NONPRECEDENTIAL DISPOSITION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

Submitted April 13, 2023
Decided April 27, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

Nos. 22-1088 & 22-1089

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEVEN CROSBY,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Nos. 1:20CR00183-001 & 1:17CR00138-001

James Patrick Hanlon,
Judge.

O R D E R

These consolidated appeals involve two criminal sentences. Steven Crosby received the first sentence (six years in prison and three years of supervised release) after he pleaded guilty to possessing firearms as a felon. See 18 U.S.C. § 922(g)(1). He received the second (a consecutive 20-month prison term) after his supervised release

was revoked for violating conditions of release from an earlier prison term. His counsel asserts that the appeals are frivolous and moves to withdraw. See *Anders v. California*, 386 U.S. 738 (1967). Because counsel's brief explains the nature of both appeals, addresses the issues that appeals of this kind might be expected to involve, and appears thorough, we focus our review on the subjects she discusses. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014). Crosby did not respond to counsel's motion. See CIR. R. 51(b). Although a defendant has no absolute right to counsel in an appeal from a revocation of supervised release, see *Gagnon v. Scarpelli*, 411 U.S. 778, 789–90 (1973), we still follow the *Anders* framework in that context, see *United States v. Brown*, 823 F.3d 392, 394 (7th Cir. 2016). We grant counsel's motion and dismiss Crosby's appeals.

Crosby's guilty plea arose after police, in July 2020, saw Crosby enter his car with what looked like a gun. (At the time, he was on supervised release from a conviction for possessing a gun as a felon.) At first Crosby drove away, and the officers tried to stop him. He briefly slowed down and pulled over, but then sped off, starting a high-speed chase. Several minutes later (and after narrowly missing several other cars), Crosby left the car and tried to flee on foot. Officers arrested him and found two guns in his car. They also found about $1,700 in cash, marijuana, and a digital scale. Crosby was indicted on one count of 18 U.S.C. § 922(g)(1), to which he later pleaded guilty.

A probation officer prepared the presentence investigation report. The officer calculated Crosby's total offense level as 15: the base offense level was 14, see U.S.S.G. § 2K2.1(a)(6); plus two levels because one of the guns was stolen, see *id.* § 2K2.1(b)(4)(A); plus two more levels because Crosby created a substantial risk of death or serious bodily injury to others when he fled in his car, see *id.* § 3C1.2; and minus three levels because he accepted responsibility, see *id.* § 3E1.1(b). Crosby's criminal history placed him in category VI: he received 14 points for prior convictions and two more points because he was on supervised release when he committed this offense. See *id.* § 4A1.1(d). The guidelines range was thus 41 to 51 months. See *id*. Ch. 5, Pt. A.

The parties filed sentencing memoranda regarding the PSR. The government argued that Crosby's offense level should be enhanced four levels because Crosby carried the gun in connection with the Indiana felony of possessing marijuana for sale. See IND. CODE § 35-48-4-10; U.S.S.G. § 2K2.1(b)(6)(B). To support the enhancement, it produced a lab report stating that the marijuana weighed over 30 grams (enough for a felony in Indiana). See IND. CODE §§ 35-48-4-10(c)(2)(A), 35-50-2-7(b). It also furnished

social media posts suggesting that Crosby sold marijuana. And it submitted photos of items in Crosby's car further signifying drug sales and the gun's connection to the sales. Crosby responded by asking for concurrent sentences to avoid unwarranted sentencing disparities, or a downward variance on consecutive sentences. In mitigation, his counsel argued that Crosby believed he needed a gun for protection (he had previously been shot), was relatively young, and used marijuana to self-medicate.

Sentencing came next. After accepting Crosby's plea, the court considered the four-level enhancement that the government urged. Crosby unsuccessfully argued that insufficient evidence supported the Indiana felony of possessing marijuana because the lab report did not measure THC, the psychoactive content in the marijuana, which Crosby contended was needed to prove he violated the state statute. He also argued to no avail that the social media posts were irrelevant because they occurred a few days before the arrest. The court applied the enhancement, yielding a new guidelines range of 63 to 78 months. The court sentenced Crosby to 72 months in prison followed by three years of supervised release. It also accepted Crosby's admission that he violated his conditions of release by committing a new federal crime and sentenced him to 20 months in prison, consecutive to his § 922(g)(1) sentence, for that violation. It did not impose an additional supervised-release term.

Counsel tells us that Crosby does not wish to contest his guilty plea for the § 922(g)(1) charge, and thus she properly does not evaluate the plea colloquy. See *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012). Crosby does, however, wish to contest his sentence on that charge. We would review factual findings underlying sentencing enhancements for clear error and the application of facts to the Guidelines, or other procedural errors, de novo. *United States v. Sandidge*, 784 F.3d 1055, 1061 (7th Cir. 2015); *United States v. Marin-Castano*, 688 F.3d 899, 902 (7th Cir. 2012). We would review the substantive reasonableness of a sentence for an abuse of discretion. See *Marin-Castano*, 688 F.3d at 902.

Counsel rightly concludes that Crosby cannot reasonably challenge the district court's finding that he possessed the guns in connection with the Indiana felony offense of possessing marijuana with intent to sell. First, Crosby cannot plausibly argue the court clearly erred in finding that, based on a preponderance of the evidence, he was selling marijuana: Crosby did not dispute that the substance in his car was marijuana, and its weight, the $1,700 in cash, the digital scale, and the nearly contemporaneous social media posts (marijuana-like photos with captions suggesting sales) implied his

felonious intent to sell it. See, e.g., *United States v. Bernitt*, 392 F.3d 873, 879–80 (7th Cir. 2004) (drug quantity and paraphernalia show intent to distribute). Counsel correctly concludes that the government's failure to provide the THC percentage is irrelevant because Crosby never argued in district court that the substance was not marijuana. See *Fedij v. State*, 186 N.E.3d 696, 709 (Ind. Ct. App. 2022). Second, given the close proximity of the guns to the marijuana, it would be "a non-starter," *United States v. LePage*, 477 F.3d 485, 489–90 (7th Cir. 2007), for Crosby to argue that the court clearly erred in finding that he possessed the gun in connection with his intended sale of that marijuana.

Counsel also addresses whether Crosby could dispute any other component of the guidelines calculation and correctly concludes that he could not. Aside from disputing the four-level enhancement (which we have just discussed), Crosby made no objections to the guidelines computation; thus, any objections are waived or forfeited. See *United States v. Oliver*, 873 F.3d 601, 607 (7th Cir. 2017). In any case, counsel observes, the probation officer correctly calculated the base-offense level, U.S.S.G. § 2K2.1(a)(6); enhancements for possessing a stolen firearm, recklessly endangering others in the high-speed chase, and possessing a firearm in connection with another felony, *id.* §§ 2K2.1(b)(4)(A), (6)(B), 3C1.2; reduction for acceptance of responsibility, *id.* § 3E1.1(b); and the criminal history category, *id.* § 4A1.1(d).

Next, apart from evaluating the guidelines calculation, counsel assesses other potential challenges to the reasonableness of the sentence but properly considers them fruitless. Defense counsel acknowledged at the end of the sentencing hearing that the court addressed Crosby's mitigating arguments, including his challenging past, relative youth, and self-medicating use of marijuana. See *United States v. Stinefast*, 724 F.3d 925, 931 (7th Cir. 2013). The 72-month prison-term is within the applicable guidelines range of 63 to 78 months; thus, we would presume that it is reasonable. See *LePage*, 477 F.3d at 491. Nothing here could rebut that presumption because the court reasonably balanced the sentencing factors under 18 U.S.C. § 3553(a): It emphasized the dangerousness of the car chase, Crosby's history of repeating the same crimes, the need to promote respect for the law, and the need to protect the public.

As for the three-year term of supervised release, counsel correctly observes that Crosby cannot plausibly challenge it or its conditions. He did not object to the conditions at sentencing, and the court confirmed that Crosby read the conditions, reviewed them with counsel, and waived reading them into the record, so any appellate

challenge is waived. See *United States v. Flores*, 929 F.3d 443, 449 (7th Cir. 2019). We add that the three-year term does not exceed the maximum supervised-release term for § 922(g)(1) offenses. See 18 U.S.C. § 3583(b)(2).

We now turn to the consecutive 20-month sentence for the supervised-release violation. Counsel tells us that Crosby does not wish to challenge the revocation itself; therefore, we do not review whether his admission to violating his conditions of release was knowing or voluntary. See *United States v. Wheeler*, 814 F.3d 856, 857 (7th Cir. 2016); *United States v. Knox*, 287 F.3d 667, 670–72 (7th Cir. 2002).

Counsel concludes that Crosby cannot reasonably contest the 20-month sentence. Crosby admitted that he had committed the new offense of possessing a firearm as a felon while on supervised release, a Grade B violation. See U.S.S.G. § 7B1.1(a)(2). The 20-month prison term was within the range recommended in the Guideline's policy statement for a Grade B violation committed by someone with Crosby's criminal history category of V. See *id.* § 7B1.4(a). Thus, we would presume that the term is reasonable. See *United States v. Yankey*, 56 F.4th 554, 560 (7th Cir. 2023). Counsel notes that Crosby wishes to argue that the sentence should not be consecutive to the § 922(g) sentence but correctly concludes that this argument (or any other challenge to the sentence's substantive reasonableness) would be pointless. The policy statement recommends that a prison term for a supervised-release violation run consecutive to the sentence imposed in the new case. See U.S.S.G. § 7B1.3(f). And the court reasonably exercised its discretion to make the two sentences consecutive here, see *United States v. Taylor*, 628 F.3d 420, 423–24 (7th Cir. 2010), when it balanced the § 3553(a) factors, as discussed above.

We therefore GRANT counsel's motion and DISMISS the appeals.