

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *

Docket Number:
1:22-CR-00035-JLS-HKS-1

v. *

Buffalo, New York
August 3, 2023
9:32 a.m.

LUKE MARSHALL WENKE, *

SENTENCING ON VIOLATION
OF SUPERVISED RELEASE

Defendant. *

* * * * *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

TRINI E. ROSS,
UNITED STATES ATTORNEY,
By DAVID J. RUDROFF, ESQ.,
Assistant United States Attorney,
Federal Centre,
138 Delaware Avenue,
Buffalo, New York 14202,
Appearing for the United States.

For the Defendant:

FEDERAL PUBLIC DEFENDER'S OFFICE
By ALEXANDER J. ANZALONE, ESQ.,
FONDA KUBIAK, ESQ.,
Assistant Federal Public Defenders,
300 Pearl Street,
Suite 200,
Buffalo, New York 14202.

The Courtroom Deputy:

KIRSTIE L. HENRY

1 The Court Reporter: BONNIE S. WEBER, RPR,
2 Notary Public,
3 Robert H. Jackson Courthouse,
4 2 Niagara Square,
5 Buffalo, New York 14202,
6 Bonnie_Weber@nywd.uscourts.gov.

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8 Proceedings recorded by mechanical stenography,
9 transcript produced by computer.

10 (Proceedings commenced at 9:32 a.m.)

11 **THE CLERK:** All rise.

12 The United States District Court for the Western
13 District of New York is now in session. The Honorable John
14 Sinatra presiding.

15 **THE COURT:** Please be seated.

16 **THE CLERK:** The United States versus Luke Marshal
17 Wenke, Case Number 22-CR-35. This is a date set for sentencing
18 on violation of supervised release.

19 Counsel, please state your appearances.

20 **MR. RUDROFF:** Good morning, Your Honor, David Rudroff
21 for the Government.

22 **MR. ANZALONE:** Good morning, Your Honor, Alexander
23 Anzalone and Fonda Kubiak from the Federal Defenders Office on
24 behalf of Mr. Wenke. Mr. Wenke is to my left seated in custody.

25 **THE COURT:** Good morning, Counsel.

Good morning, Mr. Wenke.

1 **MS. KUBIAK:** Good morning, Your Honor.

2 **THE COURT:** We're here today for sentencing after a
3 violation hearing where I found that Mr. Wenke had violated a
4 condition of his supervised release back on August 18, 2022.

5 Pursuant to the Rule 11(c)(1)(C) agreement, I
6 sentenced Mr. Wenke to 18 months of imprisonment, followed by
7 three years with supervised release with conditions.

8 And he began his supervision on March 31, 2023. On
9 May 16 of this year, I received a petition for offender under
10 supervision alleging a violation of supervised release
11 conditions.

12 On June 1, we held a violation hearing as to charge
13 one in the petition, specifically, that Mr. Wenke failed to
14 comply with the condition that he not have any contact directly
15 or indirectly, including through social media, telephone, text,
16 mail or e-mail with the victim, , his family members, or his
17 current or prior place of employment.

18 I received post-hearing briefing and continued the
19 hearing June 23. At that time, I found that the Government had
20 proven by a preponderance of the evidence that Mr. Wenke had
21 violated this condition.

22 Okay. Mr. Anzalone, have you received a copy of the
23 probation officer's final report for violation of supervised
24 release sentencing, dated July 7, 2023?

25 **MR. ANZALONE:** Yes, Your Honor.

1 **THE COURT:** And did you have a chance to review it
2 with your client?

3 **MR. ANZALONE:** Yes, Your Honor.

4 **THE COURT:** Mr. Wenke, did you receive a copy of this
5 final report?

6 **THE DEFENDANT:** Yes.

7 **THE COURT:** And did you discuss it with your lawyer?

8 **THE DEFENDANT:** Yes, I have.

9 **THE COURT:** All right. Mr. Rudroff, you received it
10 as well?

11 **MR. RUDROFF:** Yes, Your Honor.

12 **THE COURT:** All right. I will replace -- excuse me, I
13 will place the report in the record under seal.

14 If an appeal is filed, counsel on appeal will be
15 permitted access to the sealed final report, but not access to
16 the recommendation.

17 Mr. Anzalone, do you have any objections to the
18 factual statements contained in the final report?

19 **MR. ANZALONE:** No, Your Honor.

20 All right. And, Mr. Rudroff, same question.

21 **MR. RUDROFF:** No, Your Honor.

22 **THE COURT:** Okay. And I've also received and reviewed
23 both parties submissions. I adopt the statements, as set forth
24 in the probation officer's final report as my findings of fact.

25 Mr. Anzalone, do you have any objections regarding the

1 applicable sentencing guidelines discussions in the report?

2 **MR. ANZALONE:** No, Your Honor.

3 **THE COURT:** Same question, Mr. Rudroff.

4 **MR. RUDROFF:** No, Your Honor.

5 **THE COURT:** I adopt the final report's conclusions
6 regarding the applicable sentencing guidelines and incorporate
7 them into the record.

8 Mr. Wenke is found guilty of a Grade C violation and
9 under the guidelines, in that scenario, I may either revoke the
10 supervised release or extend the term of supervised release
11 and/or modify the conditions of supervision.

12 According to application note one of guideline Section
13 7B1.4, the criminal history category used to calculate the range
14 of imprisonment for a violation is the same criminal history
15 that category that applied at sentencing, on the underlying
16 offense.

17 Mr. Wenke has a criminal history category of one.
18 Pursuant to the revocation table at Section 7B1.4, a Grade C
19 violation with a criminal history category of one results in an
20 imprisonment range of three to nine months.

21 According to Section 7B1.3(c)(1), whereas here, the
22 minimum term of imprisonment determined under 7B1.4 is at least
23 one month, but not more than six months, the minimum term may be
24 satisfied by a sentence of imprisonment or a sentence of
25 imprisonment that includes a term of supervised release with a

1 condition that substitutes community confinement or home
2 detention, according to the schedule in 5C1.1(e) for any portion
3 of the minimum term.

4 Pursuant to application note four of 7B1.4, where the
5 original sentence was the result of a downward departure or a
6 charge reduction that resulted in a sentence below the
7 guidelines range applicable to the offender's underlying
8 conduct, an upward departure may be warranted.

9 At the time of sentencing, the guideline imprisonment
10 range was 24 to 30 months and the defendant was sentenced to 18
11 months under the Rule 11(c)(1)(C) agreement.

12 Pursuant to the -- that agreement and the factors in
13 3553(a), at that time, I considered the defendant's age, history
14 of gainful employment, presence of family support and lack of
15 criminal history as mitigating factors when I accepted the
16 agreement.

17 Under 18 United States Code 3583(e)(3), the statutory
18 maximum penalty upon revocation for a Class D felony is two
19 years.

20 And under Section 3583(h), if supervised release is
21 revoked, the Court may include a requirement that the defendant
22 be placed on a term of supervised release upon release from
23 imprisonment.

24 And the length of such supervised release shall not
25 exceed the term of supervised release authorized by the statute,

1 which is three years for the offense that resulted in the
2 original term of supervised release, less any term of
3 imprisonment imposed upon revocation.

4 Which brings me to, Mr. Rudroff, what would the
5 Government like to say regarding sentencing?

6 **MR. RUDROFF:** Yes, Your Honor, I'll be brief. I think
7 I've said most of what we need to say in our sentencing
8 memorandum.

9 As the Court noted, the defendant's underlying
10 sentence was a result of a downward departure and it seemed to
11 me, at the original sentencing that the Court was somewhat
12 skeptical that an 18 month sentence would be adequate to deter
13 the defendant and to protect society.

14 At the time, I assured the Court that 18 months was a
15 harsh sentence for a first time offender. That the defendant
16 would take it seriously and that it would be enough to -- to
17 halt this kind of behavior, the Court had described as the
18 prelude to a violent crime.

19 I believed it then. I think at this point, I am
20 willing to admit that I was wrong. 18 months clearly was not
21 enough for the defendant. His behavior resumed almost
22 immediately upon his release from prison.

23 I think his statements on social media, which we
24 attached to our sentencing memorandum as Exhibit C, clearly
25 demonstrate that the defendant did not take his term of

1 incarceration as seriously as I think everybody in this Court
2 hoped that he would.

3 So given that this was the result of a downward
4 departure, that the defendant's behavior and his comments since
5 his release clearly demonstrate that it wasn't enough to deter
6 him, as well as the concerning conduct that led to this
7 violation.

8 It is a Grade C violation, but the underlying conduct
9 itself can't be ignored.

10 The defendant almost immediately indirectly contacted
11 the victim of his prior crime, at the same time that he was
12 posting -- what I would describe as vitriolic posts, on social
13 media.

14 I think taking all of that into account, 12 months is
15 an appropriate sentence.

16 I've been with this office just shy of 12 years. In
17 that time, I've actually never asked for a non-guideline
18 sentence. This is the first time.

19 And it's sort of surprising that it would be a
20 violation of supervised release, where I would break that trend,
21 but I do think it's warranted here.

22 The defense sentencing memorandum talks about the need
23 for comprehensive mental health treatment and I think that's
24 true.

25 I think the defendant probably does need some help in

1 that regard and I certainly hope that he finds that eventually.

2 But, first, I think this Court needs to send a message
3 that this behavior is not acceptable. That the conditions of
4 supervised release are not a suggestion.

5 That the defendant won't benefit from his constant
6 attempts to push the boundaries of what I would consider a
7 violative conduct.

8 So against all of that, Your Honor, we do ask the
9 Court to impose a 12-month sentence.

10 As we noted in our sentencing memorandum, you add that
11 to the 18 months on the first conviction, you get what was
12 essentially the top end of the guidelines on that conviction.

13 And so I think intuitively, logically, it also -- it
14 makes sense and it's warranted in this case.

15 **THE COURT:** Thank you, Mr. Rudroff. Are there any
16 victims who would like to speak?

17 **MR. RUDROFF:** No, Your Honor.

18 **THE COURT:** Okay. Mr. Taberski, is there anything
19 from probation?

20 **PROBATION OFFICER:** Yes, Your Honor, thank you.

21 I'd like to address something that was brought to the
22 Court's attention in the defense sentencing memorandum and that
23 is the assertion that we essentially ignored the mental health
24 condition for a number of months, after the defendant was
25 released and it's simply not true.

1 Defense could have reached out to us and asked and I
2 would have explained this exactly this way, but they didn't,
3 before filing the memorandum.

4 The fact of the matter is that shortly after Mr. Wenke
5 was released and he was assigned to Officer Zenger, Officer
6 Zenger immediately addressed the mental health condition, along
7 with all of the other conditions.

8 He made sure that the defendant understood them. That
9 he was going to comply with them, supposedly, and he addressed
10 the mental health condition.

11 And Mr. Wenke said that he had a mental health
12 counselor that he worked with in the past and that he wished to
13 return to and we said that's great. Officer Zenger said that's
14 great.

15 Our office's practice is that if someone has a
16 counselor they're comfortable with, we allow them to return to
17 them because they have developed a rapport.

18 We think that the treatment will be more effective,
19 rather than trying to reestablish a relationship.

20 And what Officer Zenger did was confirm that Mr. Wenke
21 had an appointment set. Officer Zenger made multiple attempts
22 to reach out to the counselor directly, but received no
23 response.

24 Which is not uncommon, Your Honor. They are busy
25 people. We understand that. And Mr. Wenke went to that

1 counselor. He underwent the substance abuse evaluation that's
2 cited in the sentencing memo.

3 And at no point did Mr. Wenke return to the subject
4 with his probation officer and say that wasn't a mental health
5 evaluation.

6 He was able to advocate for himself to begin with and
7 say this is a mental health counselor. That I've gone to mental
8 health counselling to in the past, but this was just them asking
9 me about my substance abuse and they gave me a drug test and I
10 left. He never brought that up.

11 A number of weeks went by before we received the
12 write-up of that evaluation, which, again, is not uncommon for
13 there to be a delay in time.

14 But in between that time, when the probation officer
15 then discovered that this mental health counselor actually
16 specializes in substance abuse treatment, Mr. Wenke violated his
17 conditions.

18 And we submitted a petition and we asked for his
19 supervised release to be revoked and our intention was for him
20 to go to jail and be held accountable at that point.

21 But I do take issue with this memorandum trying to
22 portray that the probation officer was negligent and just blew
23 off the mental health condition.

24 That he didn't do anything about it until he was
25 pressed by the Court and defense counsel to finally do something

1 about it. It's simply not the case.

2 You know, the -- the Assistant U.S. attorney brought
3 up the pushing boundaries issue. And all I'll say about that is
4 that this is a very time intensive case.

5 There is a lot that we could talk about this morning
6 and if, Your Honor, wishes I will, about things that are not in
7 the violation petition that have been taking a great deal of
8 time to address with Mr. Wenke, because he pushes the boundaries
9 of what is or is not violation conduct.

10 But the bottom line is, all of his conditions were
11 addressed. He decided to violate, perhaps, the most important
12 condition, the most relevant condition in his case, and that's
13 why we're here today.

14 Thanks, Your Honor.

15 **THE COURT:** Okay.

16 Mr. Anzalone --

17 **MR. ANZALONE:** Thank you, Your Honor.

18 So I'd like to address things set forth by both the
19 Government and probation today, and in the Government's
20 sentencing memorandum, but I'll start with the Government's
21 argument that Mr. Wenke should be sentenced to 12 months.

22 Your Honor, this argument is self-defeating. As I
23 understand it, the Government argues Mr. Wenke was given
24 18 months in jail. That jail time didn't work.

25 He was released and returned to similar behavior and

1 now, you should put him back in jail and, I guess, just hope
2 that that works.

3 They said they hope he eventually gets the help he
4 needs. Your Honor, I think we can do a little better than hope.

5 I think we can focus on concrete logic and cause and
6 affect and encourage and mandate that Mr. Wenke gets the help he
7 needs.

8 The report says it itself, Mr. Wenke is quote: "Very
9 motivated to get mental health treatment." That's on page five
10 of the report.

11 I can't fathom probation's position today that they
12 placed so much faith in someone who has clear mental illness.
13 Clear mental health issues.

14 I think it betrays a fundamental misunderstanding of
15 what mental illness is. That's not -- to take someone at their
16 word and not follow up and not confirm that they are receiving
17 mental health care, and that's just in the first month of his
18 supervision.

19 Let's talk about what happened after May 18th.
20 May 18th, when Mr. Wenke first appeared before Judge Schroeder
21 on the violation, from May 18th until July 27th, just by pushing
22 by Magistrate Judge Schroeder, by Your Honor, by myself, his
23 initial evaluation at Horizon was scheduled for June 27th -- I'm
24 sorry, so a month and a week.

25 How can that be? How -- when it's so clear to

1 everyone involved, when it was so clear to everyone involved a
2 year-and-a-half ago, and it's so clear to everyone involved
3 today, on May 18th, and at the commencement of his supervision
4 on March 31st, how can his first mandated mental health
5 evaluation appointment be arranged by probation for June 27th?

6 Your Honor, we've submitted what we believe is a
7 roadmap to make this stop. The roadmap is not more time in
8 jail. The roadmap is not an above guideline sentence.

9 The roadmap is to release Mr. Wenke, maybe place him
10 on home detention, maybe show that there's a consequence for
11 these -- these communications.

12 But to mandate and encourage and put the structure in
13 place to get him the help he needs. And Dr. Rudder spoke
14 specifically to that. He spoke to a mental health evaluation
15 and DBT.

16 This is not -- this doesn't have to be complicated
17 stuff, but it does need to be followed through on by everyone
18 and that doesn't just include Mr. Wenke.

19 Your Honor, I -- additional jail time prolongs the
20 inevitable, which is that Mr. Wenke is going to be released.
21 He's going to need treatment.

22 He wants treatment and he can get treatment. And I
23 would submit that an additional period of incarceration has a
24 limited deterrent affect and I just don't see why we shouldn't
25 start solving this problem immediately and not further on down

1 the road.

2 I'm happy to answer any questions, but that's what I
3 have for the Court.

4 **THE COURT:** Mr. Wenke, would you like to have the
5 opportunity to say something?

6 **MR. ANZALONE:** So, Your Honor, I can address that.

7 Mr. Wenke in the report indicates that he's very
8 motivated to get treatment. Given the procedural posture of
9 this case, I'm advising him to not say anything further at this
10 time.

11 **THE COURT:** Okay.

12 Mr. Wenke, do you take that advice?

13 **THE DEFENDANT:** Yes.

14 **THE COURT:** Okay. All right. So both sides are
15 right. Now, what do I do?

16 Mr. Rudroff is right, 12 months sounds about right.
17 On the other hand, we'll be right back here.

18 I think I agree with Mr. Anzalone on that. We've got
19 to fix the problem, otherwise we're going to be back and back
20 and back.

21 So how do I help get this problem fixed? And that is
22 to get Mr. Wenke into his mental health treatment as soon as we
23 can do that.

24 So let's kind of talk about how we're going to
25 accomplish that a little bit. What I'm going to do is adjourn

1 the sentencing hearing to next week, August 10th at 9:00 o'clock
2 in the morning.

3 **MR. ANZALONE:** Can I have a moment just to grab my
4 calendar, Your Honor? Thank you.

5 **THE COURT:** Yeah. That's okay. That's good. It
6 doesn't fail, unless you lose it.

7 August 10 at 9:00 a.m. And what I'll do is I'll pick
8 up where I left off right here and complete -- and state the
9 sentence.

10 What I'm likely to do is release him with time served
11 at that point and send him straight to -- where, Mr. Taberski?
12 Horizon in Amherst? Where is that.

13 **PROBATION OFFICER:** Yes, Your Honor. They had an
14 appointment for intensive outpatient treatment.

15 At least an evaluation for that program that also
16 incorporates the DBT therapy, that's outlined in the sentencing
17 memorandum from the defense, and that's on August 10th at 10:30
18 in Getzville.

19 **THE COURT:** All right. So he's got to get there.
20 He's going to be released between 9:00 and 9:20, something like
21 that.

22 He will be brought in all-property and then he's going
23 to go right to Getzville. And from there, we'll figure out
24 what's going to happen in terms of the balance of the sentence
25 and the balance of the supervised release.

1 I'll conclude that then on August 10 at 9:00 o'clock.
2 Some of the reasons are obviously are -- what I'm hearing from
3 Mr. Anzalone, that we need to encourage and mandate this. I'm
4 doing that and I am going to do that, and the defendant's
5 statements that he's very motivated to get this treatment.

6 So to the extent that he understands that he needs it
7 and he takes it seriously, then I think that we'll get the
8 problem fixed.

9 So we're going to try to put ourselves on that path,
10 so we'll see you all August 10 at 9:00 o'clock and Mr. Wenke
11 will be brought back here all-property.

12 And unless something changes like, you know, some
13 bizarre statement from Mr. Wenke out of the jail, then I'll
14 release him at that point and we'll get him some treatment and
15 it's going to -- Mr. Wenke, you're going to take that treatment
16 seriously.

17 **THE DEFENDANT:** Yes.

18 **THE COURT:** You know, not that I don't like seeing you
19 here, but we don't want to see you here anymore.

20 All right. Very good. August 10, 9:00 o'clock.

21 Thank you all. Mr. Taberski, go ahead.

22 **PROBATION OFFICER:** Judge, would you be able to order
23 that the evaluation that was done by -- or asked for by the
24 defense, can be provided to Horizon's to begin their evaluation
25 process?

1 **THE COURT:** I think that's a good idea.

2 Any objections?

3 **MR. ANZALONE:** No. We'll provide it voluntarily.

4 **THE COURT:** How? Now, in advance?

5 **MR. ANZALONE:** We have no problem with that.

6 **THE COURT:** So make sure they have it before the 10th,
7 then, Mr. Anzalone.

8 **MR. ANZALONE:** Will do. Thank you.

9 **THE COURT:** Anything else, Mr. Taberski?

10 **PROBATION OFFICER:** No, Your Honor.

11 **THE COURT:** Anybody have anything else?

12 **MR. RUDROFF:** No, Your Honor.

13 **MR. ANZALONE:** No, Your Honor.

14 **THE COURT:** All right. See you next week.
15 Thank you.

16

17 (Proceedings adjourned at 9:55 a.m.)

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2 In accordance with 28, U.S.C., 753(b), I certify that these
3 original notes are a true and correct record of proceedings in
4 the United States District Court for the Western District of
5 New York before the Honorable John L. Sinatra, Jr.
6
7
8
9

10 s/ Bonnie S. Weber
11 Signature

September 29, 2023
Date

12 **BONNIE S. WEBER, RPR**

13 Official Court Reporter
14 United States District Court
15 Western District of New York
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