UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	*	Docket Number: 1:22-CR-00035-JLS-HKS-1
	*	
	*	Buffalo, New York
v.	*	November 21, 2023
	*	10:05 a.m.
	*	
LUKE MARSHALL WENKE,	*	STATUS CONFERENCE
	*	
Defendant.	*	
	*	

* * * * * * * * * * * * * * * * *

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

APPEARANCES:

For the Government:

MICHAEL DiGIACOMO,
UNITED STATES ATTORNEY,
By MICHAEL DiGIACOMO, 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 FRANK PASSAFIUME, ESQ.,
Assistant Federal Public Defender,
300 Pearl Street,
Suite 200,
Buffalo, New York 14202.

The Courtroom Deputy: KIRSTIE L. HENRY

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

Proceedings recorded by mechanical stenography, transcript produced by computer.

(Proceedings commenced at 10:05 a.m.)

THE CLERK: All rise.

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

THE COURT: Please be seated.

THE CLERK: Court calls United States versus Luke Marshall Wenke, Case Number 22-CR-35.

We're here for a sentencing on violation of supervised release.

Counsel, please state your appearances for the record.

MR. DiGIACOMO: Michael DiGiacomo for the United States.

MR. PASSAFIUME: And Frank Passafiume for Mr. Wenke.

THE COURT: Okay. Good morning, Counsel.

Good morning, Mr. Wenke.

THE DEFENDANT: Good morning, Judge.

THE COURT: We are here today for sentencing on Mr. Wenke's previous plea of guilty for violating a condition of his supervised release.

And when we were all here the last time, we had Mr. Zenger working on some things, and so I feel like we should start with him for an update.

And if anyone else has anything they want to talk about before we get started, now is the time.

Mr. Zenger, what's the status of things?

THE PROBATION OFFICER: Your Honor, while we were working to schedule a date for the defendant to participate in a psychiatric evaluation with Horizon Health Services, Horizon indicated just yesterday that they have a strong recommendation that the -- the defendant is in need of a different type of evaluation to appropriately address his needs and any risk to the community.

And so we are currently working on determining the best path to achieve that goal.

THE COURT: And Horizon has been his mental health treatment provider until now?

THE PROBATION OFFICER: It has been, Your Honor.

THE COURT: All right.

All right. Is there anything from the Government before we get started?

MR. DiGIACOMO: Judge, again, we were hoping that we would have something in place.

I mean, Mr. Passafiume advocated -- you know, when we were last here, that, you know, Mr. Wenke should have that evaluation that he didn't have prior to being, you know, placed into Marshal custody.

And I know that was something, you know, that Frank was -- Mr. Passafiume was advocating for. And this Court, you know, had raised concerns about whether or not Mr. Wenke is just a letter writer or does he really pose a danger to the community?

And I think that the goal was to see, once that evaluation was completed, sentencing. We could be in a better position to fashion a sentence that was appropriate for this type of violation, but now we're back to square one.

And so, really, it boils down to -- I know, having spoke with Mr. Zenger in the presence of Mr. Passafiume, Probation is recommending that this evaluation be done via the Marshal service where Mr. Wenke would have to go and get a BOP evaluation.

Obviously, Mr. Passafiume's opposed to that, but I think where we all agree, Judge, is that, you know -- is there

has to be some type of evaluation so that all the parties, including the Court, fully understands and has those concerns addressed.

And it really boils down to where do we do it. And it's my understanding, from speaking with Mr. Zenger -- and he can correct me if -- or Mr. Passafiume can, if I'm misstating anything, but it's my understanding there's potentially one new local provider that might be able to do this evaluation, but we don't know.

So there's a couple of avenues of which we can do this. I mean, we can obviously proceed to sentence today, and then, obviously, I know there would be an -- you know, the Government and, I know, Probation would be advocating for Mr. Wenke to obviously have the various terms and conditions put back in place for any remaining term of supervised release.

Or the second alternative is -- is that we determine -- you know, do we adjourn the sentencing for a short period of time to determine whether or not there is an alternative local assessment that can be done?

With the full understanding that when we come back, we still may be where we are today.

That's the way the Government sees it, but, obviously, that's just my take.

THE COURT: Mr. Zenger, what's Mr. DiGiacomo referring to, in terms of this alternate option?

THE PROBATION OFFICER: Yes, Judge.

So, when speaking with Horizon yesterday, the administrator at Horizon did identify one other community-based program, Endeavor, in Buffalo, that may potentially be able to potentially do the appropriate assessment for Mr. Wenke.

Although, that same administrator did indicate -- and this was also indicated by our internal treatment specialist -- that the evaluation that would be done by the BOP would be far superior in addressing any kind of safety needs, along with that recommendation.

THE COURT: Okay. All right, Mr. Passafiume. What are your thoughts?

And, also, does Mr. Wenke have private insurance? Can he go find a psychiatrist on his own? Is his family willing to pay for a private psychiatrist on his own?

What are our options besides -- if any -- besides what you're hearing already here today?

MR. PASSAFIUME: That's -- I haven't explored that yet, as far as privately retaining a doctor for -- a psychiatrist for treatment.

You know, I obviously agree with what everybody just said, and Mr. DiGiacomo's, kind of, option A/option B plan.

I guess I don't understand -- this is all new. I just found this out, all before Court, so I'm a little unprepared here.

I guess I don't understand why Horizon opted out of working with Mr. Wenke. That's besides the point.

But I also don't understand why the BOP is -- is a consideration when there are -- I don't know what assessment the BOP can do that can't be done locally.

I know Dr. Rutter evaluated Mr. Wenke on the original case. Dr. Rutter is very well respected in the community.

There are also other psychiatrists that -- that work with both the Government and our office, that could do an evaluation as well, that can be then relayed to Endeavor or Horizon or whoever the local treatment provider agency would be.

So that's -- I guess that's the first portion, is -- the BOP road. I -- I didn't like it, you know, when we appeared last. I think there's a lot of issues.

I don't know why it can't be done locally -- and I think it can be done locally.

As far as contacting Endeavor, yeah. We would be all for it. And Mr. DiGiacomo suggested that we all be present with this -- you know, with this call with Endeavor, to maybe be there to answer any questions or provide any more insight, so they can make a better determination of whether they can provide services for -- for Mr. Wenke.

You know, it's a long-winded way of me -- of saying I don't think we should go forward with sentencing today. I know we're back at square one.

Just other opportunity to -- to get back on track with this plan that we're all on the same page with a couple weeks ago, that we thought was going to be in the benefit of -- of everybody, including Mr. Wenke.

So I didn't give you any answers, Judge. I'm sorry. I just -- I don't think he should go to the BOP. I think there are local doctors.

He's already been evaluated once; he can be evaluated again. And -- and, as far as treatment is concerned, if Endeavor won't -- won't do it, we'll explore the private -- the private options then.

THE COURT: One other thing, Mr. Zenger, that I'm not aware of, I guess, is: Is Horizon not interested, even, in doing the medical health counseling that they have been doing until now?

THE PROBATION OFFICER: Your Honor, they did not explicitly say that they would not work with Mr. Wenke, but the impression that I got was that they were strongly recommending that they were not the appropriate service.

At least for the initial evaluation that we're discussing here, that pertains -- not necessarily to the medication management. That they can do.

The issue here is the need for an assessment that addresses any kind of risk to the community. And that is the assessment that they cannot do, that Endeavor might potentially

be able to do, but that the BOP sounds like it can do.

THE COURT: And Mr. Passafiume's telling us that perhaps there's something short of sending him into BOP custody for that.

Can that be explored, Mr. Passafiume? What exactly are you thinking, if that can be done locally?

MR. PASSAFIUME: Again, Mr. Wenke has been evaluated -- Dr. Rutter. There are other doctors that -- that can do an evaluation I know.

THE COURT: Is Dr. Rutter a psychiatrist?

MR. PASSAFIUME: I don't know his credentials. I think he's a just a psychologist.

I don't want to say "just." I don't know his credentials specifically, but -- but we've worked the -- on other cases where the insanity defense was raised, we've done out-of-custody evaluations.

The Government has provided -- always seem to find a doctor. The -- one's out of Rochester -- I don't know his name.

But -- but there's a joint kind of evaluation. I know we also use Dr. Cervantes, which is used by both the Government and the defense, Dr. Antonius.

These are all names of people that are respected in the community, that can make that -- that evaluation that Horizon, frankly, just doesn't want to do. Maybe they don't want to take on that -- that responsibility.

THE COURT: So I don't think we necessarily need someone who can dispense medicine to give us a risk assessment.

So there's two different things, correct?

MR. DiGIACOMO: That's correct, Judge. And, while I agree with Mr. Passafiume, the offices have used different experts.

I will say that, again, Dr. Rutter -- I actually had him on the stand for two hours on a cross-examination. He tends to focus primarily on child exploitation cases and whether or not the person has a risk to reoffend.

I have not -- in all candor, I have not looked at his assessment of Mr. Wenke, so I'm not saying it's an improper assessment. And I think Mr. Passafiume's correct. He might be a psychologist.

But so what -- the specific nature of the assessment of Mr. Wenke's danger, I don't know if the evaluators we've used, whether it be Rochester or Buffalo -- I mean, my dealings with Dr. Cervantes is she tends to -- I've used her as to whether or not the person is competent to stand trial. I don't think that's the issue here we need to address.

So while I'm not saying it can't be done and I'm not saying I won't work with Mr. Passafiume and Probation, I just want the Court to be aware we might need a little time to find the right psychiatrist to do the assessment that would be beneficial to everybody.

THE PROBATION OFFICER: If I could add, Your Honor, Dr. Rutter's report did come up during the conversation with Horizon yesterday.

And although it is very informative, they specified that that is also not the type of assessment that they're suggesting we take.

MR. PASSAFIUME: I guess I don't -- is this assessment that has a -- does it have a name?

Like, I don't know what assessment they want. Like, all these doctors -- there's not going to be a doctor that specializes in risk assessment for defendants who are sending letters from -- you know, from jail.

I don't -- I don't understand what -- maybe the Rutter report is not comprehensive enough for -- for Horizon, but I don't understand why -- why there aren't local doctors that -- I mean, there are -- between Rochester and Buffalo that can perform this assessment, this evaluation.

THE COURT: Give me just a minute. Just by way of a benchmark -- and, again, I'm not prepared to go there today, again, because I'd like to use it as a last resort.

But the statutory provision that I mentioned before, which is 4244, envisions a psychological or a psychiatric evaluation in custody of the Bureau of Prisons.

But one of the things that can be looked at in the report there, right in the statute, is -- this is in 4247(c) --

can be that they can give a report on whether the person is suffering from a mental disease or defect, as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property on another.

So I don't know why -- there's nothing magical about somebody in BOP who can look at that question. Why can't some other provider locally look at that question?

Same question. If I order it, I can order it here short of the statute, can't I? Can't I tell somebody to look at that question?

MR. PASSAFIUME: Yes. Yes, absolutely.

THE COURT: Well, where is this provider? That's the problem. We're kind of banging our head against the wall here.

I'm concerned. I went back to the PSR yesterday and read the PSR from the criminal case, and it's concerning.

I guess the good thing I can say is that the trajectory has been -- from where he was in the criminal conduct in the PSR, to where he is now, in terms of the letter writing -- there's no more threats, at least, right?

No more crimes, at least, in the letters. So that's progress.

But -- but what if he goes backwards? What if he gets worse? And that's on me, right?

So that's the -- kind of the bind that I'm in, Mr. Passafiume. I'm trying to work with you and your client and

with the Government and Mr. Zenger, but now what?

So we're sitting here -- I mean, I can do it a lot of different ways, but we need a provider; and we need a provider quickly, right? Because I -- I don't want to prolong this thing either.

MR. PASSAFIUME: I don't -- I don't know, Judge. I wasn't anticipating Horizon saying we're not going to do something that they said they would do, that they were doing.

Like, I, frankly, don't understand why they can't. Maybe -- I don't know.

But there is -- I think, if you give Mr. DiGiacomo and I a week or two, we can get on the same page and find, I think, a doctor that we would both be okay with, I guess.

Like, I don't --

THE COURT: How does that doctor get funded? Does that bill go to Mr. Zenger?

MR. PASSAFIUME: No.

THE COURT: Nobody knows?

MR. PASSAFIUME: So it would be likely our office. And I don't want to volunteer -- I don't want to -- I'm not writing the checks here, but in the past, when there have been two experts competing, the Government -- again, this is -- again, this is for more if an adversarial proceeding, where there was the -- insanity was an issue, the Government paid for its own expert and we paid for our own expert.

In this venture, maybe we could split the costs. I -- I don't know, but -- but --

MR. DiGIACOMO: I'm not writing checks either, so I can't agree to that at this point, but I'm not saying that we couldn't try to work towards that.

THE COURT: All right. Well, because what I would like to do is be comfortable that a time served sentence is appropriate, and then I can massage some conditions going forward that make sense to everybody, you know.

And I've got some thoughts on what the conditions might be about letter writing, et cetera, and trying to draw a line between the letter writing that is a problem and letter writing that's not a problem.

You know, again, everybody's entitled to write letters. You write a letter to the editor and it goes in the garbage, that's where it goes, right?

Or you write a letter -- whatever, a letter that -- you don't like a product that you bought, and, okay, it goes -- whatever.

But there's also a line. And one of the conditions someday that will be imposed is a condition that he spend time with you, Mr. Passafiume, to learn the distinction between his First Amendment rights and the criminal law.

MR. PASSAFIUME: Okay.

THE COURT: There's a distinction, right? You fight

about it all the time, but there is a line.

Sometimes there's a line that's pretty clear. And I think we can make some progress on those fronts. And we can make some progress on making sure that the recipients of prior letters are adequately thought about and protected.

But I don't want Mr. Wenke sitting in the county jail while we're continuously finding -- trying to find somebody, because, you know, he is getting sentenced for a letter that he admitted to the last time we were here and not more than that.

So I don't want to get carried away either, by letting this linger.

MR. PASSAFIUME: One question that needs to -- that Your Honor asked that needs to be answered is even postevaluation, is Horizon still willing to do the treatment that he was in before -- or more intense? Or is Endeavor willing to do that?

I understand they're not willing to do an evaluation, for whatever reason, but there's got to be the treatment on the back end. And I think that -- that has to be answered at some point.

THE COURT: Right. And so, Mr. Zenger, make sure that they're still willing to oblige.

And would they be doing the medical part of it, too? You said -- it sounded like you said they would; it's just the assessment that they won't do.

THE PROBATION OFFICER: That is correct, Your Honor.

THE COURT: So they would provide him with a psychologist and psychiatrist going forward?

THE PROBATION OFFICER: Yes. The only caveat to that would be it might be dependent upon that evaluation and what the recommendation is if they believe that their services are safe and stable and appropriate for Mr. Wenke moving forward.

But I would imagine, if the outcome was positive, that they would be willing to do those services that we've already contracted with them for.

And also, Mr. Passafiume had asked is there a name for this evaluation?

And, to admit, I don't know if it has a formal title. But during that conversation I had with Horizon, the terminology that kept coming up was essentially an evaluation and recommendation that addresses the criminogenic needs of the defendant and how they relate to the safety of the community.

THE COURT: All right. Did you write that down, lawyers?

THE PROBATION OFFICER: And then, lastly, Your Honor, we have already been in contact with Endeavor.

And this issue was personally handed off by the administrator at Horizon to the CEO of Endeavor. So I -- I'm very confident that this -- these answers will be obtained quicker than what we experienced in the last couple weeks.

THE COURT: And also, you should write down, Counsel, 4247(c)(4)(C), which is the provision that I read to you about -- really, that's what I want to hear.

I want to hear that he's not going to create a problem for other members of society in terms of physical danger.

If I can hear that, then I can give him a time served sentence and a set of conditions that are a little bit new.

I've been working on them with Mr. Zenger and with my law clerk, but conditions that are going to try to get better -- do a better job at getting at the carrot-and-stick kind of way to manage this issue.

I understand he's got an urge to write letters. That's okay. But he's also got to know that there's a line.

And I think maybe we can tolerate, as a society, some irritation, but we can't have him going across that line. About right?

So if somebody gets a letter they don't want, so what? That's my going-forward view on things. But he's got to be mindful of the line.

The line is there's lots of criminal statutes out there that he can violate by writing a letter.

I'm sentencing someone this afternoon who wrote a letter that had some contents in it.

So I'm working -- I'm trying to work here, and work hard, but I just need to get across that threshold of somebody

who knows psychological issues, maybe psychiatric issues, much better than all of us, can tell us that Mr. Wenke should be fine.

Nobody's going to give me a guarantee, but they can certainly tell me the process; tell me what the interview looked like, and tell me what they see. I.

Also want that person to look at the letters. How could you evaluate Mr. Wenke without looking at what comes out of his mind?

But we've got to have a process in place pretty quickly because the tension here is that the clock is ticking on his sentence.

Mr. Passafiume knows that well because his job is to advocate for the shortest sentence possible.

But I think -- I think your charge also has to be what's the best for your client. And part of that is getting him the proper treatment.

You agree?

MR. PASSAFIUME: Yes, Judge. Absolutely.

THE COURT: And I think he has to agree with that, too.

Mr. Wenke?

THE DEFENDANT: Uh-huh?

THE COURT: You agree with that? You on board with all this?

THE DEFENDANT: Yes. Yes, I do.

THE COURT: One of the questions I was planning to ask you -- it's a little premature, but if we -- if we find the right doctor who's ready to do this, are you willing to take this seriously?

THE DEFENDANT: Yes. I am.

THE COURT: All right. So what should we do? Should we have a status conference back here in a week or something like that? Is that too soon?

MR. DiGIACOMO: Judge, with the holiday, I would -- again, I'm not trying to prolong this. I understand the sensitivity.

But if we could -- I would suggest -- and Mr. Passafiume can weigh in. I would say, due to the holiday, two weeks.

But if we find someone in advance of that, we can make application to the Court to see if they can get us in here sooner. That's my suggestion.

(Discussion off the record.)

MR. DiGIACOMO: My suggestion: I said two weeks, but, if you want it shorter, we'll come back shorter. What's your -- it's up to you.

MR. PASSAFIUME: Yeah, I agree with that, Judge. I have doctors on -- on my mind now that I want to run by the Government that -- that I think are great.

Dr. Benedict's another one, Judge, that I think I've submitted reports for -- before Your Honor.

So I don't think it should be hard to find a qualified doctor that -- that could do this evaluation pursuant and along the lines of the statute.

I mean, not pursuant, but answering the questions of the statute.

THE COURT: All right. So if we come back in two weeks, maybe you can give me a status report in one week. And that can be something that you just put on the letter and file it --

MR. PASSAFIUME: Great.

THE COURT: -- and tell me what your progress is.

MR. PASSAFIUME: Great.

THE COURT: All right?

So Tuesday the 28th for a status report. It can be a joint status report, if possible.

And then, the week after that, Ms. Henry, how's that calendar looking?

THE CLERK: How about December 5th at 9 a.m.?

MR. PASSAFIUME: That works.

THE COURT: I guess we should call it sentencing, and then we can go as far as we can at that time, right? If we're ready to sentence, we'll sentence, right?

MR. PASSAFIUME: Yes.

December 5 at 9 a.m. We'll call it a sentencing and, hopefully, we can get all the way through it if we're making progress.

MR. DiGIACOMO: Sounds great, Judge. Thank you.

THE COURT: All right. But I just don't want to prolong this needless -- and I know everyone's working -- needlessly.

From the process viewpoint, not from any individual participant. I just -- I don't want it to linger, okay?

Every provider you call is going to be busy, right? But we've got to work through that somehow.

Mr. Zenger, help these lawyers out and help them find somebody, if you can.

THE PROBATION OFFICER: Absolutely, Judge.

THE COURT: All right. Anything else?

MR. DiGIACOMO: Nothing from the Government, Your Honor. Thank you.

MR. PASSAFIUME: No, Judge.

THE COURT: All right. Very good. See you December 5.

(Proceedings concluded at 10:31 a.m.)

* * *

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

s/ Bonnie S. Weber — Signature

May 22, 2025 — Date

BONNIE S. WEBER, RPR

Official Court Reporter
United States District Court
Western District of New York