NONPRECEDENTIAL DISPOSITION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 March 16, 2023*
Decided August 10, 2023

Before

JOEL M. FLAUM, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 22-2322

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Central District of Illinois.
v.	No. 19-20061
CHRISTOPHER ASBURY, *Defendant-Appellant*.	Colin S. Bruce, *Judge*.

O R D E R

This is Christopher Asbury's second appeal from the sentence he received for distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1). In the initial proceedings, a jury found him guilty on one count, which charged him with

* Pursuant to Internal Operating Procedure 6(b), the panel has concluded that this appeal is successive to No. 21-1385, *United States v. Asbury*, 27 F.4th 576 (7th Cir. 2022). After examining the briefs and record, we have concluded that oral argument is unnecessary. The appeal is thus submitted on the briefs and record. See FED. R. APP. P. 34(a)(2).

distributing 50 grams or more of the pure form of that drug. *United States v. Asbury*, 27 F.4th 576 (7th Cir. 2022) (*Asbury I*). At sentencing, the judge found that he had sold 82.2 grams of the pure drug (so-called ice), but that he was also responsible for nearly 16 additional kilograms of a mixture containing methamphetamine. The latter was treated as relevant conduct under U.S.S.G. § 1B1.3, and the addition of this relevant conduct yielded an offense level of 38. Coupled with a criminal history category of VI (based on a whopping 34 criminal history points), Asbury's advisory guidelines range was 360 months to life. The court selected a sentence of 360 months, the bottom of that range.

We concluded in *Asbury I* that the government had not offered any evidence to support the relevant conduct that drove the sentence. Nor were we confident that the district court's brief comment that its sentence would have been the same even if it had erred in its guidelines calculations was enough to render any error harmless. We thus remanded for resentencing "using an offense level that does not rely on the contested relevant conduct." 27 F.4th at 583. Following our instructions, the district court conducted a new sentencing hearing, at the end of which it imposed a sentence of 234 months, which lay within the recalculated guidelines range of 210 to 262 months. Back before this court, Asbury contends that the district court erred by failing adequately to address his post-sentencing rehabilitation and that his sentence is substantively unreasonable. He now concedes, however, that he waived the former argument. Reply Br. at 8. The only question before us is therefore whether the sentence the judge selected was substantively unreasonable for failing to give adequate weight to Asbury's post-sentencing rehabilitation.

It is difficult under the best of circumstances to show that a sentence is substantively unreasonable, once the guidelines range has properly been calculated and the judge is deciding how to exercise his discretion under 18 U.S.C. § 3553(a). And this is not the case in which the defendant has met that burden. In coming to this conclusion, we are not saying that Asbury had no evidence of post-sentencing rehabilitation. To the contrary, he did. The sentencing memorandum counsel filed on his behalf for purposes of the resentencing proceedings pointed to Asbury's extensive efforts to take advantage of the greatest possible number of programs offered in the prison—not just those that he was required to complete. He worked hard to address his addiction, using the resources offered in the Alcoholics Anonymous and Helping Men Recover programs; he completed the Drug Abuse Education course and the Money Smart course. With the help of these programs and his own determination, he stayed sober, drug-free, and sanction-free during his time in prison. As the district court acknowledged, he is to be commended for that effort.

The main problem with Asbury's argument here is that the district court did explicitly take into account his post-sentencing rehabilitation—the court just did not give those efforts as much weight as Asbury thought it should have done. For example, during its discussion of the section 3553(a) factors, the following exchange occurred:

> [The court]: Likewise, he has, while he's been incarcerated, he's received a GED. He's taken other self-help programs. They're referenced in the sentencing memorandum. I didn't write them all out, but I noted how many he took. It seemed to me, from my reading of the classes he's taken, that he was taking just about every class he could take; and now he's sort of said that in his allocation.
>
> [Defendant Asbury]: I've been very busy, Your Honor.
>
> [The court]: Good to hear.
>
> So that, that's a factor that weighs in his favor.

Immediately after this statement, the court said: "Now, I am also cognizant of the fact that incarcerated individuals are supposed to comply with prison rules, so that sort of cuts both ways." The natural way to read this statement is as one relating to Asbury's lack of sanctions, rather than as a reference to his participation in the prison's classes and educational programs. Compliance with prison rules was good, in the court's view, but not something that carried much weight, because "[prisoners] shouldn't be rewarded for simply doing what is expected." The lack of sanctions was thus "a wash"—neither positive nor negative.

Perhaps another district judge would have chosen to give greater weight to Asbury's efforts; perhaps one or more of us would have done so, had we been presiding over this case. But we see nothing unreasonable about the assessment that the responsible judge made here. Indeed, the resentencing record as a whole shows a painstaking effort to reweigh all pertinent considerations in light of our conclusion that Asbury's sentence should be based only on the basic drug quantity of 82.2 grams, not the enormous amount that had been proffered as relevant conduct before. Asbury was the beneficiary of the judge's effort: the court lopped 126 months off his previous sentence of 360 months when it settled on a new sentence of 234 months. Asbury wanted a greater reduction, down to 150 months, but the sentence the court selected lay roughly at the mid-point of the recalculated guidelines range of 210 to 262 months. The court thoroughly explained why it thought that this sentence was the correct one for Asbury, based on the seriousness of his offense, the harm methamphetamine inflicts both on individual people and on entire communities, Asbury's very extensive criminal history, his commission of perjury at the original trial, and the need to provide both

specific and general deterrence. And by staying within the range recommended by the Sentencing Guidelines, the court forestalled any argument about unwarranted disparities in sentences. That is true even assuming that the average sentence for Asbury's offense of conviction falls within a much lower 87- to 97-month range. Averages are fine, but they mask many important details about the individual members of the group. Here, the district court was sentencing Asbury, not a hypothetical average man, and it rationally concluded that the correct sentence for Asbury was the one suggested by the Guidelines.

In short, the district court did just what we asked it to do in *Asbury I*. We therefore AFFIRM its judgment resentencing Asbury to 234 months' imprisonment.