

No. 17-1149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 18, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

ROSSAHN BLACK,

Defendant-Appellant.

ORDER

BEFORE: McKEAGUE, KETHLEDGE, and THAPAR, 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

Rich L. Hunt

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 16, 2018
DEBORAH S. HUNT, Clerk

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

ORDER

Before: McKEAGUE, KETHLEDGE, and THAPAR, Circuit Judges.

Rossahn Black, a federal prisoner represented by counsel, appeals the district court's judgment on resentencing. Black also moves for a stay and for new counsel. 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 2012, a jury convicted Black of three counts of being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). The district court determined that he qualified for an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), because he had at least three prior convictions that were violent felonies. Thus, Black's advisory sentencing range under the United States Sentencing Guidelines was 262 to 327 months of imprisonment, and the district court sentenced him to 300 months. We affirmed Black's convictions and sentence on appeal. *United States v. Black*, 739 F.3d 931 (6th Cir. 2014). In 2015, Black filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, which he later amended. Black claimed, among other arguments, that his sentence was

unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), which held that the ACCA's residual clause was unconstitutionally vague. *See also Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (holding that *Johnson* applies retroactively to cases on collateral review). The government conceded that, after *Johnson*, Black was no longer subject to the ACCA. Thus, the district court granted Black's § 2255 motion on that ground only, vacated his sentence, and ordered resentencing.

On resentencing, the district court determined that Black's guidelines range was 210 to 262 months of imprisonment and imposed a sentence of 252 months: 120 months on one count and 66 months each on the other two, all of them to be served consecutively.

Black raises two arguments on appeal: (1) his sentence was procedurally unreasonable because the district court did not make clear its rationale for imposing consecutive sentences; and (2) his sentence was substantively unreasonable because it was greater than necessary to achieve the sentencing goals contained in 18 U.S.C. § 3553(a).

Before concluding the sentencing hearing, the district court did not ask whether the parties "have any objections to the sentence just pronounced that have not previously been raised," *United States v. Bostic*, 371 F.3d 865, 872 (6th Cir. 2004), but instead asked only, "Anything further concerning sentence or [another] matter?" Therefore, despite Black's raising his procedural-reasonableness argument for the first time on appeal, we nonetheless review it under an abuse-of-discretion standard. *United States v. Cochrane*, 702 F.3d 334, 344 (6th Cir. 2012); *see also United States v. Batti*, 631 F.3d 371, 379 n.2 (6th Cir. 2011) (holding that the question, "[a]nything else concerning sentence?" did not meet the requirement in *Bostic*).

Black argues that the district court did not give an explanation for imposing consecutive sentences. The district court has discretion to impose multiple sentences to run either concurrently or consecutively, but it must consider the sentencing factors in § 3553(a) when making that decision. *See* 18 U.S.C. § 3584(a), (b). And although a court is not required to give a specific reason, it is "obliged to make 'generally clear the rationale under which it has imposed

the consecutive sentence.” *Cochrane*, 702 F.3d at 346 (quoting *United States v. Owens*, 159 F.3d 221, 230 (6th Cir. 1998)).

In Black’s case, the district court thoroughly explained its reasoning in fashioning his sentence. The court noted, in particular, that Black was “a very dangerous person;” that he had “a series of violent incidents in prison;” and that his “violent tendencies and his violent past [were] extraordinary.” The district court, however, also cited Black’s “potential,” and that Black could possibly benefit from better medical treatment. For those reasons, in fact, the district court declined the government’s request to impose an upward variance from the guidelines range, while they also led the court to reject Black’s request for a downward variance below the guidelines range. Instead, the district court stated that it was satisfied that the guidelines range accurately reflected the appropriate sentence. Thus, the district court crafted Black’s sentence so that it would fit within the advisory guidelines range, which the court believed “balance[d] the need to protect the community from Mr. Black with trying to find a way to open his potential.” And because the district court believed that Black’s sentence should be within the guidelines range, imposing consecutive sentences was inescapable: Black’s three § 922(g) convictions each carried a maximum prison sentence of 120 months, *see* 18 U.S.C. § 924(a)(2), but his applicable guidelines range began at 210 months. Thus it was impossible to set Black’s sentence within the guidelines range without running them consecutively. In short, the district court did not abuse its discretion in deciding to impose Black’s sentences to run consecutively, and it gave a full explanation for its decision.

Black next argues that his sentence was substantively unreasonable because it was longer than necessary to achieve the sentencing goals set forth in § 3553(a). We review that claim for an abuse of discretion. *See United States v. Freeman*, 640 F.3d 180, 185 (6th Cir. 2011). “A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.” *United States v.*

Conatser, 514 F.3d 508, 520 (6th Cir. 2008). “A properly calculated within-guidelines sentence will be afforded a rebuttable presumption of reasonableness on appeal.” *Id.*

Black maintains that “there are many factors to justify a low range sentence of 210 [months] or a variance below the recommended guideline sentencing range.” He cites his projected age upon release, the years he has been incarcerated, his mental-health issues, and the fact that he is no longer subject to a mandatory fifteen-year sentence under the ACCA. But the district court considered and discussed these factors. It simply determined that, together with his potential danger to society and the seriousness of his crimes, among other factors, they weighed in favor of a sentence in the middle of the guidelines range. That determination was not an abuse of discretion.

Black has also moved this court to appoint him new counsel and to stay his appeal until new counsel can be appointed. Black argues that he sent several letters to counsel expressing his wish to discuss his options and appellate strategy but that he has never met or spoken with his appointed counsel. He claims that he received only an introductory letter from his attorney, and then a second letter apologizing for filing his appellate brief without Black’s input. Black also finds the brief inadequate. Additionally, Black argues that the brief ignores the matters that he raised in his § 2255 motion.

While Black, as an indigent defendant, has a right to have counsel appointed to represent him on appeal, he has no right to counsel of his choice, so long as counsel is adequate. *See Daniels v. Lafler*, 501 F.3d 735, 739 (6th Cir. 2007) (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989)). Although he complains about counsel’s lack of communication and the adequacy of the appellate brief, the filed brief is not substandard. And Black’s argument that counsel ignored the claims in his § 2255 motion cannot sustain his new-counsel motion because Black’s § 2255 motion is not before us in this appeal. The district court granted Black’s § 2255 motion only on the *Johnson* ground. The district court later denied his remaining § 2255 claims in a separate order and judgment which was unrelated to this appeal, in which Black appealed his resentencing judgment. Thus, counsel’s failure to raise arguments

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about Black's § 2255 motion in his appeal of his resentencing is not grounds for appointing new counsel.

Accordingly, we **DENY** Black's motion for a stay and new counsel and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written over a horizontal line.

Deborah S. Hunt, Clerk

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