

SECOND CIRCUIT REVIEW

Expert Analysis

Supervised Release Not Terminated by Deportation

This month, we discuss *United States v. Roccisano*,¹ in which the U.S. Court of Appeals for the Second Circuit affirmed a district court's judgment of conviction sentencing a defendant to a 46-month term of imprisonment after the defendant pled guilty to one charge of illegally reentering the United States. The court's opinion, issued per curiam, considered whether a defendant-alien's deportation terminates his term of supervised release. Because the U.S. Sentencing Guidelines add two criminal history points to a violation committed during a period of supervised release, the decision not to terminate supervised release upon deportation allows for longer sentences of defendant-alien who reenter the United States and commit criminal offenses here post-deportation. The case was decided by Circuit Judge Robert Katzmann, Circuit Judge Barrington Parker, and Judge Jane Restani of the U.S. Court of International Trade, sitting by designation.

Background

In August 1989, a New York jury convicted Italian citizen Vincenzo Roccisano of conspiring to import and export illegal narcotics.² Specifically, Roccisano was convicted of: (1) conspiring to import into the United States more than one kilogram of heroin and export out of the United States more than five kilograms of cocaine; (2) conspiring to distribute heroin and cocaine domestically; and (3) attempting to export out of the United States five kilograms or more of cocaine.³

In connection with this conviction, Roccisano received a sentence of 235 months' imprisonment, to be followed by five years of supervised release.



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Despite the five-year term of supervised release, Roccisano was never actually placed under active supervision after his release from prison in 2006. Rather, he was deported to Italy immediately upon

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release.

After his 2006 deportation, Roccisano illegally reentered the United States. In February 2010, federal law enforcement agents spotted Roccisano at a Nassau County restaurant. After verifying that Roccisano had not received permission to reenter the United States legally, the law enforcement agents placed him under arrest. This arrest occurred roughly four years after Roccisano's 2006 release from prison and his deportation to Italy.

The District Court Case

Roccisano pled guilty to a charge of illegally reentering the United States in violation of 8 U.S.C. §§1326(a) and (b)(2) before the U.S. District Court for the Southern District of New York. The district court calculated Roccisano's applicable sentencing guidelines range as 46 to 57 months, after assigning two criminal history points for Rocci-

sano's having committed his offense while under a term of supervised release. According to the guidelines, two criminal history points should be assigned "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status."⁴

At the time of Roccisano's sentencing hearing, neither Roccisano nor the government objected to the district court's calculation of the guidelines range. The government sought a sentence of 46 months' imprisonment—the very lowest sentence still within the guidelines range as calculated by the district court.⁵ Roccisano sought a non-guidelines sentence of time-served.

Roccisano sought leniency on the grounds that his illegal reentry was motivated by his desire to save the life of his mentally ill daughter. Roccisano presented evidence that one of his daughters, Daniela, suffered from a serious case of bipolar disorder. Daniela had previously attempted suicide while living with Roccisano in Italy, and she had subsequently relocated to the United States to seek medical attention. Roccisano claimed that his sole motivation in illegally reentering the United States was to visit his daughter Daniela.

The government cast doubt on Roccisano's claim by presenting evidence that Daniela's primary caregiver had not been Roccisano, but his wife. The government also showed that despite the fact that Roccisano had no reported income, he traveled extensively throughout Europe, Canada, and Latin America between 2006 and 2009, and that he had often visited with Daniela and other family members abroad, obviating any need to enter the United States illegally to visit family.

Upon hearing this evidence, the district court noted that Roccisano apparently had the financial ability to reunite with his daughter "by means other than illegally reentering the United States" and that the family could have afforded to return Daniela to Italy "if that was their choice." The court

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concluded that Roccisano's illegal reentry was motivated by factors unrelated to his daughter's psychiatric condition, and that his personal circumstances therefore did not merit a downward departure from the applicable guidelines range. The court then sentenced Roccisano to a 46-month term of imprisonment. This sentence was in line with the recommendation of the government and was within the calculated guidelines range.

The Second Circuit Decision

Roccisano sought review of his judgment of conviction, arguing in part that the district court miscalculated the applicable sentence range under the guidelines by improperly assigning two criminal history points for Roccisano's having committed an offense while under a term of supervised release.⁶ According to Roccisano, this constituted reversible error because he was not actually under active supervision at the time of his illegal reentry in 2010.

Undoubtedly, if Roccisano had been permitted to remain in the United States after his release from prison in 2006, he would still have been within his five-year term of supervised release four years later in February 2010. But Roccisano reasoned that his deportation to Italy in 2006 terminated his term of supervised release. He contended that the district court ought not to have assessed the two criminal history points to its calculation of the applicable guidelines range in his case.

In support of this argument, Roccisano cited a recent amendment to §5D1.1(c) of the guidelines, which states that sentencing courts "ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment."⁷

The Second Circuit affirmed the district court's sentence of 46-months' imprisonment, holding that deportation does not terminate a defendant-alien's term of supervised release for purposes of applying the sentencing guidelines. In reaching this decision, the court applied an abuse of discretion standard.

The court noted that although it had not yet had occasion to address this specific issue, it had, in a previous case, relied on a U.S. Court of Appeals for the Fifth Circuit decision, *United States v. Brown*, in deciding that a defendant-alien's deportation does not terminate a "special parole term" imposed under a different federal statute.⁸ In *Brown*, the Fifth Circuit reasoned that "Congress would not require that a defendant be deported despite a term of supervised release and at the same time allow for super-

vised release to be conditioned on the defendant not reentering the United States illegally. If Congress intended for deportation to terminate this sentence, it could have specifically provided for such to occur."⁹ The Second Circuit fully embraced this reasoning.

The court was unpersuaded by Roccisano's reliance on the recent amendment to the sentencing guidelines for two reasons. First, the amendment went into effect in November 2011, well after Roccisano's sentence. Second, the amendment did not apply to Roccisano's case because a term of supervised release was a statutorily mandated component of his narcotics trafficking sentence.¹⁰

Because Roccisano's five-year term of supervised release was not terminated by his deportation to Italy in 2006, the court found that he was still under supervised release when he illegally reentered the United States in 2010. The district court therefore did not err in assigning two criminal history points when calculating the applicable sentencing range under the guidelines.

Conclusion

In *Roccisano*, the Second Circuit joined five of her sister circuits in holding that deportation does not extinguish a term of supervised release. The U.S. Court of Appeals for the First, Third, Fifth, Seventh, and Ninth Circuits have also so held.¹¹ *Roccisano* did not, however, clarify exactly how such deported aliens are to be "supervised" when serving their terms of supervised release abroad.

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Under current federal law, conditions of supervised release may require offenders to attend court approved rehabilitation programs, to comply with sex offender registry laws, or to submit to periodic drug tests, depending on the underlying crime.¹² Yet none of these often mandatory requirements can be effectively enforced against defendants once they have been deported. In effect, these requirements are meaningless in cases of deportation. Indeed, several courts have recognized the impossibility of imposing effective programs of

supervised release on deported defendants.¹³

It will be interesting to see if, in the future, Congress will specifically address how such mandatory requirements are to be met in cases of deportation. Realistically, a prohibition against reentering the United States illegally may be the only condition enforceable against alien-defendants after deportation. Currently, a court may consider imposing such a condition under 18 U.S.C. 3583(d)(3), but it is not mandatory.

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1. Docket No. 10-5237-cr, 2012 WL 833887 (2d Cir. Mar. 14, 2012).

2. *United States v. Vincenzo Roccisano et al.*, 89-CR-2206 (RJW) (S.D.N.Y. 1990), aff'd sub nom. *United States v. Batista*, No. 90-1167(L) (2d Cir. Sept. 19, 1990).

3. See *Roccisano v. United States*, 936 F.Supp. 96, 98 (S.D.N.Y. 1996), aff'd, 152 F.3d 920 (2d Cir. 1998).

4. U.S.S.G. §4A1.1(d).

5. The government originally represented that it would be seeking an upward departure from the guidelines range to the statutory maximum of 20 years' imprisonment based on information that could not be publicly disclosed without compromising other investigations. At a rescheduled sentencing hearing, however, the government withdrew this earlier representation and sought a Guidelines sentence of 46 months' imprisonment.

6. Roccisano also contended that the district court's sentence was procedurally and substantively unreasonable. The Second Circuit disagreed, holding that the district court properly "put aside" the government's earlier representations about Roccisano's participation in other criminal activity, and that the district court did not abuse its discretion in rejecting Roccisano's argument that concerns over his daughter's mental health merited a below Guidelines sentence.

7. See U.S.S.G. §5D1.1(c).

8. See *United States v. Cuero-Flores*, 276 F.3d 113, 117-18 (2d Cir. 2002) (citing *United States v. Brown*, 54 F.3d 234 (5th Cir. 1995)).

9. Id. at 117 (quoting *Brown*, 54 F.3d at 238).

10. See 21 U.S.C. §§841(b)(1)(A), 960(b)(1)(H) ("Any sentence under this subparagraph shall...impose a term of supervised release of at least 5 years in addition to such term of imprisonment....").

11. First Circuit: See *United States v. Carrasco-Mateo*, 389 F.3d 239, 247 (1st Cir. 2004); Third Circuit: *United States v. Williams*, 369 F.3d 250, 252-53 (3d Cir. 2004); Fifth Circuit: *United States v. Brown*, 54 F.3d 234 (5th Cir. 1995); Seventh Circuit: *United States v. Akinyemi*, 108 F.3d 777 (7th Cir. 1997); Ninth Circuit: *United States v. Ramirez-Sanchez*, 338 F.3d 977, 980 (9th Cir. 2003).

12. See 18 U.S.C. §3583(d).

13. See e.g., *United States v. Ceja-Hernandez*, 895 F.2d 544 (9th Cir. 1990).