UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4512

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCUS WAYNE COVINGTON,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:08-cr-00495-WO-1)

Submitted: June 14, 2022 Decided: June 29, 2022

Before GREGORY, Chief Judge, and MOTZ and HARRIS, Circuit Judges.

Affirmed and remanded by unpublished per curiam opinion.

ON BRIEF: Brian M. Aus, BRIAN AUS, ATTORNEY AT LAW, Durham, North Carolina, for Appellant. Sandra J. Hairston, United States Attorney, Veronica L. Edmisten, 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Unpublished opinions are not binding precedent in this circuit.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:

Marcus Wayne Covington appeals his 33-month revocation sentence. Covington's counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there are no meritorious grounds for appeal but questioning whether Covington's revocation sentence is plainly unreasonable. Covington filed pro se supplemental briefs raising multiple challenges to the revocation judgment and to proceedings unrelated to the revocation hearing. We ordered supplemental briefing on whether the district court plainly erred in relying on the need to promote respect for the law, a disfavored factor under 18 U.S.C. § 3553(a)(2)(A), in sentencing Covington. We affirm but remand for correction of a clerical error.

I.

To revoke supervised release, a district court need only find a violation of a condition of supervised release by a preponderance of the evidence. 18 U.S.C. § 3583(e)(3). "[W]e review the district court's revocation of supervised release for abuse of discretion, evaluating the court's legal conclusions de novo and its factual determinations for clear error." *United States v. Patterson*, 957 F.3d 426, 435 (4th Cir. 2020).

Revocation of supervised release is mandatory when, as relevant here, a defendant "tests positive for illegal controlled substances more than 3 times over the course of 1 year." 18 U.S.C. § 3583(g)(4). However, "when considering any action against a defendant who fails a drug test," the district court is required to "consider whether the availability of appropriate substance abuse treatment programs, or an individual's current

or past participation in such programs, warrants an exception" from § 3583(g)'s mandatory-revocation requirement. 18 U.S.C. § 3583(d); *see United States v. Coston*, 964 F.3d 289, 293-94 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1252 (2021).

Covington argues that revocation of his supervised release was not appropriate and that the district court should have considered substance-abuse treatment under § 3583(d) as an alternative. Our review of the record revealed that the district court considered revocation to be the only appropriate option. The court observed that Covington tested positive for illegal drugs on multiple occasions, despite the opportunities for treatment offered to him. Accordingly, we conclude that the district court properly revoked Covington's supervised release.

II.

"A district court has broad discretion when imposing a sentence upon revocation of supervised release. [We] will affirm a revocation sentence if it is within the statutory maximum and is not plainly unreasonable." *Patterson*, 957 F.3d at 436. Before deciding "whether a revocation sentence is plainly unreasonable, [we] must first determine whether the sentence is procedurally or substantively unreasonable," *id.*, evaluating "the same procedural and substantive considerations that guide our review of original sentences" but taking "a more deferential appellate posture than we do when reviewing original sentences," *United States v. Padgett*, 788 F.3d 370, 373 (4th Cir. 2015) (cleaned up). "Only if a sentence is either procedurally or substantively unreasonable is a determination then made as to whether the sentence is plainly unreasonable—that is, whether the

unreasonableness is clear or obvious." *Patterson*, 957 F.3d at 437 (internal quotation marks omitted).

Counsel and Covington both argue that the district court incorrectly concluded that Covington's violations were Grade B, rather than Grade C violations. Because Covington did not raise this issue in the district court, we review the claim for plain error. *See Coston*, 964 F.3d at 294. To establish plain error, Covington must show "(1) an error, (2) that was plain, and (3) that affected his substantial rights." *Id.* If Covington makes that showing, "we may exercise our discretion to correct the error if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up).

The policy statement defines a Grade B violation as "conduct constituting [a] federal, state, or local offense punishable by a term of imprisonment exceeding one year" that does not qualify as a Grade A violation. U.S. Sentencing Guidelines Manual § 7B1.1(a)(2), p.s. Covington's conduct does not amount to a Grade A violation. The policy statement defines a Grade C violation as "conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision." USSG § 7B1.1(a)(3), p.s. "The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct." USSG § 7B1.1 cmt. n.1, p.s.

In Violation 1, Covington admitted testing positive for marijuana, cocaine, or both on multiple occasions. We have held that testing positive for a controlled substance is enough to establish possession of the controlled substance. *See United States v. Clark*,

30 F.3d 23, 25 (4th Cir. 1994). Simple possession of unknown quantities of marijuana and cocaine is generally a misdemeanor under federal law. *See* 21 U.S.C. § 844(a). But, when a defendant possesses marijuana or cocaine "after a prior conviction under this subchapter," he can be sentenced up to two years in prison, making the offense a felony. *Id.* Covington had a prior conviction under this subchapter—possession with intent to distribute heroin. Thus, his conduct constitutes a "federal, state, or local offense punishable by a term of imprisonment exceeding one year" and qualifies as a Grade B violation. USSG § 7B1.1(a)(2), p.s.; *see United States v. Wynn*, 786 F.3d 339, 343-44 (4th Cir. 2015). We therefore conclude that the district court did not err, plainly or otherwise, in determining that Violation 1 is a Grade B violation.

We agree, however, that the district court incorrectly designated Violation 2—failing to report for treatment and substance-abuse testing—and Violation 3—failing to complete a four-day confinement sanction—as Grade B violations because they are in fact Grade C violations. But this error did not affect Covington's substantial rights because "[w]here there is more than one violation of the conditions of supervision, . . . the grade of the violation [for the purpose of calculating the policy-statement range] is determined by the violation having the most serious grade." USSG § 7B1.1(b), p.s. Covington's most serious violation was Violation 1, a Grade B violation, so the district court's incorrect designation of Violations 2 and 3 as Grade B violations made no difference in the calculation of the policy-statement range.

Counsel also questions whether the district court adequately considered the 18 U.S.C. § 3553(a) factors and Covington's arguments in mitigation. "A revocation

also must consider certain enumerated factors under § 3553(a), excluded from that list is "the need for the sentence . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A); *see id.* § 3583(e). We have recognized, however, that "the factors listed in § 3553(a)(2)(A) are intertwined with the factors courts are expressly authorized to consider under § 3583(e)." *United States v. Webb*, 738 F.3d 638, 641 (4th Cir. 2013). Thus, although the district court may not base a revocation sentence "predominately" on the § 3553(a)(2)(A) factors, "mere reference to such considerations does not render a revocation sentence procedurally unreasonable when those factors are relevant to, and considered in conjunction with, the enumerated § 3553(a) factors." *Id.* at 642. Because Covington did not object to the court's reliance on a § 3553(a)(2)(A) factor, our review is for plain error.* *Id.* at 640.

We conclude that the district court's multiple references to Covington's lack of respect for the law is more troubling than counsel argues and less benign than the Government contends. The court repeatedly emphasized Covington's lack of respect for the law throughout the hearing. Nevertheless, we conclude that Covington has not met his burden of demonstrating "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Combs*, ___ F.4th ___, ___,

* Counsel asserts that Covington waived any objections to the district court's findings. This is incorrect because waiver applies only when a party "identifies an issue, and then explicitly withdraws it," which did not occur here. *United States v. Robinson*, 744 F.3d 293, 298 (4th Cir. 2014) (internal quotation marks omitted).

No. 21-4064, 2022 WL 2032295, at *4 (4th Cir. June 7, 2022) (internal quotation marks omitted); *see Webb*, 738 F.3d at 642-43 (holding that appellant "failed to justify a remand for resentencing" when he did "not argue[] that he would have received a lower sentence had the district court not" considered § 3553(a)(2)(A) factors).

Having found no reversible procedural error, we turn to the substantive reasonableness of Covington's sentence. *See United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019). "A revocation sentence is substantively reasonable if, in light of the totality of the circumstances, the court states an appropriate basis for concluding that the defendant should receive the sentence imposed." *Coston*, 964 F.3d at 297 (internal quotation marks omitted).

The district court was clear that Covington's behavior on supervised release breached the court's trust, and it considered several appropriate § 3553(a) factors when crafting Covington's sentence, including the need to deter him from engaging in criminal conduct, to afford him opportunities for rehabilitation, and to protect the public. The court also addressed Covington's arguments for a lesser sentence. Affording the necessary deference to the district court, we conclude that Covington's sentence is substantively reasonable.

III.

Finally, we address the remaining claims in Covington's pro se supplemental briefs. We find no evidence that the district court displayed deep-seated antagonism or bias against Covington to the extent that he was deprived of a fair hearing, and Covington's challenges to proceedings unrelated to the revocation hearing are not cognizable in this appeal. We

decline to consider Covington's ineffective-assistance-of-counsel claims in this direct appeal. *See United States v. Freeman*, 24 F.4th 320, 331 (4th Cir. 2022) (en banc).

IV.

In accordance with *Anders*, we have reviewed the entire record in this case and have found no meritorious grounds for appeal. We therefore affirm the district court's judgment. However, because the revocation judgment improperly states that Covington committed Violation 4, we remand so that the district court may correct this clerical error. *See* Fed. R. Crim. P. 36. This court requires that counsel inform Covington, in writing, of the right to petition the Supreme Court of the United States for further review. If Covington 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 Covington.

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 AND REMANDED