RECORD NO. 19-4758

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

BRIAN DAVID HILL,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

REPLY BRIEF OF APPELLANT

E. Ryan Kennedy
ROBINSON & MCELWEE, PLLC
140 West Main Street, Suite 300
Clarksburg, West Virginia 26301
(304) 326-5318

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

I. ARGUMENT

i. The government's argument unduly limits the scope of *United States v. Haymond*, as the provided opinion indicates a new direction for the Supreme Court of the United States. Therefore, the district court erred as a matter of law in conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt[1].

The government's argument unduly limits the scope of *United States v. Haymond*, as the provided opinion indicates a new direction for the Supreme Court of the United States. Therefore, the district court erred as a matter of law in conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt.

As stated by the government in its brief, the Supreme Court of the United States, in *United States v. Haymond*, 139 S. Ct. 2369 (2019), was divided into a 4-1-4 decision. While this division of the Court does make the opinion more difficult to interpret, it does not lessen its impact. The similarities between the two (2) defendants in *Haymond* and the instant case are striking.

In *Haymond*, the defendant was initially convicted of possession of child pornography, which is the same initial offense as Appellant. *Id*. at 2373. As in the instant case, Haymond was sentenced to a term of (10) years of supervised release.

[1] As previously stated in Appellant's opening brief, this Court reviews questions of law in supervised release revocation proceedings de novo, including the interpretation of the United States Sentencing Guidelines and the Constitution of the United States. *United States v. Barton*, 26 F.3d 490, 491 (4th Cir. 1994).

Id. at 2574; (JA 7). Haymond was later caught, while on supervised release, with additional child pornography and a revocation hearing was conducted before a district judge without a jury and under a preponderance of the evidence standard, not the beyond a reasonable doubt standard. *Id.* Similarly, in the instant case, Appellant appeared before a district judge in a revocation hearing based upon his alleged indecent exposure, without a jury and under a preponderance of the evidence standard. (JA 26-27, 35-36, 120-21).

Both Haymond and Appellant were sentenced to an additional term of incarceration based upon the findings of fact of a district judge, without a jury, by a preponderance of the evidence. *Id.*; (JA 120-21).

The government emphasizes that Haymond's violation invoked the mandatory minimum provision of 18 U.S.C. § 3583(k), whereas Appellant's sentence for his alleged violation fell under 18 U.S.C. § 3583(e). Despite the government's assertions to the contrary, however, Appellant maintains that the expanded scope of trial by jury and the burden of proof being beyond a reasonable doubt also applies to Section 3583(e) violations, such as this case, either directly through *Haymond* or through an expansion and/or change in existing law.[2] Simply

[2] For the sake of brevity, Appellant will not reproduce the Supreme Court of the United States' eloquent remarks from *Haymond* on the historic and fundamental importance of both the right to trial by jury and that proof of criminal conduct must be beyond a reasonable doubt. Appellant hereby incorporates by reference, as if fully set forth herein, pages 2376 through 2378 of the *Haymond* opinion.

put, *Haymond* is an established beachhead whose objectives are clear: The restoration of a robust right to trial by jury and the expansion of the use of the beyond a reasonable doubt standard.

The government's argument centered not so much on the law but on trying to play on this Court's supposed fears of being the first Court of Appeals to recognize the full scope of the *Haymond* doctrine. As a result, the government leaves unrebutted the detailed textual analysis of *Haymond* in Appellant's opening brief. Many statements and passages in the Court's opinion strongly suggest that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding. For example, the first sentence of the opinion reads: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Haymond*, 139 S. Ct. at 2373.

The Court defined a "crime" as any "ac[t] to which the law affixes ... punishment," and says that a "prosecution" is "the process of exhibiting formal charges against an offender before a legal tribunal." *Haymond*, 139 S. Ct. at 2376. The Court, however, uses this definition for the purpose, of declaring that every supervised-release revocation proceeding is a criminal prosecution. See *Haymond* 139 S. Ct., at 2379 ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final

sentence is imposed.... [A]n accused's final sentence includes any supervised release sentence he may receive".)

Quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004), the Court states that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Haymond*, 139 S. Ct. at 2370. Since a defendant sentenced to incarceration after being found to have violated supervised release is receiving a "punishment," then the Court's statement means that any factual finding upon which that judgment is based must be made by a jury, not by a judge.

While both *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. United States*, 570 U.S. 99 (2013), apply only to a defendant's sentencing proceeding and not to a supervised-release revocation proceeding, which has been described at times as a "postjudgment sentence-administration proceedin[g]," the Court states that "the demands of the Fifth and Sixth Amendments" cannot be "dodge[d] by the simple expedient of relabeling a criminal prosecution a ... 'sentence modification' imposed at a 'postjudgment sentence administration proceeding." *Haymond*, 139 S. Ct. at 2379. The meaning of the Court's above statement is clear. A supervised-release revocation proceeding is a criminal prosecution and is therefore governed by both the Fifth and Sixth Amendments. See *Haymond*, 139 S. Ct. at 2390 ("any accusation triggering a new and additional punishment [must be] proven to the

satisfaction of a jury beyond a reasonable doubt"); *Id.* at 2380 ("a jury must find all of the facts necessary to authorize a judicial punishment").

The Court, in summary, posits that parole was constitutional, but supervised release is entirely different. *Haymond*, 139 S. Ct. at 2381-82. The implication in the above statements is clear enough: All supervised-release revocation proceedings must be conducted in compliance with the Sixth Amendment. The Court hints at where it is heading when it writes: "[O]ur opinion, [does] not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*." *Haymond*, 139 S. Ct. at 2382-84, n.7. Section 3583(e), the section under which Appellant was sentenced, sets out the procedure to be followed in all supervised-release revocation proceedings. Therefore, the Court left open the door that provision, the one through which Appellant was sentenced, is not consistent with *Apprendi*, which means that Appellant's proceeding required trial by jury.

For the reasons both stated above and in Appellant's opening brief, there is no clear ground for limiting the *Haymond* opinion only to Section 3583(k). The Court simply let that issue sleep for another day. Today is that day. Despite the government's protestations to the contrary, this Court should recognize the larger paradigm shift which has occurred in the Supreme Court's reasoning, which when applied, protects Appellant from being sentenced to further incarceration without a jury and requires a beyond a reasonable doubt evidence standard.

ii. The government's argument expands Virginia state criminal law regarding obscenity beyond its statutory limits and, therefore, the district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387 because the evidence fails to show that Appellant acted intentionally to make an obscene display or exposure of his person.

The government's argument expands Virginia state criminal law regarding obscenity beyond its statutory limits and, therefore, the district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387 because the evidence fails to show that Appellant acted intentionally to make an obscene display or exposure of his person. While the government would have this Court believe that it knows obscenity when it sees it, Virginia has chosen to provide significant codification in this area of law. That statute provides, in relevant part, that "[e]very person who **intentionally** makes an **obscene** display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor." Va. Code § 18.2-387 (emphases added).

"The `obscenity' element of Code § 18.2–387 may be satisfied when: (1) the accused admits to possessing such intent, *Moses v. Commonwealth*, 611 S.E.2d 607, 608 (Va. App. 2005) (*en banc*); (2) the defendant is visibly aroused, *Morales v. Commonwealth*, 525 S.E.2d 23, 24 (Va. App. 2000); (3) the defendant engages in masturbatory behavior, *Copeland v. Commonwealth*, 525 S.E.2d 9, 10 (Va. App.

2000); or (4) in other circumstances when the totality of the circumstances supports an inference that the accused had as his dominant purpose a prurient interest in sex, *Hart*, 441 S.E.2d at 707–08.[3] The mere exposure of a naked body is not obscene. *See Price v. Commonwealth*, 201 S.E.2d 798, 800 (Va. 1974) (finding that `[a] portrayal of nudity is not, as a matter of law, a sufficient basis for finding that [it] is obscene')." *Romick v. Commonwealth*, No. 1580-12-4, 2013 WL 6094240, at *2 (Va. Ct. App. Nov. 19, 2013) (unpublished) (internal citations reformatted).

While the evidence may show that Appellant was naked in public, as stated above, nudity, without more, is not obscene under Virginia law. Rather, "[t]he word `obscene' where it appears in this article shall mean that which, **considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex**, that is a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and

[3] Although the government has placed all of its eggs in the basket of a single, unreported, three (3) page decision of a state intermediate appellate court, defendant is citing a summary of multiple reported decisions, some of which came from Virginia's highest court. Further, as *Maness v. Commonwealth*, 2014 WL 2136469, *3 (Va. App. 2014). (unpublished), the case cited by the government acknowledges, every circumstance of alleged obscenity is fact-specific. Maness was riding a bicycle nearly nude through a major throughway on a Sunday in broad daylight. *Id.* at *1. Further Maness did not appear to be in any distress and said that he simply thought it was a nice day for a bike ride. *Id.* Unlike Appellant, there does not appear to be any other logical reason why Maness would have thus conducted himself except to have as his dominant theme or purpose an appeal to the prurient interest in sex. Appellant's belief that he was being forced to take nude pictures of himself in public under threat of harm to his family constitutes a completely different purpose.

which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value." Va. Code § 18.2-372 (emphasis added). While Virginia does not appear to have established a clean definition of criminal intent, Black's Law Dictionary defines it as "[a]n intent to commit an actus reus without any justification, excuse, or other defense."

In summary, in order to show that Appellant violated his supervised release by committing the offense of indecent exposure under Virginia law, the government was required to prove, among other things, that Appellant had the intent to display or expose himself in a way which has, as its dominant theme or purpose, appeal to the prurient interest in sex, as further defined above, without any justification, excuse, or other defense.[4] The government failed to do so. Rather, the government's evidence, presented through its own witnesses, showed Appellant as someone who was running around naked between midnight and 2:00 a.m. and taking pictures of himself because he believed that someone was going to hurt his family if he did not do so. (JA 42-43, 53).

[4] For the reasons stated above, the government's burden was to prove every element of the offense, including the *mens rea*, beyond a reasonable doubt. However, even if, *arguendo*, this Court were to find that the government's burden was only a preponderance of the evidence, the government has still failed to carry its burden.

The district court did not hear, however, any evidence of Appellant having his dominant theme, or purpose being an appeal to the prurient interest in sex. For example, the government does not dispute that there was no evidence of Appellant making any sexual remarks, being aroused, masturbating, or enjoying his conduct, sexually or otherwise. If a person was purposing to expose himself in public because he or she found it sexually arousing, it would be logical that he or she would pick a place and time where he or she would expect to encounter lots of members of the public. Appellant did not do that. Rather, he was running around between midnight and 2:00 a.m. and the witnesses to his nudity were few. Hence, the statements Appellant made to police and his conduct both indicate that, in the light most favorable to the government, (1) he was naked in public while having a psychiatric episode[5], but (2) without the intent necessary to commit indecent exposure under Virginia law. Consequently, for the reasons stated above and in Appellant's opening brief, the district court erred, as a matter of law, when it found that Appellant had violated his supervised release by committing the Virginia state law offense of indecent exposure as per Virginia Code § 18.2-387.

[5] It is irrelevant whether there actually was someone threatening him to take naked pictures or whether he just believed there was at the time. Either circumstance would be a lack of the appropriate *mens rea*.

iii. The government's argument misses the point of Appellant's argument that this situational violation was completely avoidable had the district court granted Appellant's Motion to Continue. Therefore, this Court should extend and/or modify existing law to hold that the district court abused its discretion when it denied Appellant's motion to continue the revocation hearing until after the underlying criminal appeal was completed.

The government's argument misses the point of Appellant's argument that this situational violation was completely avoidable had the district court granted Appellant's Motion to Continue. Therefore, this Court should extend and/or modify existing law to hold that the district court abused its discretion when it denied Appellant's motion to continue the revocation hearing until after the underlying criminal appeal was completed. As stated above and in Appellant's opening brief, this Court should extend and/or modify existing law to find that Appellant had a constitutional right to a trial by jury and for his guilt to be determined to the beyond a reasonable doubt standard.

An abuse of discretion occurs when the district court demonstrates "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

If the district court had not wanted to empanel a jury, it could have still protected Appellant's constitutional rights by simply granting Appellant's motion to continue the hearing in order to allow Appellant's pending state court appeal, which would have been a *de novo* jury trial, to reach a final decision. (JA 30-36). Had the

district court done so, it could have used the final conviction from the Virginia state court, if the appeal were unsuccessful, as a factual basis for a revocation because Appellant would have, at that point, been determined to be guilty of said underlying offense beyond a reasonable doubt by a jury of his peers. Conversely, if said appeal were successful, then the district court could have dismissed the revocation petition. Therefore, the district court demonstrated an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay by insisting that the hearing proceed that day.

As provided in 18 U.S.C. § 3583(e)(4), and discussed at the revocation hearing, the district court could have ordered Appellant to remain at his place of residence during non-working hours and/or placed him on electronic monitoring. (JA 103-06). Such an order would have alleviated any public safety concern while Appellant's appeal was ongoing in state court. Therefore, the district court abused its discretion when it denied Appellant's motion to continue, as the district court could have alleviated the basis for this appeal by merely granting the continuance.

II. CONCLUSION

For the reasons state above and in Appellant's opening brief, the Appellant urges this Court to vacate the revocation of his supervised release.

Respectfully Submitted,

BRIAN DAVID HILL
By Counsel

/s/ E. Ryan Kennedy
E. Ryan Kennedy
(W.Va. State Bar. #10154)
ROBINSON & McELWEE PLLC
Post Office Box 128
Clarksburg, West Virginia 26302
Phone: 304-622-5022
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   [X] this brief contains [*2,845*] words.

   [ ] this brief uses a monospaced type and contains [*state the number of*] lines of text.

2. This brief complies with the typeface and type style requirements because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2016*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: January 17, 2020

/s/ E. Ryan Kennedy
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of January, 2020, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Anand P. Ramaswamy
OFFICE OF THE U.S. ATTORNEY
101 South Edgewater Street, 4th Floor
Greensboro, North Carolina 27401
(336) 333-5351

Counsel for Appellee

I further certify that on this 17th day of January, 2020, I caused the required copy of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

/s/ E. Ryan Kennedy
Counsel for Appellant