

**NONPRECEDENTIAL DISPOSITION**

To be cited only in accordance with FED. R. APP. P. 32.1

**United States Court of Appeals**

**For the Seventh Circuit  
Chicago, Illinois 60604**

Argued August 1, 2023  
Decided August 14, 2023

**Before**

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 23-1205

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

*v.*

BRIAN RAY,  
*Defendant-Appellant.*

Appeal from the United States District  
Court for the Southern District of Illinois.

No. 21-CR-30020-SPM

Stephen P. McGlynn,  
*Judge.*

**ORDER**

After revoking Brian Ray's supervised release, the district court sentenced him to 24 months in prison, which was significantly above the applicable range under the policy statements in Chapter Seven of the Sentencing Guidelines. The court explained that Ray's continued methamphetamine use demonstrated that his underlying 30-month sentence had not been sufficient. On appeal, Ray argues that his sentence is substantively unreasonable because the court did not adequately demonstrate that it used the sentencing range as a benchmark or justify the upward variance under the factors in 18 U.S.C. § 3553(a). But Ray's sentence is not substantively unreasonable

because it is consistent with the court's assessment of Ray's criminal history, the need for deterrence, and the importance of protecting the public from his drug-dealing activities. Therefore, we affirm.

In 2017, federal law enforcement officers in the Eastern District of Missouri began investigating Ray for distributing methamphetamine after the U.S. Postal Inspection Service intercepted a package addressed to him containing that drug. Ray eventually pleaded guilty in 2018 to one count of possession with intent to distribute methamphetamine and two counts of possession with intent to distribute 50 grams or more of methamphetamine. 21 U.S.C. § 841(a)(1), (b)(1)(B), (b)(1)(C). The district court in the Eastern District of Missouri sentenced him to 30 months' imprisonment followed by three years of supervised release.

Ray was released from prison and began his supervision in August 2020. In February 2021, jurisdiction over his case was transferred to the Southern District of Illinois.

Ray's probation officer twice petitioned the district court for revocation of his supervision, which prohibited Ray from unlawfully possessing a controlled substance and required him to maintain lawful employment, notify his probation officer of any change in job or residence, participate in substance-abuse treatment, and report to the probation officer upon instruction. First, in May 2022, the officer reported that Ray had unlawfully possessed methamphetamine on three occasions, failed multiple times to report to the probation office when instructed or submit monthly reports, changed his residence and quit his job without informing the probation officer, and failed to attend one of his substance-abuse treatment sessions. The court held a hearing on the petition in September 2022, and it granted the parties' request to continue the proceedings for about three months. But the court warned Ray that he would be sent back to prison unless he could "demonstrate ... between now and the sentencing hearing ... that [he knew] how to be in compliance with supervised release."

The hearing reconvened on December 13, 2022. The government recommended dismissal of the petition, explaining that Ray had committed "no substantive violations" since the previous hearing and had "admitted to everything" in the petition. The court admonished Ray for the conduct that led to his original conviction, emphasizing that he was "not before this Court ... because [he] had a drug addiction problem," but "because [he was] trafficking methamphetamine"; and that while "[d]estroying [his] own life is one thing," his drug dealing had a destructive impact on

the public, including parents and “children who are born addicted to methamphetamine.” The court then granted the request to dismiss the revocation petition. But the court warned Ray of serious consequences if he committed any further violations:

If you get charged with any crime while you're on supervised release, you're going to compound your problems in ways you can't imagine. There's a lot of ways you can violate supervised release, some I'm not going to get too terribly worked up about. But methamphetamine and drugs, I am.

...

I don't know if you were hoping for a pep talk, but I think a reality check is in order. Don't fall backwards. You're going to regret it.

Just three days later, the probation officer filed a second petition for revocation, reporting that Ray had again violated his supervision terms. In addition to restating Ray's previous violations, the petition asserted that Ray had admitted to the probation officer on December 13—just after that day's hearing—that he had used methamphetamine about two days earlier.

The court held another revocation hearing in January 2023. At the outset, Ray's counsel stated that Ray did not contest any of the violations in the second petition. The court then noted that Ray faced a statutory maximum penalty of 24 months' reimprisonment on the first count and 36 months on the other two counts, along with a policy-statement range of 4 to 10 months' reimprisonment (based on Ray's criminal history category I and a Grade B most-serious violation for methamphetamine possession). *See* U.S.S.G. § 7B1.4. The government and defense counsel both requested a total sentence of six months' imprisonment followed by one year of supervised release, agreeing that this would be sufficient. Ray also gave a brief allocution, acknowledging that he was “absolutely an addict” and was “responsible for what [he] did.”

The court then revoked Ray's supervised release and sentenced him to 24 months' imprisonment and one additional year of supervised release. The court gave a thorough explanation for the sentence, noting that Ray had received a “good deal” with his initial 30-month prison sentence but had squandered it by violating the conditions of his supervision. Further, the court highlighted, Ray had “promised” at the December hearing that he “wouldn't test positive for meth,” but he then tested positive later that same day. It also emphasized that Ray was “going to kill [himself] or ... going to kill

other people” by continuing to return to meth, and that a lengthy prison sentence was necessary because his 30-month sentence “didn’t work”: Ray hadn’t “changed [his] life around” by refraining from drug use, demonstrating that he was “not serious about being law abiding.” The court further explained that it was sentencing Ray above the range “because you’ve repeatedly violated in a meaningful way the terms of your supervised release. There’s multiple instances where you’ve tested positive for methamphetamine[.]”

On appeal, Ray challenges only the substantive reasonableness of his revocation sentence. He argues that his 24-month sentence—well above the applicable policy-statement range of 4 to 10 months—is plainly unreasonable because the district court did not show that it used the Guidelines as a benchmark, mentioning them only in passing when imposing the sentence. Further, Ray contends, the court did not justify its variance with an explanation rooted in the § 3553(a) factors, as required when a sentence deviates significantly from the range.

The government responds that the above-range sentence is not plainly unreasonable because it reflected the court’s assessment—as explained at sentencing—of the gravity of Ray’s numerous violations, particularly his repeated methamphetamine use, and the need to deter Ray from future criminal conduct and protect the public. The government emphasizes that, at the December 2022 hearing, Ray omitted from his promises to the court that he was continuing to use methamphetamine, allowing the court to dismiss the first revocation petition when he had used the drug two days earlier. The government also identifies multiple examples of comparable upward variances that we have affirmed as reasonable based on defendants’ criminal histories and the need for deterrence.

Our review of a revocation sentence under 18 U.S.C. § 3583(e)(3) for substantive reasonableness is “highly deferential.” *United States v. Durham*, 967 F.3d 575, 580 (7th Cir. 2020) (quoting *United States v. Boultinghouse*, 784 F.3d 1163, 1177 (7th Cir. 2015)). We will reverse only if the sentence is “plainly unreasonable.” *Id.* The sentencing court is not required to follow the parties’ sentencing recommendations, and it may impose an above-guidelines sentence based on its assessment of the gravity of the defendant’s conduct, the need to protect the public, and the importance of providing deterrence. *United States v. Dawson*, 980 F.3d 1156, 1166 (7th Cir. 2020); 18 U.S.C. § 3583(e). The amount of justification that the court must provide depends on how much the sentence varies from the range. See *United States v. Jones*, 774 F.3d 399, 405 (7th Cir. 2014).

Here, the district court provided a sufficient justification for the upward variance, and Ray's 24-month sentence is therefore not "plainly unreasonable." In imposing the sentence, the court emphasized the importance of a lengthy prison term to deter Ray from future methamphetamine use, noting that the initial 30-month sentence "didn't work" because Ray continued to commit drug violations while on supervision. The court also highlighted the need to protect the public from the possibility of Ray resuming his drug-dealing, discussing methamphetamine's dangerous impact on society and emphasizing that Ray was "going to kill other people" if he continued to return to the drug.

The court had also discussed these factors at the previous revocation hearings in September and December 2022, which involved nearly all the same alleged violations. It emphasized the seriousness of Ray's offense of conviction (noting that he was not there for using drugs but "because [he was] trafficking methamphetamine"), highlighted the danger his activities posed to the public (referencing parental users and "children who are born addicted to methamphetamine"), and warned Ray that he would face serious consequences if he committed any additional drug-related violations of his supervision. The court also cited the leniency of Ray's underlying 30-month sentence and his failure to take advantage of it. This was a permissible justification for varying upward in the subsequent sentence. *See United States v. Wade*, 890 F.3d 629, 633–34 (7th Cir. 2018). Particularly under a "highly deferential" review, *Durham*, 967 F.3d at 580, the court's explanation for the sentence was grounded in the appropriate § 3553(a) factors and was not "plainly unreasonable." *Id.*

Further, we have upheld the substantive reasonableness of similar revocation sentences. For example, in *United States v. Dawson*, we affirmed a 24-month revocation sentence with a policy-statement range of 6 to 12 months, where the defendant possessed a loaded firearm while on supervision, and the district court concluded that the guidelines did not accurately reflect the seriousness of the breach of the court's trust. 980 F.3d at 1166. Similarly, in *United States v. Allgire*, 946 F.3d 365, 367 (7th Cir. 2019), we ruled that a 24-month revocation sentence with a range of 5 to 11 months was not substantively unreasonable, where the defendant had failed to remain in a halfway house as required by his supervision terms, and the district court justified the sentence based on his repeated violations and apparent likelihood of recidivism. *Id.* at 367–68.

Ray's circumstances do not differ meaningfully from those in *Dawson* and *Allgire*. Here, too, the district court assessed Ray's likelihood of recidivism based on his criminal history and demonstrated inability to refrain from methamphetamine use, as

well as the necessity of a serious sentence to deter Ray from future violations, and it selected a sentence consistent with this assessment. True, the court's explanation for the upward variance at the final hearing was brief (focusing primarily on the fact that Ray had "repeatedly violated" his supervision by using meth), but taken together with its comments at the first two hearings, the court provided a more thorough justification consistent with the § 3553(a) factors: It discussed Ray's criminal history trafficking drugs, his likelihood of recidivism based on his repeated drug use, and the need to protect the public and provide deterrence. *See Dawson*, 980 F.3d at 1160–61; *Allgire*, 946 F.3d at 367; 18 U.S.C. § 3553(a)(1), (a)(2)(A)–(C). Therefore, the court here justified the size of the variance from the policy-statement range. *See Jones*, 774 F.3d at 405.

AFFIRMED