

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

**File Name: 13a0805n.06**

**No. 12-6442**

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**FILED**  
**Sep 03, 2013**  
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. )  
 )  
 KENDRICK BUGG, )  
 )  
 Defendant-Appellant. )  
 )  
 \_\_\_\_\_ )

ON APPEAL FROM THE  
UNITED STATES DISTRICT  
COURT FOR THE EASTERN  
DISTRICT OF TENNESSEE

BEFORE: CLAY, SUTTON, and GRIFFIN, Circuit Judges.

GRIFFIN, Circuit Judge.

The district court sentenced defendant Kendrick Bugg at the bottom of the applicable Guidelines range to 510 months in prison for armed robbery, 18 U.S.C. § 1951, and brandishing a firearm during a crime of violence, 18 U.S.C. § 924(c), in connection with the robbery of a Western Auto store in December 2001 (“Western Auto robbery”). At the time, defendant was already serving 324 months in prison for convictions for armed robbery and brandishing a firearm during a crime of violence in connection with the robbery of a Gas-N-Go station in March 2002 (“Gas-N-Go robbery”). In his initial appeal, this court held that the 510-month sentence for the Western Auto robbery was procedurally unreasonable because the district court failed to state on the record its reasons for rejecting defendant’s argument for running his armed robbery sentences concurrently. On remand, the district court stated its reasons for rejecting defendant’s argument and again

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sentenced defendant to 510 months in prison. In this appeal, defendant argues that (1) the district court improperly limited the scope of his arguments on remand; and (2) his sentence is procedurally and substantively unreasonable. For the reasons that follow, we AFFIRM.

I.

The Presentence Report (“PSR”) for the Western Auto robbery classified defendant as a career offender and indicated that his § 924(c) conviction carried a statutorily mandated consecutive term of 25 years in prison. This was because defendant had previously been convicted of armed robbery and brandishing a firearm in connection with the Gas-N-Go robbery, for which he was sentenced to an aggregate term of 324 months in prison. In light of defendant’s history, the PSR set forth an aggregate advisory Guidelines range of 510 to 562 months’ imprisonment.

Defendant raised several objections to the PSR. First, he objected to any reference to the facts contained in the PSR implicating him in the Western Auto robbery because he pleaded not guilty to those offenses. Second, he asked that his sentence for the § 924(c) conviction run concurrently with the sentence he was already serving for his earlier § 924(c) conviction. Third, defendant argued that classifying him as a career offender twice (first for the Gas-N-Go robbery and again for the Western Auto robbery) based on the same conduct violated the Double Jeopardy Clause of the Constitution. Fourth, defendant argued that he should have been indicted for both robberies together,<sup>1</sup> in which case he would have benefitted from “grouping” under the Guidelines; therefore,

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<sup>1</sup>The robberies of the Western Auto store and Gas-N-Go station occurred approximately four months apart.

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he asked the district court to take into account his previous sentence in determining a fair sentence in the instant case. The district court rejected these arguments.

Defendant also moved to dismiss the case based on vindictive prosecution. As background, in connection with the Gas-N-Go robbery, defendant exercised his right to a jury trial and his right to appeal. He also exercised his right to remain silent by not cooperating in an unsolved murder investigation.<sup>2</sup> Defendant argued that, because he had exercised these constitutional rights, the prosecution vindictively waited nearly five years (just seventeen days before the statute of limitations expired) to indict him in connection with the Western Auto robbery. The district court rejected this argument as well.

Moving forward with sentencing, the district court stated that the applicable Guidelines range for defendant's offenses was 210 to 262 months for the armed robbery conviction and a mandatory 25-year minimum for the § 924(c) conviction, resulting in an aggregate range of 510 to 562 months. It then entertained defendant's arguments for a downward departure or variance. Central to defendant's argument was that, had he been indicted for the two robberies together, the applicable Guidelines range for his convictions would have been 594 to 646 months in prison. However, because of the separate indictments, defendant now faced a total of 834 to 886 months in prison (324 months in connection with the Gas-N-Go robbery, and 510 to 562 months in connection with the Western Auto robbery)—a difference of twenty years. Accordingly, defendant asked the district

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<sup>2</sup>Apparently, there was a murder and attempted robbery at a dive and ski shop in January 2002. Two months later, defendant was found in possession of the gun used during that incident.

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court to run his two armed robbery sentences concurrently. The prosecution acknowledged that the district court could, in its discretion, run defendant's armed robbery sentences concurrently. Nonetheless, it submitted that consecutive sentencing was justified given defendant's violent behavior.

Having considered these arguments, the district court sentenced defendant to 510 months in prison, the very bottom of the applicable Guidelines range. The court ordered that 500 months run consecutive to any sentence the defendant was already serving. Defendant appealed to this court.

Among other arguments on appeal, defendant complained that the district court improperly ran nearly his entire sentence for the Western Auto robbery consecutive to his sentence for the Gas-N-Go robbery. Finding some merit to the argument, this court held that the 510-month sentence was procedurally unreasonable because the district court did not consider defendant's argument for concurrent sentencing on the record or provide reasons for rejecting it:

[Defendant] argues that the district court abused its discretion by imposing the majority of [his] sentence for the Western Auto robbery to run consecutively to, instead of concurrently with, his sentence for the Gas-N-Go robbery. Although the district court was obligated to impose the twenty-five-year mandatory-minimum sentence for his firearm conviction consecutively to other sentences, it retained the discretion to impose the remainder of the sentence to run concurrently. [Defendant] argued to the district court that the disparity between his total effective sentence (824 months) and sentences given to similarly situated defendants who are charged in one indictment (594-646 months) was unwarranted and fundamentally unfair and requested that the court use its discretion to correct the disparity by running the sentences concurrently to the greatest extent possible. Although the district court recognized that it had discretion to impose a concurrent sentence, the record does not reflect that the court considered [defendant's] non-frivolous argument for a concurrent sentence and, if considered, its reasons for rejecting it. We therefore find the imposed sentence procedurally unreasonable.

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*United States v. Bugg*, 483 F. App'x 166, 173 (6th Cir. 2012) (internal citations omitted).

Accordingly, this court vacated the sentence and remanded for resentencing.

At resentencing, the district court understood this court's ruling to be a limited remand order directing it to consider only defendant's argument for concurrent sentencing. Both the prosecution and defense counsel agreed that the district court had properly interpreted the scope of the remand order. In its analysis, the district court stated:

The maximum punishment for the [§] 924(c) charge [defendant] faced was a life sentence. The Court therefore had the authority to sentence [defendant] to incarceration for the remainder of his natural life. The Court had the advantage of seeing [defendant] in person during the trial. From the evidence presented at trial, the Court concluded that [defendant] is one of the most dangerous individuals this Court has ever encountered in its almost 20 years on the bench. The Court observed [defendant's] demeanor and actions during the trial. The Court also heard evidence as to the specifics of the crime involved here. The Court concluded that it was imperative that [defendant] be removed from society permanently because of the substantial risk he posed to other members of society. Therefore, it was the aim of the Court with this sentence to remove [defendant] from society permanently. The options the court had to do that were (1) to impose a life sentence or (2) [to] impose a sentence that was tantamount to life. Since the Court had discretion with respect to concurrent or consecutive sentences, the Court chose to achieve that objective without imposing a life sentence.

The Court . . . understood it had the discretion to impose a concurrent or nonconcurrent sentence, and in fact exercised that discretion. The Court carefully considered the defendant's arguments, and considered them at length. But the Court's objective remained to remove [defendant] from society permanently, and this necessitated rejecting his request for concurrent sentences. The Court's actions, the Court thought, were obvious, although the Court had not made that explicit. The Court now makes explicit what was implicit, and states the reason that motivated its decision.

The district court entered an amended judgment to this effect. Defendant now appeals.

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## II.

Defendant first argues that the district court misunderstood the scope of this court’s remand order and improperly limited the arguments at resentencing to one issue—whether his armed robbery sentences should run concurrently to the greatest extent possible. The scope of a remand order is a legal issue, which we generally review de novo. *United States v. O’Dell*, 320 F.3d 674, 679 (6th Cir. 2003). In this case, however, the district court asked defendant whether he agreed with its interpretation of the remand order as directing it to consider only defendant’s argument for running his armed robbery sentences concurrently to the greatest extent possible. Defendant expressly agreed with the district court’s interpretation of the remand order as limited to this issue. Thus, defendant has waived his right to challenge the scope of the remand order on appeal. See *United States v. Olano*, 507 U.S. 725, 733 (1993) (defining waiver as the “intentional relinquishment or abandonment of a known right”). See also *Gonzalez v. United States*, 553 U.S. 242, 257 n.2 (2008) (Scalia, J., concurring) (citing *Olano* for the proposition that “waiver extinguishes the error of not complying with a legal rule”); *United States v. Aparco-Centeno*, 280 F.3d 1084, 1088 (6th Cir. 2002) (defendant waived any argument on appeal that his two prior convictions did not qualify as aggravated felonies because he expressly agreed that they did qualify as such at his sentencing hearing).

## III.

Defendant next argues that the district court imposed a procedurally and substantively unreasonable sentence. With regard to procedural unreasonableness, defendant complains that the

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district court failed to consider his post-sentence rehabilitation as a mitigating factor in determining whether to run his armed robbery sentences concurrently. At resentencing, defense counsel stated, “[defendant] has given to me some certificates of completion he’s done while in custody. . . . He would like me to present those to the Court.” On appeal, defendant claims that the district court failed to acknowledge or consider this evidence. Normally, we review for an abuse of discretion the procedural reasonableness of a sentence. *United States v. Wallace*, 597 F.3d 794, 802 (6th Cir. 2010). But because defendant failed to raise this issue below, our review is limited to plain error. *Id.*

A sentence is procedurally unreasonable if the district court fails to consider the 18 U.S.C. § 3553(a) sentencing factors. *United States v. Amawi*, 695 F.3d 457, 486 (6th Cir. 2012). However, we presume that the district court reviewed and considered the materials presented to it, unless there is reason to believe otherwise. *See United States v. Gale*, 468 F.3d 929, 941 (6th Cir. 2006). Here, although the district court did not expressly refer to defendant’s post-sentence rehabilitation, we have no reason to believe that it failed to consider it. To the contrary, the district court stated that it had considered all of the § 3553(a) sentencing factors. The district court “considered the circumstances of the offense, the characteristics of the defendant, the need for just punishment, the defendant’s need for correctional treatment, and what is most crucial in this case—the need to incapacitate the defendant and thereby protect the public from future harm committed by [him].” “Although the district court may not have mentioned all of the statutory factors or the guidelines explicitly, and although explicit mention of those factors may facilitate

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review, this court has never required the ritual incantation of the factors to affirm a sentence.” *United States v. Johnson*, 403 F.3d 813, 816 (6th Cir. 2005) (internal quotation marks omitted); *see also United States v. Collington*, 461 F.3d 805, 809 (6th Cir. 2006) (“[A] reasonable sentence based on consideration of the factors does not require a rote listing.”).

Further, as justification for imposing what essentially amounted to a life sentence, the district court reasoned that “[t]he only substantial time . . . when the defendant has not been involved in crimes, either convictions or where he’s been arrested for a serious crime, has been when he’s been incarcerated.” Thus, even assuming an oversight, it is quite clear that the district court, set on incarcerating defendant for life, would have imposed the same sentence even had it expressly considered the evidence. Simply, defendant’s rehabilitative behavior *while incarcerated* does nothing to lessen the district court’s primary concern that he is wholly incapable of functioning *in society* without putting the public in serious danger. Consequently, defendant has not shown plain error affecting his substantial rights.

Finally, defendant argues that imposing a 510-month consecutive sentence was substantively unreasonable. Having determined that defendant’s sentence is procedurally sound, we review the substantive reasonableness of the sentence for an abuse of discretion. *United States v. Madden*, 515 F.3d 601, 609 (6th Cir. 2008). The length of the sentence must be “sufficient, but not greater than necessary, to comply with the purposes” of the sentencing statute. 18 U.S.C. § 3553(a). A sentence within the applicable Guidelines range, as in this case, is afforded a presumption of reasonableness. *United States v. Rosenbaum*, 585 F.3d 259, 267 (6th Cir. 2009). “A sentence is substantively

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unreasonable if the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.” *United States v. Camiscione*, 591 F.3d 823, 832 (6th Cir. 2010) (internal quotation marks omitted).

As already stated, defendant’s claim that the district court failed to consider his rehabilitative conduct is unsupported. Defendant also argues that the district court failed to make correct statutory findings to support imposing a consecutive term of incarceration. This argument is similarly without merit. The sentencing Guidelines permit a district court to impose a consecutive sentence in its discretion. U.S.S.G. § 5G1.3(c) (policy statement). “Where . . . the court makes generally clear the rationale under which it has imposed the consecutive sentence and seeks to ensure an appropriate incremental penalty for the instant offense, it does not abuse its discretion.” *United States v. Owens*, 159 F.3d 221, 230 (6th Cir. 1998). The district court in this case made its rationale very clear: “The Court carefully considered the defendant’s arguments, and considered them at length. But the Court’s objective remained to remove [defendant] from society permanently, and this necessitated rejecting his request for concurrent sentences.” As such, the district court acted within its discretion in imposing a consecutive term of incarceration.

Defendant’s remaining arguments that his sentence was simply “too long” and greater than necessary to achieve the purposes of sentencing amount to no more than a request for this court to substitute its judgment for that of the district court. Such action is beyond this court’s authority. Further, this court’s previous order declaring defendant’s argument for concurrent sentencing to be

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non-frivolous is not reason to adopt defendant's position. Absent an abuse of discretion, the fact that we might reasonably conclude that it would have been appropriate to run defendant's armed robbery sentences concurrently to the greatest extent possible is insufficient to justify reversal of the district court's judgment. *See United States v. Evans*, 699 F.3d 858, 868 (6th Cir. 2012). Accordingly, we conclude that defendant's sentence was substantively reasonable.

IV.

For these reasons, we AFFIRM.