In the
United States Court of Appeals
For the Seventh Circuit

No. 21-3141

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONTA BAKER,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:20-cr-00768-1 — **Steven C. Seeger**, *Judge*.

ARGUED SEPTEMBER 28, 2022 — DECIDED JANUARY 6, 2023

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

HAMILTON, *Circuit Judge*. Appellant Donta Baker was sentenced to 72 months and one day in prison after pleading guilty to being a felon in possession of a firearm. In trying to avoid arrest, Baker ran from police officers, took a loaded firearm out of his waistband, and threw it over a fence into a residential backyard. Based on this conduct, the district court added two offense levels under Sentencing Guideline § 3C1.2

for Baker's having "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." On appeal, Baker challenges that guideline finding. We do not reach that issue. The record makes clear that the district judge would have imposed the same sentence even if the two contested guideline levels had not been added. Accordingly, even if there had been a guideline error, it would have been harmless. The actual sentence was also reasonable under the circumstances, so we affirm.

I. *Factual and Procedural Background*

Donta Baker pled guilty to being a felon in unlawful possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He faced a statutory maximum sentence of ten years.[1] Under Sentencing Guideline § 2K2.1(a)(6)(A), Baker's base offense level was 14. Two levels were added because the gun was stolen. § 2K2.1(b)(4)(A). Another two levels were added for obstruction of justice because Baker had removed his monitoring device and fled from home arrest before sentencing. § 3C1.1. Due to this flight, Baker also did not receive any reduction in his offense level for acceptance of responsibility. The defense agreed that the total offense level was at least 18.

The issue in this appeal is the additional two-level enhancement under § 3C1.2, which applies when a defendant "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law

[1] After Baker's conviction, the statutory maximum for an ordinary conviction under 18 U.S.C. § 922(g) was raised to fifteen years by the Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12004(c), 136 Stat. 1313, 1329 (2022), amending 18 U.S.C. § 924(a)(8).

enforcement officer." Baker fled from police and—while running—removed a loaded gun from his waistband and threw it over a fence into a residential backyard. Baker argued in the district court that these facts did not show that he had created a substantial risk of injury. The district court ruled that the enhancement did apply, bringing Baker's final offense level to 20.[2]

Baker had 13 criminal history points, placing him in criminal history category VI. The guideline range for a total offense level of 20 (including the contested two-level enhancement) and criminal history VI was 70 to 87 months. Without the contested enhancement, the total offense level would have been 18 and the guideline range would have been 57 to 71 months. The judge imposed a final sentence of 72 months and one day. In explaining the sentence, the judge focused primarily on Baker's eleven prior convictions, including three priors

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[2] Because we affirm Baker's sentence based on harmlessness and substantive reasonableness, we do not need to resolve the parties' debates about exactly when throwing a gun creates a "substantial risk of injury." District judges are in the better position to hear evidence and to decide when specific facts made conduct more or less dangerous in context or what counts as a "substantial risk." We decline to adopt bright-line rules for § 3C1.2, such as whether throwing a gun that has a drop safety feature (designed to prevent accidental firing if the gun hits the ground) can ever create a substantial risk of injury. Compare, e.g., *United States v. Mukes*, 980 F.3d 526, 538 (6th Cir. 2020) (reversing application where thrown gun was loaded with chambered round but no evidence showed gun was "actually cocked"), with *United States v. Brown*, 31 F.4th 39, 49–50, 49 n.13 (1st Cir. 2022) (declining to follow *Mukes* and affirming application where dropped gun was loaded with rounds in four of its five chambers), and *United States v. Lard*, 327 F.3d 551, 554 (7th Cir. 2003) (declining to draw bright line and affirming application where thrown gun had a round in chamber and safety was off).

for being a felon in possession of a firearm or ammunition. The judge said, "I noted that you got 72 months before when you [committed this offense] a third time. You need to get at least 72 months this time given your history. I need to deter you from committing this crime again. I need to deter others not to do it again. So that's how I reach 72 months and one day."

II. *Analysis*

To determine a federal sentence, the district court must first calculate the correct advisory sentencing range under the Sentencing Guidelines. See 18 U.S.C. § 3553(a)(4); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018); *Gall v. United States*, 552 U.S. 38, 49 (2007). The court must also weigh the factors listed in 18 U.S.C. § 3553(a) in choosing a sentence and may apply those factors to impose a sentence outside the advisory guideline range. *Gall*, 552 U.S. at 49–50.

In many cases, the record will show that the guideline range played a central role in sentencing. For instance, a judge might explain that the § 3553(a) factors support leniency and then impose a sentence at the bottom of the guideline range. If that range was miscalculated and the correct range should have been lower, it is possible that the judge would have sentenced at the bottom of that proper, lower range. When it is clear from the record that the guideline range played such a central role in shaping a sentence, a guideline calculation error will ordinarily lead to a remand for resentencing.

In other cases, and this is one, the record shows that the guideline range did not play such a central role and that the sentence imposed would not have differed even if the guideline range had been lower or higher. We may affirm a sentence

regardless of a guideline error when the error was harmless and the sentence imposed would have been substantively reasonable even under the guideline level argued for on appeal. E.g., *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009). *Abbas* explained that harmlessness and reasonableness are two distinct questions. We consider them in turn.

A. *Harmlessness*

A guideline error can be harmless if we can tell from the record that on remand, considering the different and arguably proper guideline level, the judge would impose the same sentence. *United States v. Asbury*, 27 F.4th 576, 582 (7th Cir. 2022), quoting *United States v. Jett*, 982 F.3d 1072, 1078 (7th Cir. 2020); see also *United States v. Glosser*, 623 F.3d 413, 419–20 (7th Cir. 2010) (collecting Seventh Circuit cases declining to find guideline errors harmless). The judge made that point unmistakably clear during Baker's sentencing hearing.

We have been reluctant to treat guideline errors as harmless when the judge seems to have offered only "a conclusory comment tossed in for good measure." *Abbas*, 560 F.3d at 667; see also, e.g., *United States v. Bravo*, 26 F.4th 387, 397, 401 (7th Cir. 2022) (remanding for resentencing even though judge said he would have imposed same sentence without two additional criminal history points). We must be able to determine from the judge's explanation why the disputed issue would not have mattered. At the same time, we have often said that a sentencing judge "need not belabor the obvious." E.g., *United States v. Jordan*, 991 F.3d 818, 822 (7th Cir. 2021), quoting *United States v. Sainz*, 827 F.3d 602, 608 (7th Cir. 2016); *United States v. Castaldi*, 743 F.3d 589, 591 (7th Cir. 2012).

The judge's statement here was anything but conclusory. Immediately after announcing his sentence, the judge noted Baker's challenge to the two-level enhancement for reckless endangerment. He said: "I would have imposed a sentence of 72 months and one day even if I found that the reckless endangerment enhancement did not apply. It would have made no difference to my sentence." The judge then explained his thinking. Baker had previously been sentenced to 72 months for the same offense of being a felon in possession of a firearm or ammunition, yet he had committed the offense again. The judge rooted his sentencing decision in deterrence.

The judge closely examined Baker's criminal history and was understandably "concerned" that Baker had eleven prior convictions. He considered that Baker had "committed a lot of serious offenses for a long time … [Baker had] engaged in criminal conduct on and off … for 25 years, a quarter century." The judge focused on the "especially troubling" fact that Baker had three prior convictions for the offense at issue: being a felon in possession. Baker was sentenced to 72 months for his third conviction "and apparently it was not a sufficient deterrent because he did it a fourth time." The judge told Baker that "you need to get at least 72 months this time given your history." The judge explained to Baker that "I need to deter you from committing this crime again. I need to deter others not to do it again. So that's how I reach 72 months and one day." We can understand easily from these comments why the contested guideline issue did not affect the final sentence.

B. *Substantive Reasonableness*

We review the substantive reasonableness of a sentence for abuse of discretion. *Gall*, 552 U.S. at 51. A sentence is

substantively reasonable if the judge reached it by giving "meaningful consideration to the factors enumerated in 18 U.S.C. § 3553(a), including the advisory Sentencing Guidelines" and applying those factors to the "individual circumstances of the case." *United States v. Major*, 33 F.4th 370, 379 (7th Cir. 2022), quoting *United States v. Patel*, 921 F.3d 663, 672 (7th Cir. 2019). We typically begin our analysis of substantive reasonableness by determining the correct guideline range. See, e.g., *Abbas*, 560 F.3d at 667 (phrasing the issue of substantive reasonableness based on the "appropriate guideline range"). Here, we will assume without deciding that the correct guideline total offense level was not 20 but 18, as advocated by Baker, which carries a guideline range of 57 to 71 months in criminal history category VI. Baker was sentenced to 72 months and one day.

A district court must explain how it reached its sentence considering the factors set forth in 18 U.S.C. § 3553(a). This explanation must be sufficient "to allow for meaningful appellate review." *Gall*, 552 U.S. at 50. When the sentence falls outside the advisory guideline range, the explanation must be compelling enough to justify the variance, and larger variances call for more thorough justifications than smaller ones. *Id.*; *United States v. Vasquez-Abarca*, 946 F.3d 990, 994 (7th Cir. 2020) (affirming above-guideline sentence that was marginally higher than defendant's prior sentence for same crime and was intended to achieve deterrence).

Here, the sentence was one month and one day above the top of the advisory sentencing range that Baker contends should apply. The judge explained the sentence in terms of § 3553(a). First, the judge considered the "nature and circumstances of the offense," § 3553(a)(1), noting that Baker created

a "dangerous situation" by bringing a loaded firearm onto the streets of Chicago in the middle of the night while drunk, as well as throwing that loaded firearm over a fence into an unknown person's yard.

Second, the judge considered "the history and characteristics of the defendant," § 3553(a)(1), noting Baker's criminal history with eleven prior convictions and accepting as a mitigating factor the point raised by Baker's counsel that those convictions did not involve "violent behavior." But the judge also noted Baker's decade-long gang affiliation and was especially troubled by the fact that after this arrest, Baker removed his monitor and fled home confinement, telling pretrial services that he was "going to enjoy the sunshine" and that his flight would end in his being either "arrested or killed." The judge said that this conduct created "a very dangerous situation" and showed Baker's recent disrespect for probation officers and court orders.

Third, the judge explained how the chosen sentence aimed to achieve "adequate deterrence," § 3553(a)(2)(B), given that this was Baker's fourth conviction for being a felon in possession of a firearm or ammunition. Baker's history with this repeated behavior factored heavily into the sentencing decision. The judge imposed a sentence one day longer than that imposed for Baker's third conviction for the same crime. A district court acts "well within its discretion in concluding that [a defendant] could best be deterred by serving a longer sentence than he received the last time he committed the same offense." *United States v. Sanchez-Lopez*, 858 F.3d 1064, 1068 (7th Cir. 2017); see also *Vasquez-Abarca*, 946 F.3d at 995 (affirming above-guideline sentence higher than prior sentence for same crime).

At oral argument, Baker argued for the first time that reliance on the length of his most recent state-court sentence was improper because he had received parole in that case. Under Baker's theory, that prior sentence was effectively shorter and therefore not a proper comparator for the district court judge to use in his sentencing.

This new argument is not persuasive. The judge made clear that he was aware of how much time Baker had actually spent in custody on his prior sentences. He noted the specifics of Baker's prior convictions, saying that Baker's first conviction for being a felon in possession of a firearm was in 2007 and that he was sentenced to "three years" but was "incarcerated for only a year, and [was] paroled, but [was] readmitted the following year." Baker was again convicted of this offense in 2009 and received a "four-year sentence" but served "only about a year and a half." In 2012, Baker was convicted of being a felon in possession of ammunition. (A companion charge of possessing a firearm was dismissed.) He was sentenced to "six years" but "served about two and a half years" before being paroled. The judge considered the prior sentences, the actual amounts of time served, the violation of parole, and Baker's repeated offenses to conclude that "a six-year sentence did not deter you from doing it again."

The judge was entitled to conduct this inquiry into Baker's criminal history and convictions for similar prior charges and to impose a sentence tailored to Baker's own record. The district judge was not obliged to discount his treatment of state sentences based on the possibility of parole, and Baker was not entitled to a lower sentence on this, his fourth felon-in-possession conviction.

The judgment of the district court is AFFIRMED.