NONPRECEDENTIAL DISPOSITION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 28, 2023*
Decided April 28, 2023

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-2165

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAMONTE T. POWELL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:21CR56-001

Damon R. Leichty,
Judge.

O R D E R

Lamonte Powell pleaded guilty to possessing drugs with the intent to distribute and was sentenced to 168 months in prison and 4 years of supervised release. Powell appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 744 (1967). Counsel's brief explains the nature of the case and raises potential issues that we would expect an appeal like this to involve. Because the analysis appears thorough, and Powell has not come forth with

additional issues to raise in an appeal, *see* CIR. R. 51(b), we limit our review to the subjects that counsel discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Over the course of 2021, Powell was investigated for suspected drug trafficking after methamphetamine dealers identified his apartment in South Bend, Indiana, as the source of their supply. Surveillance revealed heavy foot traffic there. In January, local law enforcement completed a controlled buy of 0.5 grams of heroin from Powell at his apartment. Several months later, federal authorities conducted another controlled buy of 0.5 grams of heroin, which tested positive for fentanyl as well. Officers then obtained a search warrant for the address. On their way to execute it, they found Powell slumped over the wheel of his parked car, in need of emergency assistance for an overdose.

In Powell's car, officers recovered one gram of crack cocaine and $1,400 in cash, which included some bills from the second controlled buy. In his apartment they found 8 grams of heroin, small amounts fentanyl, 12 grams of marijuana, 344 grams of methamphetamine packaged in one-ounce baggies, $1,958 in cash, drug scales and a ledger, multiple cell phones, and a handgun and ammunition.

Without an agreement with the government, Powell pleaded guilty to possessing with intent to distribute more than 50 grams of methamphetamine, 21 U.S.C. § 841(a)(1), (b)(1)(B). He admitted that methamphetamine is a controlled substance, that he possessed over 50 grams of it, and that he intended to distribute it. The government then dismissed the charge related to Powell's possession of the handgun.

Using a total converted drug weight of 6,694.86 kg, the final presentence investigation report (PSR) calculated a base offense level of 32 under § 2D1.1(c)(4) of the Sentencing Guidelines. Added to this were a two-level increase for possessing a dangerous weapon, U.S.S.G. § 2D1.1(b)(1), and another two-level increase for maintaining a premises (the apartment) for the purpose of distributing controlled substances, *id.* § 2D1.1(b)(12). After a three-level reduction for acceptance of responsibility, *id.* § 3E1.1, the total offense level was 33. Combined with a criminal history category of II, this yielded an imprisonment range of 151 to 188 months.

Powell objected to both upward adjustments to his offense level. First, he argued that there was no evidence that the handgun in his apartment was used in connection with any drug deal. *See id.* § 2D1.1 cmt. n.11. The government countered that the gun was loaded and kept in a drawer with various drugs and a scale, and that loose ammunition and drugs were strewn throughout the apartment—suggesting that the gun was "primed for use."

Powell also argued that his apartment was not maintained for drug distribution because he primarily used it as his personal residence. In response, the government highlighted the guideline's explanatory note that the enhancement applies if storing or distributing a controlled substance is one of the primary uses (not the sole use). It argued that because Powell rented the apartment and controlled the space as its sole occupant, he should receive the increase. *See id.* cmt. n.17.

The district court decided to apply both adjustments. With respect to the gun possession, the court explained that, because of the evidence that a firearm was present where the drug offense occurred, Powell had to show that it was "clearly improbable" that the gun was connected to the offense. The court found that the gun's location demonstrated its purpose was to "embolden [Powell's] drug enterprise" and thus was clearly connected to the offense. As to maintaining a premises for drug distribution, the court highlighted that Powell had a possessory interest in the apartment and full control over activities there, which included selling drugs just outside the door. And because the apartment contained a variety of drugs and "tools of the trade," it was evident that "a primary purpose of this apartment was to store and then distribute drugs."

Once these objections were resolved, the parties advocated for different sentences based on the factors under 18 U.S.C. § 3553(a). The government requested a sentence at the high end of the guidelines range, arguing that Powell's criminal history was more extensive than the guidelines suggested and emphasizing the large quantity of drugs. Powell asked for a below-guidelines sentence of 97 months. He argued that his offense was nonviolent, that his age (52) made recidivism less likely, and that he experienced significant trauma as a child.

The court "seriously considered" Powell's requested sentence, commending him for his strong family ties and "resilience," but it determined that a downward variance would not reflect the seriousness of his offense. It explained that criminal activity involving drugs and a firearm is particularly dangerous and that the types and quantity of drugs here presented a high risk to the community. The court also agreed with the government that Powell's criminal history, with 14 adult convictions, reflected a high risk of recidivism and warranted specific deterrence, especially because Powell was not deterred by a previous 12-year sentence. Ultimately, the court imposed a within-guidelines sentence of 168 months in prison and 4 years of supervised release.

Having confirmed that Powell wishes to undo his guilty plea, counsel first considers whether there is any nonfrivolous argument that the plea was invalid. *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d

667, 671 (7th Cir. 2002). Because Powell did not attempt to withdraw the plea in the district court, we would review the decision to accept the plea for plain error. *United States v. Davenport*, 719 F.3d 616, 618 (7th Cir. 2013). The transcript reflects that the court faithfully complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedure. The court explained, and confirmed that Powell understood, the nature of the charges and the potential penalties, his right to plead not guilty and the consequences of pleading guilty, his trial rights, and the role of the sentencing guidelines. FED. R. CRIM. P. 11(b). Powell confirmed that he was not coerced and not promised anything in exchange for his plea, and these sworn statements are presumed true. *See United States v. Smith*, 989 F.3d 575, 582 (7th Cir. 2021). The court also ensured, through Powell's admissions, that an adequate factual basis existed to support the plea. Therefore, counsel properly concludes that there is no error, plain or otherwise. *United States v. Neal*, 907 F.3d 511, 515 (7th Cir. 2018).

Counsel next considers whether Powell could raise any nonfrivolous challenge to the offense-level increases for possessing a firearm and maintaining a premises for drug distribution. These adjustments are based on factual assessments that we would review for clear error. *United States v. Sanchez*, 989 F.3d 523, 543 (7th Cir. 2021).

Counsel rightly concludes, first, that it would be frivolous to challenge the adjustment for possessing a firearm, U.S.S.G. § 2D1.1(b)(1). The adjustment applies "if the weapon was present," unless the defendant can show that "it is clearly improbable that the weapon was connected with the offense." *Id.* cmt. n.11(A). Here, the court properly applied this framework, *see United States v. Zamudio*, 18 F.4th 557, 561–62 (7th Cir. 2021), and the undisputed facts that Powell had a handgun in a dresser drawer with drugs, in a location where he stored and sold drugs, was sufficient evidence that the gun was connected to Powell's drug trafficking. *See id.*

Counsel also finds no nonfrivolous ground for challenging the adjustment for maintaining a premises for drug distribution, which includes storing drugs there, U.S.S.G. § 2D1.1(b)(12) & cmt. n.17. We agree that the court properly considered whether "a" primary purpose of the apartment was maintaining a drug operation. *See Zamudio*, 18 F.4th at 562–63. It considered the frequency of drug interactions—highlighting the controlled buys right outside the apartment and the heavy foot traffic in and out of the premises—and it noted the quantity of drugs and presence of tools of the trade within the apartment. The findings supporting this offense-level increase would easily survive a challenge for clear error. *See id.*

Noting that the sentence of 168 months did not exceed the statutory maximum sentence of 40 years, 21 U.S.C. § 841(a)(1), (b)(1)(B), counsel concludes that no other potential procedural error is worthy of raising—including a possible overstatement of the amount of drugs that corresponded to the amount of cash in Powell's apartment. According to counsel, a more accurate estimate would result in subtracting roughly 26 grams from the total converted drug weight. But counsel rightly concludes that any error could not have possibly affected the sentence: It would have made no difference in the offense level, *see* U.S.S.G. § 2D1.1(a)(5), (c)(4), and the district court believed that even the higher drug quantity underrepresented the extent of Powell's drug trafficking.

Finally, counsel considers arguing that the sentence was substantively unreasonable but again concludes that any challenge would be frivolous. On appeal we presume that a sentence within a properly calculated guidelines range is not unreasonably high, *United States v. Major*, 33 F.4th 370, 384–85 (7th Cir. 2022), and nothing here undermines that presumption. The court carefully considered mitigation arguments and Powell's request for a variance from the guidelines range, but it gave more weight to the seriousness of the offense, the danger to the community, and the need for specific deterrence.

Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeal.