

NONPRECEDENTIAL DISPOSITION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 February 14, 2023

Decided February 17, 2023

Before

DIANE P. WOOD, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-2542

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIO A. FOSTER,
Defendant-Appellant.

Appeal from the United States District
Court for the Southern District of
Illinois.

3:21-CR-30137-DWD

David W. Dugan,
Judge.

ORDER

Mario Foster pleaded guilty to possessing drugs with the intent to distribute and was sentenced to 156 months' imprisonment and three years of supervised release. Foster 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 Foster has not responded to

the motion with additional arguments, *see* CIR. R. 51(b), we limit our review to the subjects counsel discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

On July 22, 2021, law enforcement officers stopped Foster's pickup truck because it had been linked to a parental abduction. Foster and his three-month-old infant were the only occupants of the truck. When the officers lifted the infant from the car seat on the front passenger seat, they discovered on the seat two clear bags that were later determined to contain about 10 grams of fentanyl and 13 grams of cocaine base. Foster later stipulated that "the crack cocaine and fentanyl exceeded the amount a drug user would purchase for individual use" and was consistent with what "would be resold to other users." Without an agreement with the government, Foster pleaded guilty to two counts of possessing with intent to distribute a controlled substance: one count for the cocaine base and one count for the fentanyl. 21 U.S.C. §§ 841(a)(1), (b)(1)(C).

Using the total converted drug weight of the two drugs, *see* U.S.S.G. § 2D1.1(c)(10), the presentence investigation report grouped Foster's two offenses and calculated a base offense level of 20 and an initial criminal history category of V under §§ 3D1.2(d) and 4A1.1 of the Sentencing Guidelines. Then the PSR determined that the career offender guideline applied instead, because Foster had three prior convictions for felony controlled-substance offenses. *See* U.S.S.G. § 4B1.1. This increased both the offense level and criminal history category, and the guideline range after a three-level reduction for acceptance of responsibility was 151 to 188 months' imprisonment. *See id.* §§ 4B1.1, 5A.

Neither party objected to the PSR's calculations and findings, but at the sentencing hearing, they argued for very different sentences. Foster argued that even though he technically qualified as a career offender, he had no prior convictions for violent crimes and is not the type of recidivist to whom the career offender guideline was intended to apply. Foster also pointed out that over half of career offenders are sentenced outside the recommended range, with the vast majority receiving below-guideline sentences. Thus, Foster urged the court to impose a sentence within the unenhanced guidelines range of 46 to 57 months. Conversely, the government argued that Foster should be sentenced to 188 months' imprisonment, at the top of the guidelines range with the career offender enhancement. The government noted that the career offender guideline requires only two qualifying convictions, and Foster had three. Further, it said, fentanyl is extremely dangerous, Foster placed the drugs in close proximity to his infant, and his criminal history indicated a lack of respect for the law.

The court commended Foster's detailed arguments but determined that the sentencing range applying the career offender enhancement was appropriate. Before imposing the sentence, the court assured Foster that it was not considering the record's untested references to parental abduction. It also noted mitigating circumstances such as Foster's family and community support. But the court highlighted several aggravating factors such as the danger of fentanyl—particularly around a small child—Foster's extensive criminal history, and the proximity of the instant offense—two weeks—to Foster's discharge from state parole. The court imposed a within-guideless sentence of 156 months' imprisonment and three years of supervised release.

Counsel first represents that he discussed with Foster the risks and benefits of challenging his plea on appeal and reports that Foster wishes to contest only his sentence. Counsel therefore properly omits any detailed discussion of whether the plea was valid. *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002). Nevertheless, counsel considers arguing that possessing two controlled substances at one time is a single offense and not two separate offenses. But because Foster did not raise this argument in the district court, it is forfeited, *United States v. Lockett*, 859 F.3d 425, 427–28 (7th Cir. 2017), and we agree with counsel that under our precedent—and that of many sister circuits—simultaneous possession of two drugs is two crimes. *See id.* at 428–29.

Counsel also properly concludes that Foster could not raise a nonfrivolous challenge to the length of his sentence. Counsel first opines that the district court correctly calculated a sentencing range of 151 to 188 months of imprisonment. The court agreed with the government that Foster was a career offender. U.S.S.G. § 4B1.1. Based on that finding, the court raised the offense level to 32 before reducing it by 3 levels for acceptance of responsibility, U.S.S.G. § 3E1.1, and it increased the criminal history category from V to VI. Counsel considers whether he could argue that Foster should not have received the career offender enhancement because the state statutes under which he was convicted criminalize more conduct than the comparable federal laws. But counsel correctly recognizes that we have rejected this argument multiple times and that asking us to reconsider it would be frivolous. *See, e.g., United States v. Wallace*, 991 F.3d 810, 817 & n.3 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 362 (2021); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1239 (2021).

Next, counsel considers arguing that the sentence was substantively unreasonable but concludes that Foster could not possibly rebut the presumptive reasonableness of a sentence within a properly calculated guidelines range. *United States*

v. Major, 33 F.4th 370, 384–85 (7th Cir. 2022). Counsel is correct. In applying the sentencing factors under 18 U.S.C. § 3553(a), the district court carefully considered mitigation arguments but emphasized the seriousness of the offense and highlighted the need for deterrence. An argument that the court abused its discretion in imposing a sentence near the bottom of the guidelines range would be frivolous.

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