UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6364

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

WILLIAM HENRY THATCH, JR.,

Defendant – Appellant.

No. 20-4230

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

WILLIAM HENRY THATCH, JR.,

Defendant – Appellant.

No. 20-4231

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

WILLIAM HENRY THATCH, JR.,

Defendant – Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:99-cr-00050-WO-2; 1:19-cr-00399-WO-1)

Submitted: September 24, 2021 Decided: June 30, 2022

Before MOTZ, DIAZ, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: J. Clark Fischer, Winston-Salem, North Carolina, for Appellant. Matthew G.T. Martin, United States Attorney, Ashley E. Waid, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

William Henry Thatch, Jr., appeals the district court's denial of his motion for a First Step Act § 404(b) sentence reduction and imposition of a sentence upon the revocation of supervised release. For the reasons that follow, we reject both arguments and affirm the judgment of the district court.

I.

In 1999, Thatch pleaded guilty to possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). The district court sentenced him to 240 months imprisonment (which was subsequently reduced to 215 months pursuant to the Fair Sentencing Act of 2010) and a five-year term of supervised release.

As the Government acknowledges, Thatch performed well in prison and for the first four years of his supervised release. Gov't Br. at 16. But three months before his supervised release was set to end, Thatch tested positive for cocaine. Also toward the end of his term of supervised release, Thatch sold cocaine in controlled purchases on seven different occasions. Because of these infractions, the Government sought to revoke Thatch's supervised release and charged him separately for the controlled purchases. Thatch pleaded guilty to the new cocaine offenses, and in that case the district court sentenced him to 71 months of incarceration, at the high end of the Guidelines range. The district court also imposed a 60-month consecutive sentence for the violation of his terms of supervised release.

Thatch moved for a reduction in his supervised release sentence from five to four years pursuant to § 404(b) of the First Step Act. *See* Pub. L. No. 115-391, § 404(b), 132

Stat. 5194, 5222 (2018). The First Step Act allows district courts the discretion to reduce terms of supervised release for eligible defendants. *See United States v. Venable*, 943 F.3d 187, 194 (4th Cir. 2019). Thatch asserts that the district court erred in declining to reduce his sentence under the First Step Act. Thatch also argues that the revocation sentence itself is unreasonable.[1] We disagree on both counts and affirm the district court's judgment.

II.

Thatch first argues that the district court erred in denying his First Step Act § 404(b) motion for a reduction in his supervised release sentence. He also argues that if the court had properly reduced his supervised release term, he could not have received a revocation sentence because he would not have been on supervised release when he committed the new offenses in 2019.

We review a district court's denial of § 404(b) relief for abuse of discretion under a reasonableness standard. *United States v. Collington*, 995 F.3d 347, 358–59 (4th Cir. 2021). Under this standard, we affirm a district court's denial of § 404(b) relief unless the court's decision is procedurally or substantively unreasonable. *Id.*

In deciding whether a district court has adequately explained its denial of § 404(b) motion so as to be procedurally reasonable, "the touchstone must be whether the district court 'set forth enough to satisfy our court that it has considered the parties' arguments and

[1] Thatch's initial notice of appeal indicated that he wished to appeal his 71-month sentence in the 2019 case. However, his opening brief contained no argument regarding the 2019 sentence or conviction. Thus, Thatch has waived any challenge to that sentence. *United States v. Cohen*, 888 F.3d 667, 685 (4th Cir. 2018).

has a reasoned basis for exercising its own legal decisionmaking authority,' so as to 'allow for meaningful appellate review.'" *United States v. High*, 997 F.3d 181, 190 (4th Cir. 2021) (quoting *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018)) (cleaned up); *accord Concepcion v. United States*, No. 20-1650, Slip Op. at 18 (U.S. June 27, 2022) ("[T]he First Step Act [does not] require a district court to make a point-by-point rebuttal of the parties' arguments. All that is required is for a district court to demonstrate that it has considered the arguments before it.").[2] In this case, the district court provided an oral explanation for its denial of the First Step Act relief, as well as a subsequent written order elaborating on its reasoning. This individualized reasoning is sufficiently detailed to permit "meaningful appellate review." *High*, 997 F.3d at 190. Thus, we conclude that the denial of § 404(b) relief was procedurally reasonable.[3]

Next, we consider whether the district court's denial of Thatch's § 404(b) motion is substantively reasonable. "A review for substantive reasonableness takes into account the

[2] We held this case in abeyance for *Concepcion*, in which the Court granted certiorari to determine "whether a district court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact." No. 20-1650, Slip Op. at 5–6. The Court held that a district court does not err by considering such changes; thus, the district court's consideration here of Thatch's post-sentencing conduct provides no basis for reversal. *See id.* at 14–16.

[3] The district court suggested a general preference against supervised release terms of less than five years: "I don't know how my imposition of supervised release compares to what other judges do, but, generally speaking, particularly on a larger drug offense, I probably lean toward the five [years] . . . .". Although we hold in this case that the district court went on to make a sufficiently individualized finding, we note that a court's generalized policy preference for longer drug sentences, without more, is unlikely to meet the "individualized explanation" requirement of procedural reasonableness. *United States v. McDonald*, 986 F.3d 402, 410–12 (4th Cir. 2021).

'totality of the circumstances' to determine 'whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a).'" *United States v. Nance*, 957 F.3d 204, 212 (4th Cir. 2020) (quoting *United States v. Mendoza-Mendoza*, 597 F.3d 212, 216 (4th Cir. 2010)), *cert. denied*, 141 S. Ct. 687 (2020). On appeal, a sentence bears a presumption of substantive reasonableness if it is within the Guidelines range. *United States v. White*, 850 F.3d 667, 674 (4th Cir. 2017), *cert. denied*, 137 S. Ct. 2252 (2017).

Although the First Step Act rendered Thatch eligible for a sentence reduction to four years, his initial five-year supervised release term remained within the revised guidelines range. Therefore, we must presume that the decision not to reduce his within-Guidelines sentence is substantively reasonable.

Thatch cannot overcome this presumption. The district court explained that it based the denial of Thatch's § 404(b) motion on his post-sentencing conduct, *i.e.*, his criminal activity during the period of supervised release. District courts deciding § 404(b) motions may properly consider post-sentencing conduct relevant to the § 3553(a) factors. *United States v. Chambers*, 956 F.3d 667, 674–75 (4th Cir. 2020). Post-sentencing conduct can be mitigating. *See, e.g.*, *United States v. Martin*, 916 F.3d 389, 396 (4th Cir. 2019). But, as here, it can also cut against a defendant. *See Concepcion*, No. 20-1650, Slip Op. at 15 ("[W]hen deciding whether to grant First Step Act motions and in deciding how much to reduce sentences, courts have looked to postsentencing evidence of violence or prison infractions as probative."). Given the presumption of substantive reasonableness and the district court's "thorough, individualized assessment of [Thatch] and his offense conduct

in light of the § 3553(a) factors, . . . we cannot conclude that the court's exercise of discretion in [denying the § 404(b) sentence reduction motion] is [substantively] unreasonable." *Nance*, 957 F.3d at 215–16.

III.

Finally, Thatch appeals the length of his revocation sentence. "We will affirm a revocation sentence if it is within the statutory maximum and is not 'plainly unreasonable.'" *United States v. Webb*, 738 F.3d 638, 640 (4th Cir. 2013) (quoting *United States v. Crudup*, 461 F.3d 433, 438 (4th Cir. 2006)). "When reviewing whether a revocation sentence is plainly unreasonable, we must first determine whether it is unreasonable at all." *United States v. Thompson*, 595 F.3d 544, 546 (4th Cir. 2010). "A revocation sentence is procedurally reasonable if the district court adequately explains the chosen sentence after considering the Sentencing Guidelines' nonbinding Chapter Seven policy statements and the applicable 18 U.S.C. § 3553(a) factors." *United States v. Slappy*, 872 F.3d 202, 207 (4th Cir. 2017) (footnotes omitted). "A revocation sentence is substantively reasonable if, in light of the totality of the circumstances, the court states an appropriate basis for concluding that the defendant should receive the sentence imposed." *United States v. Coston*, 964 F.3d 289, 297 (4th Cir. 2020) (cleaned up), *cert. denied*, 141 S. Ct. 1252 (2021).

We cannot say Thatch's revocation sentence is unreasonable, much less plainly so. The district court imposed a revocation sentence of sixty months, which is within the statutory maximum. The court adequately explained its reasoning for doing so, noting among other rationales that it would have varied upward if Thatch had not engaged in four

years of positive conduct while on supervised release prior to the controlled buys at issue here. Thus, the revocation sentence is procedurally reasonable.

As to substantive reasonableness, Thatch asserts that "the 60-month sentence imposed by the Court was substantively unreasonable because it unavoidably imposed a double-punishment on Defendant for identical misconduct" when combined with his sentence in the 2019 case. Thatch Br. at 9–10. To the extent that Thatch's argument is implicitly based on the Double Jeopardy clause, binding precedent forecloses it. *United States v. Woodrup*, 86 F.3d 359, 362 (4th Cir. 1996), *cert. denied*, 519 U.S. 944 (1996). And to the extent that Thatch's argument is based on the unfairness of being sentenced twice for the same conduct, our precedent also rejects such reasoning. *Id.* at 361–63; *see also United States v. Jackson*, 952 F.3d 492, 498 (4th Cir. 2020) (explaining that "custodial and supervised release" sentences "serve different purposes."). Therefore, we conclude that Thatch's revocation sentence is substantively reasonable because the district court's reasoning "sufficiently states a proper basis for its conclusion that the defendant should receive the sentence imposed." *Slappy*, 872 F.3d at 207 (cleaned up).

IV.

For these reasons, the judgment of the district court is

AFFIRMED.