UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4710

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW TIMOTHY JONES,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Frank D. Whitney, District Judge. (3:03-cr-00055-FDW-DCK-1)

Submitted: October 3, 2023 Decided: November 28, 2023

Before KING, Circuit Judge, and MOTZ and FLOYD, Senior Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Leslie Carter Rawls, Charlotte, North Carolina, for Appellant. Dena J. King, United States Attorney, Elizabeth M. Greenough, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

PER CURIAM:

Andrew Timothy Jones was convicted of attempted Hobbs Act robbery, 18 U.S.C. § 1951 (Count One); using and carrying a firearm during and in relation to the attempted Hobbs Act robbery, 18 U.S.C. § 924(c)(1) (Count Two); bank robbery, 18 U.S.C. § 2113(a) (Count Three); armed bank robbery, 18 U.S.C. § 2113(d) (Count Four); and using and carrying a firearm during and in relation to the armed bank robbery, 18 U.S.C. § 924(c)(1) (Count Five). The Government dismissed Count Three, and the district court sentenced Jones to concurrent 77-month terms of imprisonment for Counts One and Four, a 120-month consecutive sentence for the first § 924(c) offense for using and carrying a firearm during and in relation to attempted Hobbs Act robbery, and a 300-month consecutive sentence for the second § 924(c) offense. The court also ordered Jones to serve five years of supervised release on each count with the terms to run concurrently.

Pursuant to Jones's 28 U.S.C. § 2255 motion, the district court vacated his conviction for Count Two because attempted Hobbs Act robbery was not categorically a crime of violence. Noting that the parties agreed "that a time-served sentence on the remaining counts is appropriate," the court found that "a resentencing hearing is unnecessary and that a sentence of time served on the remaining counts is appropriate pursuant to [18 U.S.C.] § 3553(a)." (J.A. 89). The court instructed the Clerk, "[w]ith the consent of the parties," "to issue an Amended Judgment imposing a sentence of time served for the remaining counts, with all other terms and conditions remaining in effect." (J.A. 89). A conforming amended judgment was filed, retaining the concurrent five-year terms of supervised release.

On appeal from the amended judgment, Jones asserts that the district court erred by not stating a particularized basis for the supervised release term and by imposing a substantively unreasonable supervised release sentence. A judgment entering the result of a § 2255 resentencing "is a hybrid order that is both part of the petitioner's § 2255 proceeding and part of his criminal case." *United States v. Hadden*, 475 F.3d 652, 664 (4th Cir. 2007). We generally "review the form of relief the district court awards to a successful § 2255 petitioner for abuse of discretion." *Id.* at 667.

Moreover, errors invited by the party asserting them are not reviewable on appeal. *See United States v. Bennafield*, 287 F.3d 320, 325 (4th Cir. 2002). In addition, even were we to consider Jones' sentencing challenge on the merits, our review would be only for plain error because Jones failed to raise this issue below. *United States v. Cohen*, 63 F.4th 250, 258 & n.5 (4th Cir. 2023) (applying plain error where defendant did not request a different supervised release sentence below), *petition for cert. filed* (June 20, 2023). To establish plain error, Jones must show: "(1) error; (2) that is plain; and (3) that affects his substantial rights." *United States v. King*, 628 F.3d 693, 699 (4th Cir. 2011). Moreover, we will exercise our discretion to correct plain error only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,' or where failure to correct would result in a 'miscarriage of justice.'" *United States v. Muslim*, 944 F.3d 154, 164 (4th Cir. 2019) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

The district court has "broad and flexible power . . . to fashion an appropriate remedy" in granting relief on collateral review. *United States v. Hillary*, 106 F.3d 1170, 1171 (4th Cir. 1997) (internal quotation marks omitted). In *Hadden*, we explained that a

"district court is authorized to conduct a resentencing in awarding relief pursuant to § 2255," but that a hearing is not required in every case. 475 F.3d at 668. We observed that, in a § 2255 proceeding, the district court may remedy an unlawful sentence by one of the following: (1) releasing the prisoner, (2) granting the prisoner a future new trial, or (3) imposing a new sentence either by (a) resentencing the prisoner or (b) correcting the prisoner's sentence. *Id.* at 667. "[T]he goal of § 2255 review is to place the defendant in exactly the same position he would have been had there been no error in the first instance." *Id.* at 665 (internal quotation marks omitted).

Here, the parties agreed that a resentencing hearing was not required and that a sentence of time served was appropriate. As such, we find that Jones is not entitled to relief for numerous reasons. First, Jones invited the error and waived any reconsideration of his supervised release term by arguing for the expedited imposition of a time served sentence without a resentencing hearing.[*] Second, even if the district court erred in failing to *sua sponte* reevaluate Jones's supervised release term, Jones cites no cases directly on point and, as such, has failed to show that any error was "plain." Third, the district court did not abuse its broad discretion by leaving the supervised release term untouched. It is

[*] Notably, Jones does not seek a new sentencing hearing. Nor could he given that Jones himself sought the entry of a new criminal judgment without a resentencing hearing in order to expedite his release. Jones does not explain how the district court should have both entered a new judgment without a resentencing hearing and altered the supervised release term, presumably without briefing on the issue or the preparation of a new presentence report (which would have delayed his release). Thus, Jones is apparently arguing that the district court was required to address the supervised release issue *sua sponte*, predict the parties' arguments, and make assumptions regarding his amended Sentencing Guidelines range.

undisputed that the supervised release term was originally appropriate, and while one of Jones' convictions was legally void, the facts of his criminal behavior had not changed. Further, Jones presented no evidence or argument that the factors supporting a five-year term of supervision had been altered. *See United States v. Nichols*, 897 F.3d 729, 738 (6th Cir. 2018) (holding that, when choosing to "correct" a sentence rather than conduct a de novo resentencing, district court "could properly rely on the explanation that the sentencing court originally provided").

Because there was no error in correcting Jones' sentence without reconsidering his supervised release term, we affirm Jones' sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED