

**NONPRECEDENTIAL DISPOSITION**  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 October 4, 2023  
Decided October 10, 2023

**Before**

DIANE S. SYKES, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 23-1225

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

*v.*

DAVID L. BARBER,  
*Defendant-Appellant.*

Appeal from the United States District  
Court for the Western District of  
Wisconsin.

No. 14-cr-89-wmc-1

William M. Conley,  
*Judge.*

**ORDER**

David Barber appeals the 6-month sentence he received for violating the conditions of his supervised release. His appointed counsel asserts that the appeal is frivolous and moves to withdraw. See *Anders v. California*, 386 U.S. 738, 744 (1967).

A defendant does not have an unqualified constitutional right to counsel in a revocation proceeding, and so the *Anders* safeguards need not apply. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *United States v. Brown*, 823 F.3d 392, 394 (7th Cir. 2016).

Still, it is our practice to follow them. *Brown*, 823 F.3d at 394. Because counsel's analysis appears thorough, and Barber did not respond to counsel's motion, 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). We grant counsel's motion and dismiss the appeal.

In March 2015, Barber pleaded guilty in federal court to distributing heroin. He completed a 48-month prison sentence and, in March 2019, began serving 3 years of supervised release. He soon violated multiple conditions of supervision, including the requirement that he abide by all federal, state, and local laws.

In December 2020, a police officer pulled over Barber's car for a traffic violation and observed an open can of an alcoholic drink and a revolver in the center console. Instead of getting out of the car when ordered, Barber sped off. Officers later arrested him outside his apartment, and he was eventually convicted in Wisconsin state court of fleeing and unlawfully possessing a firearm. After serving a 15-month state sentence, he pleaded guilty to the federal offense of possession of a firearm in a school zone. 18 U.S.C. §§ 922(q), 924(a)(4). The same conduct that brought on the state charge and the new federal charge also led to the revocation of his supervised release in the drug-trafficking case. The district judge held a joint hearing to impose sentences in the new case and the revocation proceeding.

As to the revocation, Barber's criminal history score was VI when the term of supervised release term was imposed. See U.S.S.G. § 7B1.4 cmt. n.1. The most serious violation, unlawfully possessing a firearm, was Grade B. See *id.* § 7B1.1(b). The policy statements in Chapter Seven of the Sentencing Guidelines prescribed 21 to 27 months' reimprisonment. See *id.* § 7B1.4. But because the underlying offense was a Class C felony, the maximum revocation sentence of 24 months supplanted the high end of the range. See 18 U.S.C. § 3583(e)(3); U.S.S.G. § 5G1.1(b). At the sentencing hearing, the judge discussed several factors, including the seriousness of the offense, Barber's criminal record, and his history of substance abuse. The judge imposed 6 months' reimprisonment, to run consecutively to a 42-month sentence for the new conviction.

Counsel, in his *Anders* brief, first states that Barber does not wish to challenge the revocation or the admissions on which it is based. Counsel therefore appropriately declines to explore any challenge to the voluntariness of the admissions or to the revocation decision. See *United States v. Wheeler*, 814 F.3d 856, 857 (7th Cir. 2016).

Next, counsel examines and rejects two potential grounds for appeal that Barber suggested: the reference to his history of substance abuse during the sentencing hearing

and the failure to account for his 15-month stint in state prison for the same conduct that led to the revocation.

We agree with counsel that the mention of Barber's substance abuse history was neither inaccurate nor improper and so cannot serve as a basis for appeal. We would review the factual finding that Barber had a history of substance abuse for clear error. See *United States v. Slone*, 990 F.3d 568, 572 (7th Cir. 2021). The presentence investigation report prepared for the underlying drug offense, and the one for the federal gun-possession charge, both detail a history of alcohol and drug abuse and treatment, the specifics of which largely came from Barber himself. Because Barber did not object to the history recounted in either PSR or show that the information about substance abuse was not reliable, it would be frivolous to challenge its accuracy. *United States v. Rogers*, 44 F.4th 728, 740 (7th Cir. 2022). And because courts may consider substance abuse with the § 3553 factors, as long as they do not link sentence length to rehabilitation, Barber could not raise a nonfrivolous argument that the judge's remarks were improper. See *United States v. Shaw*, 39 F.4th 450, 458–59 (7th Cir. 2022).

Counsel next asserts that it would be frivolous to argue that the judge failed to account for Barber's state sentence when crafting the sentence for the revocation. We agree. Assigning credit for time served on state sentences rests exclusively with the Bureau of Prisons, not the federal courts. See *United States v. Wilson*, 503 U.S. 329, 333 (1992); *United States v. Walker*, 917 F.3d 989, 993–94 (7th Cir. 2019). Moreover, the judge here cited the time Barber served in state prison as a factor in mitigation.

Finally, counsel explores the substantive reasonableness of Barber's sentence and properly concludes that it is not grounds for a nonfrivolous appeal. This court will overturn a revocation sentence only if it is "plainly unreasonable." *United States v. Njos*, 68 F.4th 1060, 1064–65 (7th Cir. 2023). Sentences that fall below or within the policy-statement's range are presumed reasonable on appeal. *United States v. Major*, 33 F.4th 370, 384 (7th Cir. 2022). Here, Barber's 6-month sentence is significantly below the effective range of 21 to 24 months. Further, the judge offered a statement of reasons consistent with the § 3553 factors, as required. See *id.* During the sentencing hearing, he discussed Barber's unrelenting substance abuse, the circumstances of the violation, and the need for deterrence, and balanced them against the mitigating factor that Barber had already served a state sentence for the same conduct. We agree with counsel that appealing based on the substantive reasonableness of the sentence would be frivolous.

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