In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1697

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL G. YANKEY,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Illinois.
No. 4:12-cr-40043-JPG-1 — **J. Phil Gilbert**, *Judge*.

ARGUED SEPTEMBER 28, 2022 — DECIDED JANUARY 3, 2023

Before EASTERBROOK, HAMILTON, and BRENNAN, *Circuit Judges*.

HAMILTON, *Circuit Judge*. While on supervised release, appellant Michael Yankey admitted to a probation officer that he had used methamphetamine and cocaine. Yankey's supervised release was revoked, and he was sentenced to 24 months in prison followed by 24 more months of supervision. Yankey appeals this sentence, arguing that the district court disregarded his mitigation arguments and failed to consider

relevant sentencing factors, and that his sentence is substantively unreasonable. We affirm.

I. *Factual and Procedural Background*

Yankey's underlying convictions occurred in 2013. Yankey pleaded guilty to the class C felony of conspiring to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. The Presentence Investigation Report prepared for Yankey's sentencing erroneously calculated the advisory guideline range as 92–115 months. Before sentencing, the parties notified the court that this calculation was too low and Yankey agreed that the proper advisory guideline range was 151–188 months. The court explained at sentencing that the Presentence Investigation Report had applied the wrong base offense level for the quantity of drugs involved. The court nonetheless considered "varying downward to the original presentence report" and sentenced Yankey to 115 months in prison followed by 48 months of supervised release. This prison term was 36 months below the bottom of the proper advisory guideline range. In other words, Yankey caught a break.

In November 2020, Yankey began his four-year term of supervised release. The probation office's summary of Yankey's violation conduct indicates that he associated with people engaged in criminal activity and had a certain person at his home who his probation officer had specifically and repeatedly warned could not be there. During a March 9, 2022 visit from his probation officer, drugs and paraphernalia were found in Yankey's home, and Yankey admitted that on March 7, 2022, he had used methamphetamine and cocaine. The probation office petitioned the district court to revoke Yankey's supervised release.

At the revocation hearing, Yankey pleaded guilty to possessing methamphetamine and cocaine. The Sentencing Guidelines classify both charges as Grade B Violations. U.S.S.G. § 7B1.1(a)(2). Yankey has a criminal history category of VI. Under the Guidelines, Yankey faced a recommended range of imprisonment upon revocation of 21 to 27 months. § 7B1.4(a). However, Yankey's statutory maximum sentence upon revocation was 24 months, 18 U.S.C. § 3583(e)(3), yielding an effective recommended range of 21 to 24 months in prison under the Guidelines. See U.S.S.G. § 7B1.4(b)(3) (statutory maximum becomes top of guideline range that would otherwise exceed maximum).

The government argued for the statutory maximum of 24 months in prison because Yankey's criminal history showed a sustained pattern of violations of parole and supervised release. For example, Yankey was on state parole when he committed the drug offenses that led to his underlying federal conviction. Another time, Yankey was convicted of driving with a revoked license while on probation for a DUI. Yankey's counsel argued for time served and treatment for drug addiction in lieu of imprisonment, or, in the alternative, the postponement of sentencing pending an opportunity for treatment. The judge who considered revoking supervised release was the same judge who had given Yankey the below-guideline sentence for his underlying convictions. Based on his prior leniency and his rejection of Yankey's claim that he had used drugs only this one time while on supervised release, the judge imposed a revocation sentence of 24 months in prison followed by 24 more months of supervised release.

II. *Analysis*

A. *Mitigation Arguments*

Yankey argues first on appeal that the district court ignored the mitigation arguments he raised at the revocation hearing. We review de novo whether the court made a procedural error by failing to consider mitigation arguments. See, e.g., *United States v. Dawson*, 980 F.3d 1156, 1164 (7th Cir. 2020).

The requirements for addressing mitigation arguments differ between initial sentencing and revocation proceedings because the latter are more informal. *Dawson*, 980 F.3d at 1165. During an initial sentencing hearing, the district court must "address a defendant's principal arguments in mitigation that have legal merit." *United States v. Williams*, 887 F.3d 326, 328 (7th Cir. 2018). At a revocation hearing, a defendant has the right to "make a statement and present any information in mitigation." Fed. R. Crim. P. 32.1(b)(2)(E); see also *Morrissey v. Brewer*, 408 U.S. 471, 486–87 (1972). But we have never required district courts to address explicitly those arguments during revocation proceedings. *Williams*, 887 F.3d at 328. Rather, we require more flexibly that district courts approach revocation hearings "with an open mind and consider the evidence and arguments presented before imposing punishment." *United States v. Dill*, 799 F.3d 821, 825 (7th Cir. 2015).

Yankey had the opportunity to present mitigation arguments at his revocation proceeding. He declined the judge's invitation to speak about mitigation on his own behalf, but his lawyer did stress the positive aspects of Yankey's life. Yankey had steady employment, a family support system, had paid

back child support, had never failed a drug test while on supervision, and had not received addiction treatment.

Yankey contends that the record is "devoid of any indication as to whether the district court rejected or deemed unpersuasive Mr. Yankey's legitimate mitigation arguments." We do not require a sentencing judge to opine about the merits of each argument raised at a revocation hearing. Even in more formal original sentencing proceedings where the requirements for considering mitigation arguments are higher, we "try to take careful note of context and the practical realities of a sentencing hearing. District judges need not belabor the obvious." *United States v. Reed*, 859 F.3d 468, 472 (7th Cir. 2017), quoting *United States v. Castaldi*, 743 F.3d 589, 595 (7th Cir. 2014). "[O]ur inquiry focuses not on the detail with which the district court expressed its reasons for imposing a specified period of confinement, but on whether the district court's statements on the record reflect that it considered the appropriate factors in exercising its discretion." *United States v. Boultinghouse*, 784 F.3d 1163, 1178 (7th Cir. 2015), quoting *United States v. Pitre*, 504 F.3d 657, 664 (7th Cir. 2007). Comments and questions indicating that the court "implicitly acknowledged" mitigation arguments can be enough. See *Dawson*, 980 F.3d at 1165. Here, several of the judge's questions and comments assure us that he considered the mitigation arguments.

Letters were submitted in support of Yankey's arguments relating to employment and family support. The judge said on the record that he had read these letters, indicating that the relevant mitigation arguments were considered. See *United States v. Graham*, 915 F.3d 456, 459 (7th Cir. 2019) ("a court's statement that it has read the defendant's submissions is often

'enough to satisfy us that [it has] considered the argument …'"), quoting *United States v. Ramirez-Gutierrez*, 503 F.3d 643, 646 (7th Cir. 2007). As to Yankey's arguments about prior treatment and length of sobriety, at several points during the hearing the court spoke about these topics, demonstrating its consideration of them. The court repeatedly asked defense counsel and Yankey himself about his treatment history. Yankey said that he had completed a 40-hour drug education program while in prison. The court also expressed skepticism toward Yankey's claim that this charged violation was the first time he had used drugs during his supervised release. This skepticism undercuts Yankey's claim that his mitigation arguments were not considered. See *United States v. Wade*, 890 F.3d 629, 632 (7th Cir. 2018) (finding proper consideration of mitigation arguments even when judge considered one proposed mitigating factor as an aggravating factor).

The only mitigation factor that the judge did not address directly was that Yankey had paid off back child support that had accrued while he was in prison. This was not a reversible error. Yankey's attorney mentioned this fact only once during the revocation hearing. The judge would not have been obliged to explain how every potential mitigation point affected his reasoning even in an original sentencing, let alone in a revocation proceeding. See *Dawson*, 980 F.3d at 1164 (noting that "district court 'need not make factual findings on the record for each factor'"), quoting *United States v. Carter*, 408 F.3d 852, 854 (7th Cir. 2005); see also *United States v. Ford*, 798 F.3d 655, 664 (7th Cir. 2015) (affirming sentence upon revocation of supervised release where judge "did not specifically mention the need to provide Ford training and treatment or the goal of avoiding sentencing disparities," because "he was not required to run through each factor one by one").

For original sentencing hearings, we have encouraged district judges to ask the parties, and especially defendants, whether their arguments have been adequately addressed at sentencing:

> In order to ensure that defendants feel that they have had such arguments in mitigation addressed by the court and to aid appellate review, after imposing [a] sentence but before advising the defendant of his right to appeal, we encourage sentencing courts to inquire of defense counsel whether they are satisfied that the court has addressed their main arguments in mitigation. If the response is in the affirmative, a later challenge for failure to address a principal mitigation argument … would be considered waived. If not, the trial court would have the opportunity to clarify whether it determined that the argument was 'so weak as not to merit discussion,' lacked a factual basis, or has rejected the argument and provide a reason why.

United States v. Garcia-Segura, 717 F.3d 566, 569 (7th Cir. 2013); see also *United States v. Donelli*, 747 F.3d 936, 941 (7th Cir. 2014) (applying *Garcia-Segura* and finding waiver of appellate claim that mitigation arguments were not considered). A similar inquiry might be useful in a contested supervised release hearing so that any needed explanation could be provided on the spot, without the delay of an appeal.

B. *Sentencing Factors*

Next, Yankey argues that the district court failed to consider required factors in reaching his revocation sentence. We

review this claim of procedural error de novo. E.g., *Dawson*, 980 F.3d at 1164.

To revoke supervised release, the judge must consider some but not all of the statutory sentencing factors. See 18 U.S.C. § 3583(c), citing portions of § 3553(a). In deciding a revocation sentence, the judge must consider: "the nature and circumstances of the offense and the history and characteristics of the defendant," § 3553(a)(1), how to "afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), how to "protect the public from further crimes of the defendant," § 3553(a)(2)(C), how to provide the defendant with needed "correctional treatment in the most effective manner," § 3553(a)(2)(D), the guideline range and certain policy statements by the Sentencing Commission, § 3553(a)(4) & (5), "the need to avoid unwarranted sentencing disparities," § 3553(a)(6), and "the need to provide restitution," § 3553(a)(7).[1]

The sentencing court must say "something" to indicate that the court considered these factors, but "need not consider the § 3553 factors in check-list form." *Ford*, 798 F.3d at 663, quoting *United States v. Robertson*, 648 F.3d 858, 859–60 (7th Cir. 2011), and *United States v. Jones*, 774 F.3d 399, 404 (7th Cir. 2014). The § 3553 factors that the court is not required to consider when deciding a supervised release violation are the need for the chosen sentence "to reflect the seriousness of the offense, to promote respect for the law, … to provide just

[1] In considering how to provide the defendant with needed "correctional treatment in the most effective manner" under § 3553(a)(2)(D), the court may not impose or lengthen a prison term "in order to foster a defendant's rehabilitation." *Tapia v. United States*, 564 U.S. 319, 323 (2011), applying 18 U.S.C. § 3582(a).

punishment for the offense," § 3553(a)(2)(A), and "the kinds of sentences available," § 3553(a)(3).

Judge Gilbert's questions here show that he considered the nature and circumstances of the offense, the characteristics of the defendant, and the need for treatment. The judge asked where Yankey obtained the drugs, whether he called his probation officer for help when faced with relapse, and what drug education or treatment programs he had completed. The judge also noted that Yankey "obviously do[es] have an addiction." The judge focused his reasoning for his sentence primarily on the fact that Yankey received an original sentence 36 months below the recommended guideline range. This consideration of Yankey's criminal history was proper and helps show that the court did consider the statutory sentencing factors. See *Wade*, 890 F.3d at 633 (noting that judge could consider prior leniency in imposing an above-guideline sentence). The judge's questions and comments show that he properly considered the required factors.

C. *Substantive Reasonableness*

Finally, Yankey challenges the substantive reasonableness of his sentence. Our substantive review of a sentence resulting from revocation of supervised release is "highly deferential." *Ford*, 798 F.3d at 663, quoting *Jones*, 774 F.3d at 403. "We will sustain the sentence so long [as] it is not 'plainly unreasonable.'" *Boultinghouse*, 784 F.3d at 1177, quoting *United States v. Kizeart*, 505 F.3d 672, 674 (7th Cir. 2007). Yankey's sentence was within the guideline range, so on appeal it is entitled to a presumption of reasonableness. E.g., *id.* at 1178. "The defendant bears the burden of rebutting that presumption by demonstrating that the sentence is unreasonably high in light of the section 3553(a) factors." *United States v. Jarigese*, 999

F.3d 464, 473 (7th Cir. 2021). The court need only give a "concise explanation" for imposing a within-guideline sentence. *Boultinghouse*, 784 F.3d at 1178.

The judge explained in imposing the sentence that the "Court gave you a break the first time," referring to the fact that Yankey's sentence for his underlying convictions was three years below the bottom of the applicable guideline range. Considering leniency from the underlying sentence while sentencing Yankey after revocation of his supervised release was not improper. Such consideration is condoned in the application notes to the Sentencing Guidelines, which even suggest using prior leniency to support "an upward departure." U.S.S.G. § 7B1.4 n.4; see also *Wade*, 890 F.3d at 633 (holding that prior leniency in part justified upward departure). The district court's decision that the prior below-guideline sentence justified a revocation sentence at the top of—but still within—the guideline range was not plainly unreasonable.

Yankey's sentence is AFFIRMED.