**NONPRECEDENTIAL DISPOSITION**
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# United States Court of Appeals

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

Submitted March 28, 2024
Decided April 3, 2024

**Before**

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 23-2459

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

*v*.

MOSEZELL JONES,
*Defendant-Appellant*.

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

No. 21-CR-30154-SPM

Stephen P. McGlynn,
*Judge*.

**O R D E R**

Mosezell Jones pleaded guilty to possessing methamphetamine with the intent to distribute, *see* 21 U.S.C. § 841(a)(1), and possessing a firearm as a felon, *see* 18 U.S.C. § 922(g)(1). The district judge sentenced Jones to a within-Guidelines sentence of 192 months in prison and 5 years of supervised release. Jones filed a notice of appeal, but his appointed lawyer believes that the appeal is frivolous and seeks to withdraw under *Anders v. California*, 386 U.S. 738, 744 (1967). Counsel's brief explains the nature of the case and addresses potential issues that an appeal of this kind would typically involve. Jones did not respond to counsel's motion to withdraw. *See* 7TH CIR. R. 51(b).

Because counsel's analysis appears thorough, we limit our review to the subjects identified in the brief. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Over two weeks in June 2021 in East St. Louis, Illinois, Jones sold ecstasy pills containing methamphetamine to a confidential source three different times. After the third sale, law enforcement obtained a warrant to search Jones's home where they found over 140 grams of methamphetamine, ecstasy, other drugs and drug paraphernalia, and three firearms. Jones admitted that he was not permitted to own any firearms because he had previously been convicted of a felony. Based on the search, Jones was charged with possessing methamphetamine with intent to distribute, *see* § 841(a)(1), and possessing a firearm as a felon, *see* § 922(g)(1). He pleaded guilty to the charges without a plea agreement.

At the sentencing hearing, the judge adopted the recommendations in the presentence investigation report, which grouped the two charges together to yield a single Guidelines range. *See* U.S.S.G. § 3D1.2(c). Jones's base offense level was 26 because his firearm offense involved a semiautomatic firearm that could accept a large capacity magazine and because he had two prior felony convictions for a crime of violence (armed robbery). *Id.* § 2K2.1(a)(1). He received a two-level increase for possessing three firearms, *id.* § 2K2.1(b)(1)(A), and a four-level increase for possessing those firearms in connection with a drug charge, *id.* § 2K2.1(b)(6)(B), resulting in an adjusted offense level of 32. That level was enhanced to 34 for being a career offender (based on two armed-robbery convictions). *Id.* § 4B1.1. With a three-level downward adjustment for acceptance of responsibility, *id.* § 3E1.1, Jones had a final offense level of 31. His criminal history category was VI because he qualified as a career offender. *Id.* § 4B1.1(b). The advisory Sentencing Guidelines range was 188 to 235 months in prison with 4 to 5 years of supervised release on the drug count and 120 months in prison (the statutory maximum) with 1 to 3 years of supervised release on the firearm count. *See id.* § 5D1.2(c); 21 U.S.C. § 841(b)(1)(B); 18 U.S.C. § 924(a)(2) (2021) (amended 2022).

Jones asked the judge to impose a below-Guidelines sentence, but the judge disagreed. Jones first argued that the government should have conducted a purity test on the methamphetamine mixture, asserting that perhaps the pills contained very little methamphetamine. The government explained that it could not do so because the State of Illinois had already tested the drugs for purity. Next, he argued that he was only a street-level dealer, that he was unlikely to commit a violent crime again, and that his age and health concerns meant a within-Guidelines sentence could be a life sentence for him. But the judge determined that the seriousness of Jones's crime (he possessed a

substantial quantity of drugs, and the pills were colorful and thus could attract children as buyers or consumers), the need to protect the public, and Jones's likelihood of selling drugs again warranted a within-Guidelines sentence. The judge sentenced Jones to 192 months in prison (near the bottom of the range) with 5 years of supervised release on the drug count and 120 months in prison with 3 years of supervised release on the firearm count, to run concurrently.

Counsel informs us that Jones wishes to challenge only the length of his sentence and not his conviction. Counsel thus properly refrains from discussing the validity of the guilty plea. *See United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002).

Counsel first considers whether Jones could plausibly argue that the judge miscalculated his Guidelines range but rightly concludes that he could not. One of Jones's guns was a semiautomatic firearm that could accept a large capacity magazine, and his two armed-robbery convictions were crimes of violence, so his base offense level was properly calculated at 26. *See* § 2K2.1(a)(1). Jones stipulated to possessing three firearms, leading to a two-level increase. *See* § 2K2.1(b)(1)(A). And he possessed those firearms in connection with his drug charge, causing a further four-level increase. *See* § 2K2.1(b)(6)(B). Jones's two convictions for armed robbery meant that he was a career offender and subject to an adjusted offense level of 34, *see* § 4B1.1, and a criminal history category of VI, *see* § 4B1.1(b). Jones did not object to any of these calculations at sentencing, and no plausible argument could show plain error.

Next, counsel considers whether Jones could argue that the judge erred by not ordering a purity test of the methamphetamine mixture but correctly concludes that he could not. Jones asked the government to test the purity of the methamphetamine to show that his pills contained a very low percentage of the drug. And although the purity of methamphetamine can matter if the defendant is charged with possessing "ice," a purer form of methamphetamine, *see United States v. Carnell*, 972 F.3d 932, 939–41 (7th Cir. 2020), purity does not matter if the defendant is charged with possessing a methamphetamine mixture because the weight of the entire mixture, no matter how pure, is used to calculate an advisory Guidelines sentence, *see* U.S.S.G. § 2D1.1(c) n.(B). Jones was charged with possessing a methamphetamine mixture, so its purity could not affect his Guidelines calculation. Nor could Jones reasonably argue that a purity test might have altered how the judge weighed the § 3553 factors because the judge focused on the pills' colorful attractiveness to children, not any aspect of their purity.

Counsel also correctly observes that a challenge to the substantive reasonableness of Jones's prison term would be frivolous. His within-Guidelines sentence of 192 months is "presumed reasonable against a defendant's challenge that it is too high." *United States v. De La Torre*, 940 F.3d 938, 953 (7th Cir. 2019) (quotation marks omitted). This presumption can be rebutted only by showing that the sentence does not reasonably comport with the § 3553(a) factors. *Id.* But Jones could not plausibly make that contention. Counsel's brief (and our own review of the judge's consideration of the § 3553(a) factors) shows that the judge reasonably balanced the seriousness of the offense, the need for specific deterrence, and the need to protect the public against Jones's mitigating arguments.

Finally, counsel considers the possibility of a challenge to the constitutionality of § 922(g)(1) in the aftermath of *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). In *Bruen* the Supreme Court held that the Second Amendment requires the government to prove that firearm statutes like § 922(g)(1) are "consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 17. Because Jones did not challenge the statute's constitutionality in the district court, our review would be for plain error, meaning that the error must be "clear and uncontroverted at the time of appeal." *United States v. Miles*, 86 F.4th 734, 740 (7th Cir. 2023) (quotation marks omitted). We recently acknowledged that at this point the historical assessment on the constitutionality of § 922(g)(1) is inconclusive. *See Atkinson v. Garland*, 70 F.4th 1018, 1022 (7th Cir. 2023) (remanding to the district court to conduct a "proper, fulsome analysis of the historical tradition supporting § 922(g)(1)" in light of *Bruen*). Because the law is unsettled, any error today would not be plain. *See Miles*, 86 F.4th at 740–41.

We acknowledge that we have stayed some direct appeals until the issue of the constitutionality of § 922(g) is answered. But a stay is not necessary here because Jones has a longer concurrent sentence for his methamphetamine conviction. We have already determined that he could not challenge that longer concurrent sentence, and counsel has not suggested why, in light of this longer concurrent sentence, the *Bruen* issue remains relevant. *Cf. United States v. Leija-Sanchez*, 820 F.3d 899, 902 (7th Cir. 2016) (holding that the existence of concurrent sentences justifies a refusal to overturn plain error in one sentence).

We thus GRANT counsel's motion to withdraw and DISMISS the appeal.