

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

**No. 21-4664**

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC SCOTT PENNINGTON,

Defendant - Appellant.

---

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Thomas S. Kleeh, Chief District Judge. (2:13-cr-00034-TSK-MJA-5)

---

Submitted: July 7, 2022

Decided: July 12, 2022

---

Before DIAZ and HEYTENS, Circuit Judges, and KEENAN, Senior Circuit Judge.

---

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

---

**ON BRIEF:** Tracy Weese, Shepherdstown, West Virginia, for Appellant. Stephen Donald Warner, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Elkins, West Virginia, for Appellee.

---

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Eric Scott Pennington appeals the district court’s judgment revoking his term of supervised release and imposing a sentence of 24 months’ imprisonment. On appeal, Pennington’s counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there are no meritorious grounds for appeal but questioning whether Pennington’s sentence is plainly unreasonable. Although notified of his right to do so, Pennington has not filed a pro se supplemental brief. For the reasons that follow, we affirm the portion of the judgment revoking Pennington’s supervised release, but we vacate his 24-month sentence and remand for resentencing.

We “review[] a district court’s decision to revoke a defendant’s supervised release for abuse of discretion.” *United States v. Dennison*, 925 F.3d 185, 190 (4th Cir. 2019). A court may revoke a defendant’s term of supervised release if it “finds by a preponderance of the evidence that the defendant violated a condition of supervised release.” 18 U.S.C. § 3583(e)(3). Because Pennington admitted to the alleged violations, we conclude that the district court did not abuse its discretion in revoking Pennington’s supervised release.

“A district court has broad discretion when imposing a sentence upon revocation of supervised release.” *United States v. Patterson*, 957 F.3d 426, 436 (4th Cir. 2020). We “will affirm a revocation sentence if it is within the statutory maximum and is not plainly unreasonable.” *Id.* Before deciding “whether a revocation sentence is plainly unreasonable, [we] must first determine whether the sentence is procedurally or substantively unreasonable.” *Id.*

“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.” *See United States v. Coston*, 964 F.3d 289, 297 (4th Cir. 2020) (internal quotation marks omitted), *cert. denied*, 141 S. Ct. 1252 (2021). When fashioning an appropriate revocation sentence, “the court should sanction primarily the defendant’s breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.” U.S. Sentencing Guidelines Manual ch. 7, pt. A(3)(b), p.s. (2018). While the district court must consider certain enumerated factors under § 3553(a), *see* 18 U.S.C. § 3583(e), “[a]bsent from these enumerated factors is § 3553(a)(2)(A), which requires district courts to consider the need for the imposed sentence ‘to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.’” *United States v. Webb*, 738 F.3d 638, 641 (4th Cir. 2013) (quoting 18 U.S.C. § 3553(a)(2)(A)).

We have recognized, however, that “the factors listed in § 3553(a)(2)(A) are intertwined with the factors courts are expressly authorized to consider under § 3583(e).” *Id.* Thus, although the district court may not base a revocation sentence “predominately” on the § 3553(a)(2)(A) factors, “mere reference to such considerations does not render a revocation sentence procedurally unreasonable when those factors are relevant to, and considered in conjunction with, the enumerated § 3553(a) factors.” *Id.* at 642.

Because Pennington did not object to the district court’s reliance on the § 3553(a)(2)(A) factors, we review this issue for plain error. *See Coston*, 964 F.3d at 294.

To establish plain error, Pennington must show “(1) an error, (2) that was plain, and (3) that affected his substantial rights.” *Id.* If Pennington makes that showing, “we may exercise our discretion to correct the error if it seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* (cleaned up).

We have reviewed the record and conclude that the district court procedurally erred in sentencing Pennington. Directly before imposing the sentence, the court remarked that Pennington’s violation conduct was “reprehensible and unacceptable.” Then, shortly following the imposition of the sentence, the district court overtly acknowledged that it believed the statutory maximum sentence of 24 months’ imprisonment was appropriate “primarily” or “exclusively” because of the seriousness of Pennington’s violation conduct. Although the district court briefly mentioned its consideration of additional factors, including the need to protect the public, deter Pennington, promote respect for the law, and provide just punishment, the latter two of these factors are also derived from § 3553(a)(2)(A). Because the district court relied predominantly on impermissible factors, particularly the seriousness of the violation conduct, Pennington’s sentence is procedurally unreasonable. *See Webb*, 738 F.3d at 642. Given our prior recognition that a sentencing court must base its decision on permissible factors, we further conclude that the district court’s sentence was plainly unreasonable. *See United States v. Slappy*, 872 F.3d 202, 210 (4th Cir. 2017). The record also supports Pennington’s contention that his sentence may have been improperly increased as a result of the court’s error. Therefore, the sentencing error affected Pennington’s substantial rights, and we exercise our discretion to recognize the error.

Accordingly, we affirm the revocation of Pennington's supervised release, vacate Pennington's sentence, and remand for resentencing.\* We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process. The mandate shall issue forthwith.

*AFFIRMED IN PART, VACATED IN PART, AND REMANDED*

---

\* Because we vacate for procedural unreasonableness, we do not address any issues related to the substantive reasonableness of Pennington's sentence. *See Slappy*, 872 F.3d at 210.