A-1 Sixth Circuit Opinion and Order

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-1108

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
CALVIN RAYMOND JONES,	)	THE EASTERN DISTRICT OF
	)	MICHIGAN
Defendant-Appellant.	)	
	)	
	)	

ORDER

Before: MERRITT, CLAY, and BUSH, Circuit Judges.

Calvin Raymond Jones, a federal prisoner, appeals the judgment of the district court revoking his supervised release and imposing an 18-month term of imprisonment. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2011, a jury convicted Jones of one count of malicious use of fire, in violation of 18 U.S.C. § 844(i), and he was sentenced to 180 months of imprisonment. He appealed, and we vacated Jones's conviction. *United States v. Jones*, 554 F. App'x 460 (6th Cir. 2014). Jones subsequently pleaded guilty to the charge. The district court resentenced Jones to a term of imprisonment of 84 months, to be followed by three years of supervised release.

Jones's term of supervised release commenced on December 5, 2016. In January 2017, he stopped attending substance abuse treatment. In April 2017, he tested positive for cocaine. After that positive test, Jones made no further contact with his probation officer. In October, his

probation officer petitioned for a warrant for his arrest for the following violations: (1) failing to report to his probation officer; (2) failing to make restitution payments; (3) using alcohol or drugs; and (4) failing to participate in substance abuse treatment.

Jones was arrested and waived his preliminary hearing. At his revocation hearing, Jones admitted the violations. The district court accepted Jones's guilty pleas to the first, third, and fourth violations, but dismissed the second violation involving restitution. The parties agreed that the dismissal did not impact the advisory guidelines range of 12 to 18 months.

At the hearing, counsel argued that Jones's cocaine relapse led to all of his violations and asked for a below-guidelines sentence. The government requested a sentence at the top of the guidelines range. The district court ultimately imposed a sentence of 18 months, to be followed by a new three-year term of supervised release.

On appeal, Jones argues the district court abused its discretion by revoking his release when it should have amended the conditions of his release to allow him to seek further substance abuse treatment. He also claims that his sentence is both procedurally and substantively unreasonable. He argues that this court's review for procedural reasonableness should be for an abuse of discretion because of the district court's failure to properly ask, after imposing sentence, whether the parties had any objections not previously raised, pursuant to *United States v. Bostic*, 371 F.3d 865 (6th Cir. 2004). Finally, Jones asserts that his sentence is substantively unreasonable because "the district court overemphasize[d] the need for deterrence," "underestimate[d] Mr. Jones's need for rehabilitation," and "stressed one factor that Congress believes is not relevant: the seriousness of the underlying criminal offense."

To revoke a defendant's supervised release, a district court must find by a preponderance of the evidence that the defendant violated a condition of supervised release. 18 U.S.C. § 3583(e)(3); *United States v. Carr*, 421 F.3d 425, 429 (6th Cir. 2005). We review a district court's decision to revoke a defendant's term of supervised release for an abuse of discretion. *Carr*, 421 F.3d at 429.

Generally, when a defendant possesses a controlled substance contrary to the conditions of his supervised release, the law provides that "the court *shall* revoke the term of supervised

release and require the defendant to serve a term of imprisonment[.]" 18 U.S.C. § 3583(g) (emphasis added). The use of a controlled substance constitutes possession under § 3583(g). *United States v. Crace*, 207 F.3d 833, 836 (6th Cir. 2000).

> In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §§ 3565(b) and 3583(g).

USSG § 7B1.4 (Policy statement cmt. n.6.). This exception allows the district court to use its own discretion to decide whether to revoke the defendant's supervised release. *Crace*, 207 F.3d at 837.

Although the district court reasonably could have amended the conditions of Jones's release to allow him to seek further substance abuse treatment, the court's decision to instead revoke Jones's supervised release and impose a prison term was not an abuse of discretion. Jones had just completed a lengthy term of incarceration where he had also completed a substance abuse treatment program. Despite that, he stopped attending substance abuse treatment approximately one month after his release and tested positive for drug use three months later. Given Jones's nearly immediate failure to attend substance abuse treatment, it was not unreasonable for the district court to believe that he would not commit to treatment if the terms of his release were amended. *See United States v. Williams*, 333 F. App'x 63, 70 (6th Cir. 2009) (recognizing that, given the record, the district court could reasonably conclude that "counseling alone was not enough to deter defendant from using drugs, and that a sentence of incarceration was warranted"). Accordingly, the district court's revocation of his release was not an abuse of discretion.

After revoking a term of supervised release, a district court may "require the defendant to serve a new term of imprisonment pursuant to 18 U.S.C. § 3583(e)." *United States v. Polihonki*, 543 F.3d 318, 322 (6th Cir. 2008). Generally, we review challenges to sentences imposed after the revocation of supervised release under the same standard that is applied to sentences after conviction. *See United States v. Kontrol*, 554 F.3d 1089, 1092 (6th Cir. 2009). In short, we must

first "ensure that the district court committed no significant procedural error" and "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007).

Even under an abuse-of-discretion standard, Jones's assertion that his sentence is procedurally unreasonable does not warrant relief.[1] A sentence may be held to be procedurally unreasonable if it is marked by "significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Id.* The transcript of the sentencing hearing demonstrates that the district court considered Jones's drug addiction and his request for treatment. Nevertheless, the district court explained that a custodial sentence was necessary given "the number of ways in which the defendant violated supervised release so soon after leaving prison where he had served a significant amount of time for the underlying offense." The court concluded that this demonstrated that Jones had not yet realized that he needed to comply with the law. The record does not support the conclusion that the district court treated the guidelines range as mandatory, failed to consider the § 3553(a) factors, failed to explain the sentence, or based it on erroneous facts. As a result, Jones cannot establish that his sentence is procedurally unreasonable.

If a sentence is procedurally sound, the next consideration is whether the sentence was substantively reasonable. *See Polihonki*, 543 F.3d at 322. A sentence "may be substantively unreasonable if the district court chooses the sentence arbitrarily, grounds the sentence on impermissible factors, or unreasonably weighs a pertinent factor." *United States v. Brooks*, 628 F.3d 791, 796 (6th Cir. 2011) (citing *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008)). Sentences within the applicable guidelines range are afforded a rebuttable presumption of reasonableness. *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc).

[1] The court does not need to review the defendant's *Bostic* arguments as we find that Jones's sentence is not procedurally unreasonable even under the abuse of discretion standard.

Jones argues that the district court placed too much emphasis on deterring him from future crime and failed to appreciate his need for rehabilitation and, in his brief, he repeatedly characterizes the district court's action as sending him back to prison for "one positive drug test." The record reveals, however, that Jones not only failed a drug test soon after he was released from incarceration, but, also he stopped attending substance abuse treatment and he compounded the problem by failing to report to his probation officer after his failed test. He also admitted that he had been using cocaine bi-weekly. Although Jones asserts that all of this stemmed from his addiction and poor decisionmaking, Jones's record contains evidence of little else. As the government noted at Jones's hearing, Jones has served prison sentences for five felonies and has violated probation following each of those sentences. The district court noted that it was "struck by the number of ways in which the defendant violated supervised release so soon after leaving prison . . . ." This is proper consideration of Jones's prior history on supervision and his characteristics, per § 3553(a)(1).

Furthermore, while Jones argues that the district court did emphasize the need to deter him from future violations per § 3553(a)(2)(C), as directed under § 3583, the court's assignment of weight to this factor was not unreasonable given Jones's history. A district court does not necessarily err simply by placing significant weight on a single factor, *see United States v. Adkins*, 729 F.3d 559, 571 (6th Cir. 2013), because sometimes, "one or two [factors] prevail, while others pale." *United States v. Bridgewater*, 479 F.3d 439, 442 (6th Cir. 2007). Nor can the district court's decision to impose a sentence at the top end of the guidelines be considered substantively unreasonable considering Jones's prior violations. *See United States v. Kirby*, 418 F.3d 621, 628 (6th Cir. 2005) ("The district court's imposition of the statutory maximum term of imprisonment was more than justified by [the defendant]'s repeated transgressions.").

Finally, the district court did not base its sentence on an impermissible factor. Although Jones argues that the district court should not have considered the seriousness of the underlying offense, consideration of that factor is permissible in this circuit. *United States v. Lewis*, 498 F.3d 393, 399-400 (6th Cir. 2007). Jones even acknowledges that fact in his brief but simply disagrees with this court's position on the issue. This argument does not warrant reversal.

The judgment of the district court is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

A-2 Order Denying En Banc Review

No. 18-1108

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 06, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CALVIN RAYMOND JONES,

Defendant-Appellant.

ORDER

BEFORE: MERRITT, CLAY, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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FOR THE SIXTH CIRCUIT
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Filed: November 06, 2018

Ms. Colleen P. Fitzharris
Federal Defender Office
613 Abbott Street
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Re: Case No. 18-1108, *USA v. Calvin Jones*
Originating Case No.: 2:10-cr-20568-2

Dear Ms. Fitzharris,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Jeanine M. Brunson
Mr. Jonathan Miles Epstein I
Mr. John N. O'Brien II

Enclosure

Additional material from this filing is available in the Clerk's Office.