in
14 large part on weighing the reliability of her earlier statements
15 regarding domestic abuse against her desire not to testify as
16 expressed just prior to the hearing. The earlier statements bore
17 significant indicia of reliability. Zavatsky had conducted six
18 interviews with Marquita, as well as interviews with Booker and
19 Nancy. Their stories corroborated each other. Zavatsky observed
20 a scar on Marquita's right hand consistent with the wound
21 Marquita had described in her account of the events of February
22 26, 2010, in which appellant stabbed her right hand with a
23 scissor blade. The district court found additional corroborating
24 evidence in the NYPD Domestic Incident Report, Marquita's Family
25 Offense Petition, the temporary and permanent orders of
26 protection, and the fact that Marquita sought protection from
27 appellant at a shelter for victims of domestic violence.

1 The hearsay portions of this evidence were detailed,
2 credible, and sometimes under oath. They were not idle chit-
3 chat. They were also corroborated by other evidence, including a
4 court order that was admissible as an official record, see Fed.
5 R. Evid. 803(8) (public records exception); the scar that was
6 personally observed by Zavatsky; and Marquita's report to the
7 shelter that was not hearsay under Fed. R. Evid. 801(a) because
8 it was not intended as an assertion.

9 Also, Marquita's expressed desire not to testify was not an
10 unusual reaction by a victim of domestic abuse. And, while she
11 sought at that time not to testify and to minimize the extent of
12 that abuse, she actually confirmed the truth of her earlier
13 statements in saying that she should have just "taken the ass
14 whipping."

15 We have held that good cause justifying the absence of a
16 declarant exists when a defendant has a "history of violent
17 conduct [that] ma[kes] reprisal against [the declarant] a
18 possibility." Jones, 299 F.3d at 113. In United States v.
19 Jackson, 347 Fed. App'x 701, 703 (2d Cir. 2009), cert. denied,
20 130 S. Ct. 1544 (2010), we found good cause not to call an
21 assault victim to testify after she had "recanted her original
22 accusations" because she had previously offered a "sworn and
23 recorded account of her assault," and additional independent
24 evidence corroborated her original statements. Id.; see also
25 United States v. Hall, 419 F.3d 980, 988 n.6 (9th Cir. 2005)
26 (noting "well recognized" difficulty of securing cooperation of
27 domestic violence victims and that most common reason for

1 dismissal of domestic violence crimes is non-cooperation of
2 victims); United States v. Martin, 382 F.3d 840, 846 (8th Cir.
3 2004) (holding hearsay statements of rape victim admissible where
4 she refused to testify and statements were corroborated by other
5 evidence).

6 Finally, as in Jones, appellant has a history of violence.
7 Appellant was previously arrested for a number of charges related
8 to violence against the mother of his two oldest children. Prior
9 to that, appellant had been convicted of misdemeanor assault on a
10 female and misdemeanor simple assault.

11 Regarding the failure to call Booker and Nancy, the
12 government asserts that it expected Nancy to refuse to testify
13 because she would align with her daughter out of loyalty.
14 Moreover, the government believed her testimony to be of less
15 importance than Marquita's because the only pertinent event of
16 which she had first-hand knowledge was the incident on March 15,
17 2010, which was already detailed in the NYPD report. The
18 government further argues that it believed Booker to be in
19 Delaware, which, it argued, was enough for a finding of good
20 cause. Although it would have been preferable to ask Booker or
21 Nancy to testify, the failure to pursue them does not fatally
22 undermine the finding of good cause given the strength of the
23 record viewed as a whole.

24 Thus, the district court did not abuse its discretion in
25 balancing the interests under Rule 32.1. Accordingly, appellant
26 was not deprived of his constitutional right to confront and
27 cross-examine adverse witnesses.

1 b) Finding of Felonious Conduct

2 Appellant argues that the government presented legally
3 insufficient evidence to prove assault in the second degree or
4 attempted assault in the second degree -- the two felonies
5 enumerated in Count 1 of the Violation Report. The government
6 concedes that the evidence presented at the VOSR hearing was
7 insufficient to prove assault in the second degree. The
8 question, therefore, is whether the evidence presented was
9 sufficient to establish attempted assault in the second degree.

10 Under New York law, attempted assault in the second degree
11 requires that a defendant, "with intent to cause physical injury
12 to another person," attempt to cause "such injury to such person
13 . . . by means of a deadly weapon or a dangerous instrument."
14 N.Y. Penal Law § 120.05(2). Physical injury is defined as
15 "impairment of physical condition or substantial pain." Id. §
16 10.00(9). To constitute physical injury, the "pain caused by
17 such a wound need not be severe or intense to be substantial,"
18 but at a minimum the injury must "cause some pain or, to some
19 extent, result in some [physical] impairment." People v.
20 Kruppenbacher, 917 N.Y.S.2d 405, 410 (3d Dep't. 2011) (internal
21 quotation marks omitted). In Kruppenbacher, the evidence of
22 physical injury presented only an "insignificant" scar, which is
23 insufficient to establish assault in the second degree; however,
24 where the "defendant harbored an intent to harm the victim when
25 he attacked her with" the dangerous instrument, that is legally
26 sufficient evidence to establish that he attempted to assault.
27 Id.

1 On several different occasions, appellant physically
2 attacked and expressed a desire to injure Marquita severely. He
3 grabbed her around the throat, threw her against a wall, and used
4 scissors to get her hands off the doorknob, ultimately stabbing
5 her in her right hand. Although the injury was relatively minor,
6 leaving only a small scar, Marquita could have been injured more
7 severely, resulting in physical impairment or substantial pain.

8 Appellant's actions easily support an inference that he had
9 no qualms about seriously injuring Marquita and indeed wished to
10 do so. Therefore, the evidence presented at the VOSR hearing was
11 sufficient to support the district court's finding, by a
12 preponderance of evidence, that appellant committed attempted
13 felony assault under New York law.

14 c) Reopening the VOSR Hearing

15 Appellant also argues that the district court erred in
16 declining to reopen the VOSR hearing in light of Marquita's
17 October 28, 2010, letter stating that she "lied on [sic] Mr.
18 Tyrone Carthen," that appellant "never put his hands on [her],"
19 and that she "just [does not] want Mr. Carthen to have to spend
20 any more time in jail because of [her]."

21 Although we have not explicitly ruled on the proper standard
22 of review of a district court's denial of a motion to reopen a
23 revocation hearing, the standard clearly is one of abuse of
24 discretion. That "standard accurately reflects the degree of
25 deference properly accorded a district court's decision[]
26 regarding evidentiary matters and the general conduct of trials."
27 United States v. Bayless, 201 F.3d 116, 131 (2d Cir. 2000)

1 (applying abuse of discretion to reconsideration of a suppression
2 motion because of new evidence); see also United States v. Gotti,
3 794 F.2d 773, 780 (2d Cir. 1986) (applying abuse of discretion
4 standard to denial of motion to reopen bail hearing).

5 In the analogous context of motions for a new trial,
6 witness recantations are viewed "with the utmost suspicion,"
7 Haouari v. United States, 510 F.3d 350, 353 (2d Cir. 2007)
8 (quoting Ortega v. Duncan, 333 F.3d 102, 107 (2d Cir. 2003)),
9 particularly in the context of recantations from victims of
10 domestic violence, see O'Laughlin v. O'Brien, 577 F.3d 1, 4 (1st
11 Cir. 2009) (noting that victims of domestic violence often recant
12 or refuse to cooperate).

13 Factors considered in reviewing a district court's decision
14 to decline an evidentiary hearing involving a recanting witness
15 include: the importance of the witness's testimony in the
16 original proceeding; "the existence of evidence corroborating
17 either the conviction or the recantation; . . . the temporal
18 proximity of the trial testimony and the purported recantation;
19 the consistency of the recantation with the witness's comments
20 and behavior before, during, and after trial; and the existence
21 of evidence of outside influence suggesting either coerced
22 testimony or coerced recantation." United States v. Rojas, 520
23 F.3d 876, 884 (8th Cir. 2008). Where the evidence "could have no
24 effect on the ultimate disposition of the matter," a district
25 court may decline to reopen the revocation hearing. United
26 States v. Mitchell, 429 Fed. App'x 271, 276 (4th Cir. 2011).

1 The district court did not find Marquita's letter
2 sufficiently credible to undermine her earlier corroborated and
3 sworn accounts of the attacks. That finding was not an abuse of
4 discretion.

5 Marquita's effort to minimize appellant's conduct is
6 consistent with the guilt she expressed for reporting the abuse
7 instead of "tak[ing] the ass-whipping and not report[ing] what
8 happened." It is also consistent with her expressed desire not
9 to be responsible for appellant returning to prison.

10 Furthermore, the district court was entitled to consider that
11 such a recantation is not unusual in domestic violence cases.
12 Victims of this type of violence often are protective of, and
13 deny allegations against, their abusers.

14 In contrast to the recantation, Marquita's original story
15 was corroborated by the scar on her hand; Zavatsky's interviews
16 with Booker and Nancy; her own sworn and graphically detailed
17 testimony in her March 23, 2010, Family Offense Petition; the
18 NYPD Domestic Incident Report; and the fact that Marquita went to
19 a domestic violence shelter in a self-evident attempt to escape
20 appellant. Therefore, the district court did not err in denying
21 appellant's request to reopen the VOSR hearing.

22 CONCLUSION

23 For the foregoing reasons, the order of the district court
24 is affirmed.