

NONPRECEDENTIAL DISPOSITION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 9, 2023

Decided March 10, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-2671

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FULTON LEE GULLY,
Defendant-Appellant.

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

No. 3:21-CR-30047-DWD

David W. Dugan,
Judge.

ORDER

The district court sentenced Fulton Gully to 48 months' imprisonment, three years' supervised release, and a \$100 fine after he pleaded guilty to possessing a firearm as a felon. 18 U.S.C. § 922(g)(1). He appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). Counsel's brief explains the nature of the case and addresses potential issues that this kind of appeal would typically involve. Gully has not responded to the motion with additional potential issues. *See* CIR. R. 51(b). Therefore, because counsel's analysis

appears thorough, we limit our review to the issues he discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Gully was arrested but released without charges after he fired a shotgun at someone during an argument in July 2020. In October, Illinois State Police officers arrested Gully on an unrelated warrant and recovered a sawed-off shotgun from his residence. A federal grand jury later indicted him on one count of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). Before pleading guilty without a plea agreement, he stipulated in writing that (1) he was convicted in 2003 of the federal felony offense of unlawfully possessing a firearm; (2) he knew during the months leading up to his arrest in this case that he was a convicted felon; and (3) he had knowingly possessed the 12-gauge shotgun recovered at the time of his arrest. Based on these facts, the district court accepted his guilty plea.

The presentence investigation report calculated a total offense level of 21 under § 2K2.1(a)(4)(B) of the Sentencing Guidelines. This included a four-level increase for possessing the shotgun in connection with another felony (reckless discharge of a firearm), U.S.S.G. § 2K2.1(b)(6)(B), and a three-level reduction for accepting responsibility, *id.* § 3E1.1(a)–(b). Gully had three criminal history points from 22 adult convictions, placing him in criminal history category II. *Id.* §§ 4A1.1(a), 4A1.2(k)(1). This calculation resulted in a guidelines range of 41–51 months’ imprisonment, *id.* Ch. 5, Pt. A (Table), which was well within the statutory maximum of ten years that applied at the time of Gully’s offense, 18 U.S.C. § 924(a)(2) (2018). Under the Guidelines, the range of supervised release was one to three years, and three years was the statutory maximum as well. U.S.S.G. § 5D1.2(a)(2); 18 U.S.C. § 3583(b)(2). The PSR stated that Gully was eligible for one to five years’ probation under 18 U.S.C. § 3561(c)(1) but that the Guidelines did not allow for probation, U.S.S.G. § 5B1.1, cmt. n.2.

Gully received the PSR before his sentencing hearing and did not object to any aspect of it. But in his sentencing memorandum and at his hearing, he asked for probation. Acknowledging that a sentence of probation represented a substantial variance from the guidelines range, he argued that it was warranted because of his age (61), his “serious, sustained, and verified addiction to cocaine,” and the absence of convictions for any serious crimes in the 20 years since his last federal offense. He also asserted that his most serious convictions were related to or aggravated by his addiction, and that he believed he needed a gun to protect himself from crime because his age made him feel vulnerable, and he had previously been the victim of unpunished crimes.

At the sentencing hearing, the court adopted the PSR after confirming that neither party objected. The court heard argument from both sides and then considered the factors in 18 U.S.C. § 3553(a). The court noted that firing a sawed-off shotgun in the direction of a person is serious and that Gully had many prior convictions and multiple revocations of supervised release. It concluded that Gully could not be left in the community because of his problem with compliance: even accepting that Gully was not dangerous when his addiction was under control, he had been so far unable to control it. The court commented that feeling a need to protect oneself is not an excuse for breaking the law, and it declined to mitigate the sentence because of Gully's age. But it believed some slight mitigation was appropriate because the investigating officers said that Gully did not mean to hurt anyone.

The court announced that it would sentence Gully to 48 months' imprisonment, three years' supervised release, and a \$100 fine. The court separately explained its decision to impose supervised release: "[I]t has the particular potential to help Mr. Gully because of his controlled substance abuse, his lack of consistent employment, all these things I've found in the past are served well by supervised release and I think the longer that Mr. Gully can be beholden or responsible to someone else, including probation, I think the better for him." The court confirmed that there were no objections to the proposed conditions of supervised release and then imposed them. Before adjourning, the court asked if it had sufficiently addressed the § 3553(a) factors and Gully's arguments in mitigation, and Gully's attorney said the court had done so.

In his *Anders* brief, counsel represents that he consulted with Gully and confirmed that Gully does not wish to withdraw his guilty plea; thus, counsel properly refrains from discussing potential challenges to the plea's validity. See *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 670–71 (7th Cir. 2002). This leaves only potential challenges to the sentence.

Counsel first considers arguments about the calculation of Gully's guidelines range but correctly concludes that any such attacks would be frivolous. Gully did not object to the PSR's guidelines calculations or make any argument against them at sentencing, so he would be entitled to plain-error review at most. See *United States v. Oliver*, 873 F.3d 601, 607 (7th Cir. 2017). Like counsel, we cannot discern any potential error, let alone an obvious one that affected Gully's substantial rights.

Counsel considers arguing that the court failed to explain the sentence or address Gully's arguments in mitigation but correctly recognizes that these procedural challenges would be futile. When asked at the sentencing hearing, Gully affirmed that the court adequately explained its assessment of the § 3553(a) factors and addressed all his mitigation arguments. *See United States v. Donelli*, 747 F.3d 936, 940 (7th Cir. 2014). Waiver aside, we agree with counsel that Gully lacks any nonfrivolous argument about these issues on appeal.

Next, counsel correctly recognizes that any challenge to the substantive reasonableness of Gully's sentence also would be futile. We would review this issue for an abuse of discretion. *United States v. Major*, 33 F.4th 370, 379 (7th Cir. 2022). Gully's 48-month prison sentence is within the properly calculated guidelines range and therefore would be presumed reasonable on appeal. *Id.* That presumption is rebutted if the sentence is unreasonable "when measured against the factors set forth in § 3553(a)." *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). Here, though, the court discussed the § 3553(a) factors in detail, highlighting the seriousness of the offense, Gully's intractable addiction that led to criminal activity, and his long criminal history and multiple revocations of supervised release.

Counsel does not discuss any potential issues related to the imposition of a fine or to the term or conditions of supervised release, and we do not see any potential arguments worthy of discussion either.

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