

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
 v.) 1:14-cr-00059-JAW
)
ROBERT BERG ENTERPRISES,)
INC.)

**ORDER DENYING MOTION FOR EARLY TERMINATION
OF PROBATION**

Having concluded that federal statute prohibits a termination of probation before the expiration of one year, the Court rejects the corporate Defendant’s request for such an early termination. The Court also rejects the corporate Defendant’s request that the Court reduce the sentence imposed on Robert Berg, one of the former officers of the corporation, for the commission of the separate federal felony of acting as an accessory after the fact in a marijuana conspiracy in order to make up for asserted mistakes the Court made during the corporate sentencing.

I. BACKGROUND

On August 7, 2015, the Court sentenced Robert Berg Enterprises, Inc. (RBE), a corporation, for trafficking in counterfeit goods, a violation of 18 U.S.C. § 2320(a)(1), to one year probation, a \$10,000 fine, restitution in the total amount of \$11,855.87, and a \$400 special assessment. *J.* (ECF No. 24). On August 14, 2015, the Government filed a Satisfaction of Judgment, indicating that RBE had satisfied and paid in full the monetary penalties. *Satisfaction of J.* (ECF No. 26). On August 18, 2015, RBE moved the Court for early termination of its probation on the ground that

it had paid all of the court-ordered amounts. *Def. Robert Berg Enterprises, Inc.'s Unopposed Mot. to Terminate Probation* (ECF No. 27). The motion represented that “Joel Casey, AUSA has no opposition to the relief sought herein.” *Id.* at 1. In addition, the United States Probation Office wrote the Court, indicating that it had no objection to an early termination.

After receiving the motion, the Court reviewed 18 U.S.C. § 3564(c), which reads:

(c) Early termination. The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

Id. (emphasis supplied). As RBE had been convicted of a felony, this statutory provision prevents this Court from reducing the term of probation to less than one year for RBE, and the Court wrote to counsel, alerting them to this provision, and asking for their positions on the applicability of § 3564(c). In response, Attorney Berne wrote the Court to confirm that “the statute precludes termination of probation in a felony case before one year elapses.” *Email from Att’y Rick Berne to Clerk of Court* (Sept. 10, 2015). However, Attorney Berne indicated that the principle, namely Robert Berg, was “seeking answers to a few additional questions.” *Id.*

On September 11, 2015, Attorney Berne forwarded a letter from Mr. Berg directed to him, which reads:

I did not know there was a “challenge” option.

I am a bit disappointed in this probation error.

I was told by you and the court that once we paid fines in full [RBE] would be off probation.

I straddled the company with more debt to pay that lump sum 30K. I was assured by you and the Judge at the sentencing that [RBE] would be off of probation. And my wife could get back to business without the burden of probation on her business.

If I was told [RBE] was going to be on probation weather (sic) we pay immediately or while we make payments over 1 to 2 years, I would have opted to make payments over time, and let that 30K stay in business.

Now we are out the lump sum 30K and we are still on probation, we lost both ways.

In Light (sic) of our cooperation in this error on the courts (sic) part is there anything that could be done to help ease the burden in my PERSONAL (sic) sentencing?

Email from Bob Berg to Rick Berne (Sept. 11, 2015).

II. DISCUSSION

A. Alleged Representations by the Court

Mr. Berg alleges in his email that the he was told “by the court” and that he was “assured by . . . the Judge” at the sentencing that RBE would be released from probation once it paid the fines in full. Mr. Berg is wrong.

At the sentencing hearing, the Court reviewed the guideline calculations for RBE and without objection, calculated the following: (1) the fine range was from \$520,000 to \$1,040,000, (2) restitution to identifiable victims was mandatory in the amount of \$11,855.87; (3) probation was mandatory if the court determined that such a sentence was necessary to ensure the payment of a monetary penalty; (4) if probation was ordered, the term of probation had to be at least one year but not more

than five years; and, (5) a special assessment of \$400 was mandatory. *Tr. of Proceedings* 47:17-53:1 (ECF No. 29) (*Sentencing Proceedings*).

The Court's sentence of RBE was substantially below the guideline ranges. Instead of a fine of \$520,000 to \$1,040,000, the Court imposed a fine of only \$10,000. *J.* at 4. The Court imposed mandatory restitution and the mandatory special assessment. *Id.* Finally, as the fine and restitution had not been paid in full and probation allowed a mechanism for collection if RBE did not pay, the Court imposed the lowest term of probation available under the guidelines of one year. *Id.* at 2.

The issue of probation and whether it could be terminated early arose in the following context. During the Assistant United States Attorney's presentation, he suggested that because RBE was "prepared to pay those penalties . . . then the government doesn't see the need to saddle the U.S. Probation Office with another client on probation to supervise. So we would not be asking for a term of probation." *Sentencing Proceedings* 53:13-18. However, RBE had not yet paid the court-ordered amounts and the Court was concerned about whether, if payment were not made as promised, there would be a ready enforcement mechanism for payment. *Id.* 53:19-54:2. Accordingly, the Court stated:

I don't for a second doubt Mr. Berne when he tells me that payment's going to be made, but I'm of the school that show me the money is the better approach. And what I would be inclined to do is place the corporation on probation, and once payment has been made and the check has cleared or checks have cleared and the victims have been paid, then Mr. Berne is free to file a motion to terminate probation. This is a little different than - - it's quite a bit different than personal probation. It's a corporate probation, and the real purpose of it is to ensure payment of the only punishment available, which is basically restitution and a fine.

Id. 53:20-54:7. Finally, to create a prompt payment incentive, the Court ordered that the interest requirement on the fine and restitution be imposed. *J.* at 4 (“The defendant organization shall pay interest on the restitution and the fine”).

The Guidelines themselves state that one of the purposes of corporate probation is to ensure payment. U.S.S.G. § 8D1.1(a)(1). Thus, the Court was making the point that unlike personal probation, the purpose of which includes rehabilitation, readjustment, treatment, education, and other factors, the main purpose of corporate probation from the Guideline perspective is typically to enforce payment obligations. *Compare* U.S.S.G. § 8D1.1(a)(1), *with* U.S.S.G. § 5B1.3.

But the Court never “assured” RBE that it would grant such a motion, only that Mr. Berne was free to file one. Obviously, once the motion was filed, the Court would be obligated to review it on its merits and grant or deny it, based on the facts and the law. Here, when Mr. Berne filed the motion, if the Court had held the legal discretion to reduce the term of probation to less than one year, it would have done so in keeping with the purpose of the corporate probation as expressed in the Guidelines. However, the Court determined that the statute, which trumps the Guidelines, prohibited a reduction of the term of probation to less than one year, and the Court is of course duty-bound to follow the law enacted by Congress.

It is true that the Government, defense counsel, the Probation Office and the Court were all under the misimpression at the sentencing hearing that the Court could legally reduce the term of probation to less than one year. But for RBE to claim that it was somehow misled into making early payments, when it could have strung

the Government and the victims along by delay, does not speak well for RBE and its contrition.

Mr. Berg's argument rewrites history. The docket reveals that before the Court imposed the sentence on RBE, RBE had represented to the Court that it had decided to make immediate payment of the fine and restitution obligation. In its sentencing memorandum, RBE wrote that it "is raising the funds necessary to pay full restitution and the recommended fine and is committed to making payment on or within a few days after sentence has been imposed on August 7, 2015." *Sentencing Mem. on Behalf of Def. Robert Berg Enterprises, Inc. d/b/a Berg Sportswear*, at 7 (ECF No. 22). RBE's early payment promise was repeated to the Court during the sentencing hearing before it imposed sentence. *Sentencing Proceedings* 63:7-12 ("I understand you want to see the money; that's fine. It will be paid - - I think by the time we're finished here, it may have to be Monday, but as soon as the check clears, so to speak, I'll file the motion as Your Honor directed"). Again, both these defense representations were made before the Court imposed sentence and did not depend on a sentence without probation. In short, Mr. Berg's assertion that he would not have immediately paid the fine and restitution, had he known the business would remain on probation for a year, is demonstrably false.

Furthermore, his assertion elevates RBE's business interests over the legal obligations imposed as punishment for the federal crime that RBE committed. Nor does it make much sense. Although Mr. Berg claimed that RBE would have made the payments over time, he failed to note that the Court expressly imposed the

interest requirement on any fine or restitution obligation. Accordingly, by paying immediately, RBE avoided substantial post-judgment interest costs.

Moreover, if RBE failed to make payment in full, the terms of ongoing probation would have been effective, including the Probation Office's obligation to appraise itself of RBE's financial status, to periodically request financial information to assure compliance, and to adjust its periodic payment obligations to reflect its financial capacity. By contrast, because RBE has paid the court-ordered amounts in full, the Probation Office has indicated an intention to minimize its supervision of RBE over the remainder of the term of its probation.

In short, RBE is, generously stated, incorrect. The Court indicated that RBE could file the motion, and like any motion, it must comport with the law before it may be granted.

C. Robert Berg's Request for a Reduction in his Personal Sentence

In his email, Mr. Berg suggests that because the Court erred in sentencing RBE, it should correct its mistake by reducing the sentence that it imposed on him. *J.* (ECF No. 573) (*United States v. Robert Berg*, No. 1:12-cr-00160-JAW). The Court firmly rejects his request. The Court has neither the authority nor inclination to alter Mr. Berg's personal sentence of six months, one year of supervised release, a \$10,000 fine, and a \$100 special assessment. *Id.* Mr. Berg's attempt to horse-trade his personal sentence in exchange for his misperceived contentions about the Court's mistakes in its sentencing of his business is highly inappropriate.

III. CONCLUSION

The Court DENIES Defendant Robert Berg Enterprises, Inc.'s Unopposed Motion to Terminate Probation (ECF No. 27).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 5th day of October, 2015

Defendant (1)

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INC**

TERMINATED: 08/14/2015

doing business as

BERG SPORTSWEAR

TERMINATED: 08/14/2015

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