APPENDIXES A ~~&~~ Q

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4207

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIE ANTHONY SAXBY, JR.,

Defendant - Appellant.

No. 18-4208

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIE ANTHONY SAXBY, JR.,

Defendant - Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, Chief District Judge. (1:17-cr-00396-TDS-1; 1:11-cr-00132-TDS-1)

Submitted: October 23, 2018 Decided: November 6, 2018

APPENDIX A

Before WILKINSON, MOTZ, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Brian Michael Aus, Durham, North Carolina, for Appellant. Clifton Thomas Barrett, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Willie Anthony Saxby, Jr., pled guilty to distributing heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (2012) ("controlled substance offense"), and the district court sentenced Saxby to 65 months' imprisonment. At the time Saxby committed this offense, he was on supervised release. Based on Saxby's admission to violating the terms of his supervision, the district court revoked his supervised release and imposed a 12-month sentence, to run consecutively to the 65-month sentence for the controlled substance offense.

This court consolidated Saxby's appeals from the controlled substance offense and revocation judgments. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), conceding that there are no meritorious grounds for appeal but questioning whether the district court erred in denying Saxby's pro se motion to dismiss and imposed a reasonable sentence. Saxby has also filed a pro se supplemental brief raising several issues. We affirm the district court's judgment.

Prior to pleading guilty to the controlled substance offense, Saxby filed a pro se motion to dismiss the indictment, contending that the State's failure to serve warrants related to state controlled substance charges violated his Fourth Amendment rights. However, Saxby's unconditional guilty plea "waives all nonjurisdictional defects in the proceedings conducted prior to entry of the plea." *United States v. Fitzgerald*, 820 F.3d 107, 110 (4th Cir. 2016) (internal quotation marks omitted). The State's failure to prosecute its charges against Saxby has no bearing on the district court's jurisdiction over

Saxby's violation of federal law and supervised release term, and thus this claim is waived.

As to Saxby's sentences, we review a defendant's sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). Under the *Gall* standard, a sentence is reviewed for both procedural and substantive reasonableness. *Id.* at 51. In determining procedural reasonableness, we consider whether the district court properly calculated the defendant's advisory Sentencing Guidelines range, gave the parties an opportunity to argue for an appropriate sentence, considered the 18 U.S.C. § 3553(a) (2012) factors, and sufficiently explained the selected sentence. *Id.* at 49-51. If a sentence is free of "significant procedural error," then we review it for substantive reasonableness, "tak[ing] into account the totality of the circumstances." *Id.* at 51.

Likewise, "[a] district court has broad discretion when imposing a sentence upon revocation of supervised release." *United States v. Webb*, 738 F.3d 638, 640 (4th Cir. 2013). "We will affirm a revocation sentence if it is within the statutory maximum and is not plainly unreasonable." *United States v. Slappy*, 872 F.3d 202, 207 (4th Cir. 2017) (internal quotation marks omitted). "When reviewing whether a revocation sentence is plainly unreasonable, we must first determine whether it is unreasonable at all." *United States v. Thompson*, 595 F.3d 544, 546 (4th Cir. 2010). A revocation sentence is procedurally reasonable if the district court adequately explains the sentence after considering the Chapter Seven policy statements and the applicable 18 U.S.C. § 3553(a) factors. *Slappy*, 872 F.3d at 207; *see* 18 U.S.C. § 3583(e) (2012). A revocation sentence is substantively reasonable if the court states a proper basis for concluding that the

defendant should receive the sentence imposed, up to the statutory maximum. *United States v. Crudup*, 461 F.3d 433, 440 (4th Cir. 2006).

Counsel questions whether the district court erred in applying a 2-level enhancement pursuant to U.S. Sentencing Guidelines Manual § 2D1.1(b)(12) (2016) ("premises enhancement"). "We accord due deference to a district court's application of the sentencing guidelines." *United States v. Steffen*, 741 F.3d 411, 414 (4th Cir. 2013). We review the district court's factual determinations for clear error. *Id.* However, "if the issue turns primarily on the legal interpretation of a guideline term, the standard moves closer to de novo review." *Id.* (alterations and internal quotation marks omitted).

The premises enhancement provides for a 2-level increase in a defendant's offense level if he "maintained a premises for the purpose of manufacturing or distributing a controlled substance." USSG § 2D1.1(b)(12). This includes "storage of a controlled substance for the purpose of distribution." USSG § 2D1.1 cmt. n.17.* "Among the factors the [sentencing] court should consider in determining whether the defendant maintained the premises are (A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises." *Id.* Moreover, the distribution of controlled substances "need not be the sole purpose for which the premises was maintained, but

* Guidelines commentary that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993).

must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises." *Id.*

Here, the district court did not clearly err in applying the premises enhancement. Saxby conceded that he held a possessory interest in his residence and controlled access to it, and he directed an undercover law enforcement officer to purchase controlled substances from his residence. *See United States v. Flores-Olague*, 717 F.3d 526, 532 (7th Cir. 2013) ("[A]n individual maintains a drug house if he owns or rents premises, or exercises control over them, and for a sustained period of time, uses those premises to manufacture, store, or sell drugs, or directs others to those premises to obtain drugs." (internal quotation marks omitted)). Moreover, the fact that only three documented drug transactions occurred at the house does not compel the conclusion that the distribution of heroin was not a principal use of the premises. *See United States v. Miller*, 698 F.3d 699, 706-07 (8th Cir. 2012). During one of these transactions, for example, Saxby stated to the undercover officer that he had additional drugs for purchase at his residence and assured the officer that he could call him "day or night if he needed anything."

We further discern no other procedural error. The district court rightfully concluded that Saxby's criminal history indicated a likelihood that he would commit further crimes, a conclusion bolstered by the fact that Saxby committed the controlled substance offense while on supervised release. *See United States v. McCoy*, 804 F.3d 349, 352 (4th Cir. 2015). We further conclude that Saxby's sentence is substantively reasonable. In determining whether an above-Guidelines sentence is substantively reasonable, we "consider whether the sentencing court acted reasonably both with respect

to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range." *United States v. Washington*, 743 F.3d 938, 944 (4th Cir. 2014) (internal quotation marks omitted). "While a district court's explanation for the sentence must support the degree of the variance, it need not find extraordinary circumstances to justify a deviation from the Guidelines." *United States v. Spencer*, 848 F.3d 324, 327 (4th Cir. 2017) (citation and internal quotation marks omitted). Our review is ultimately for an abuse of discretion, and we accord "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *United States v. Zuk*, 874 F.3d 398, 409 (4th Cir. 2017). The district court rightfully considered Saxby's lengthy criminal history in determining that an above-Guidelines sentence was necessary to deter Saxby's criminal conduct and protect the public.

We further conclude that Saxby's revocation sentence is not plainly unreasonable. The district court correctly calculated the statutory maximum and policy statement range of 12 months' imprisonment. *See* 18 U.S.C. §§ 472, 3559(a)(3), 3583(e)(3); USSG § 7B1.4(a), (b)(1), p.s. While the district court did not expressly mention the Chapter Seven policy statements, Saxby did not present any argument at the revocation hearing, and the district court thoroughly considered the need to deter Saxby and to protect the public from his criminal conduct, especially in light of the extensive record created during Saxby's sentencing hearing. *See United States v. Montes-Pineda*, 445 F.3d 375, 381 (4th Cir. 2006).

In accordance with *Anders*, we have reviewed the entire record in this case, including the issues raised in Saxby's supplemental brief, and have found no meritorious

issues for review. We therefore affirm the district court's judgments. This court requires that counsel inform Saxby, in writing, of the right to petition the Supreme Court of the United States for further review. If Saxby requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Saxby.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	)	
	)	
v.	)	1:11CR132-1
	)	
WILLIE ANTHONY SAXBY	)	

DETENTION ORDER

This matter came before the Court on October 20, 2017, for a detention hearing and preliminary revocation hearing on whether probable cause exists to sustain the petition for supervised release action as to Defendant Willie Anthony Saxby ("Defendant"). See Fed. R. Crim. P. 32.1.

On June 8, 2011, Defendant pled guilty to one count of passing and possessing counterfeit currency in violation of 18 U.S.C. § 472. Following a period of imprisonment, Defendant was released to a term of supervised release. On March 19, 2015, supervised release was revoked and Defendant was sentenced to a term of imprisonment, followed by an additional term of supervised release. On September 29, 2017, a Petition was filed alleging a violation of the terms of supervised release, and an arrest warrant was issued. Defendant was arrested October 12, 2017.

On the basis of the evidence presented by the United States Probation Officer at the preliminary hearing, the Court finds probable cause to believe that Defendant violated the terms of his supervised release by engaging in new criminal conduct and by using controlled substances.

APPENDIX B

At the hearing, the Probation Officer testified that she has been supervising Defendant for approximately two years under supervised release. The Probation Officer testified that Defendant had a prior revocation in 2015 for absconding supervision, excessive use of alcohol, and use of marijuana. The Probation Officer testified further regarding the basis of the instant petition for supervised release action. According to the Probation Officer's testimony, Defendant tested positive for marijuana on five occasions. The Probation Officer also testified that she arrived at Defendant's home unannounced in June 2017 and saw a shopping cart filled with beer cans. The Probation Officer testified that Defendant admitted to drinking alcohol, but denied that he was drinking to excess. The Probation Officer testified that she arrived at Defendant's residence unannounced ten days later and found Defendant pouring wine and liquor bottles into a punch container. The Probation Officer further stated that when she again made a residence check in July 2017, Defendant admitted to her that he was "hungover" from excessive use of alcohol and marijuana. The Probation Officer also testified that, despite agency assistance that covers the cost of Defendant's mental health medication and provides him with transportation to appointments to obtain his medication, Defendant has issues attending those appointments and maintaining his mental health regimen.

With regards to the allegations that Defendant has engaged in new criminal conduct, the Probation Officer testified that a Detective from the Archdale Police Department, located in Randolph County, contacted her via telephone to inform her that arrest warrants for the Defendant were forthcoming. According to the Probation Officer, the Detective indicated that, through the use of a confidential informant, he had made contact with the Defendant and arranged to purchase heroin from Defendant at the Defendant's home. The Probation

Officer testified that the "Detective" stated that he subsequently purchased heroin from the Defendant, at the Defendant's home, on three separate occasions. The Probation Officer further testified that the Detective indicated to her that those transactions were audio recorded, that arrest warrants had issued, and that the Defendant would be prosecuted on felony charges arising from those transactions. The Probation Officer testified that Defendant was facing state charges for three counts each of felony sale and delivery of heroin, felony possession of heroin, and felony maintaining a vehicle, dwelling, or place for keeping a controlled substance. Based on this testimony, the Court finds probable cause to support the alleged violations. court should not have found probable cause

The finding of probable cause of a supervised release violation is a constitutionally sufficient predicate for directing that the releasee, already convicted of a crime, be held in custody pending the revocation hearing. See Morrissey v. Brewer, 408 U.S. 471, 487 (1972) (holding that a finding of probable cause is a sufficient ground for detention of a parole violator); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (holding that an alleged probation violator is entitled to the same due process as is set forth in Morrissey with respect to parole violators); United States v. Copley, 978 F.2d 829, 831 (4th Cir. 1992) (applying the protections of Morrissey and Gagnon to revocations of supervised release); United States v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991) (holding that Morrissey's standards apply to supervised releases); see also Fed. R. Crim. P. 32.1.

Federal Rule of Criminal Procedure 32.1(a)(6) provides that a supervised releasee's eligibility for release pending a revocation hearing shall be in accordance with 18 U.S.C. § 3143(a)(1). Under that section, the Court "shall" order a supervised releasee detained unless

the Court "finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released." 18 U.S.C. § 3143(a)(1). Rule 32.1(a)(6) further states that "[t]he burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person."

Having considered the evidence presented at the hearing, the Court cannot conclude by clear and convincing evidence that Defendant will not pose a risk of flight or risk of danger to the community if released. The Court has concerns regarding Defendant's ongoing use of controlled substances, particularly in light of the allegations and evidence regarding Defendant's sale of heroin from his residence. The alleged violations also include multiple failed drug tests and/or Defendant's admissions to using marijuana. According to the Petition, lab results from August 18, 2017, also confirmed Defendant's use of both cocaine and marijuana. The Court also has concerns related to Defendant's issues maintaining his mental health treatment, his criminal history, his prior history of absconding supervision with a prior revocation of supervised release, and the current allegations of new criminal conduct.

The Court notes that Defendant proffered his fiancé, Ms. Clark, as a potential third-party custodian, who testified at the hearing in support of Defendant. However, the proposed release plan would involve Defendant returning to the residence where he is alleged to have conducted controlled sales of heroin on three occasions. Moreover, in light of the seriousness of the alleged violations, Defendant's prior revocation, his prior convictions, the allegations of new criminal conduct, his continued involvement with controlled substances, and his issues maintaining his mental health treatment, the Court concludes that the use of a third-party

custodian would not address the Court's concerns regarding the risks to the safety of the community and Defendant's appearance in this case.

Given Defendant's criminal history, his prior violation of supervised release, his present alleged violations of supervised release, his continued use of controlled substances, and the alleged new criminal conduct, the Court concludes that Defendant has failed to show by clear and convincing evidence that he is not likely to pose a flight risk or risk to the safety of the community.

IT IS THEREFORE ORDERED that Defendant be held in custody until the final revocation hearing in this matter.

This, the 25th day of October, 2017.

/s/ Joi Elizabeth Peake
United States Magistrate Judge

FILED: December 27, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4207 (L)
(1:17-cr-00396-TDS-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

WILLIE ANTHONY SAXBY, JR.

Defendant - Appellant

No. 18-4208
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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

WILLIE ANTHONY SAXBY, JR.

Defendant - Appellant

APPENDIX C

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk