

NOT RECOMMENDED FOR PUBLICATION

No. 22-5935

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

May 26, 2023

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
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)
Plaintiff-Appellee,)
)
)
v.)
)
DEUNTA L. FINCH,)
)
)
Defendant-Appellant.)

O R D E R

Before: McKEAGUE, GRIFFIN, and NALBANDIAN, Circuit Judges.

Deunta L. Finch appeals the sentence that the district court imposed after vacating one of his convictions and holding a resentencing hearing. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a). Finch did not preserve the procedural-reasonableness argument that he raises on appeal, so we review for plain error only. Because Finch has not shown that the district court plainly erred by declining to grant an acceptance-of-responsibility reduction under USSG § 3E1.1(a), we affirm.

In 2017, a grand jury charged Finch with four counts: being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924; attempted Hobbs Act robbery and extortion, in violation of 18 U.S.C. § 1951(b); carrying, brandishing, and discharging a firearm during a crime of violence, in violation of § 924(c); and being a felon in possession of a firearm, in violation of §§ 922(g)(1) and 924. The charges arose from a series of offenses committed in June and November 2015. In June, Finch was involved in a shootout between the occupants of two vehicles. In November, while attempting to rob a drug dealer, Finch brandished a firearm,

shot the victim in the knee, and stole the victim’s cocaine and rental car. Later that month, Finch was arrested while in possession of a firearm. Finch initially intended to plead guilty pursuant to a written plea agreement, but the government moved to withdraw the agreement after Finch assaulted another inmate while detained and awaiting sentencing. Finch subsequently pled guilty as charged. The district court sentenced him to a total term of 290 months of imprisonment, followed by five years of supervised release. We affirmed Finch’s sentence, holding in part that the district court did not clearly err by denying Finch’s request for a two-level acceptance-of-responsibility reduction under USSG § 3E1.1(a). *United States v. Finch*, 764 F. App’x 533, 535-36 (6th Cir. 2019).

In 2020, Finch filed a 28 U.S.C. § 2255 motion to vacate or set aside his sentence, asking the district court to vacate his § 924(c) conviction because his conviction for attempted Hobbs Act robbery and extortion no longer qualified as a “crime of violence” in light of *United States v. Davis*, 139 S. Ct. 2319 (2019). The district court granted Finch’s motion and vacated his conviction and sentence for the § 924(c) offense, leaving intact Finch’s aggregate 170-month sentence on the remaining counts. But at the request of both the government and Finch, however, the district court subsequently withdrew its “correction of Finch’s sentence” and held a resentencing hearing.

At the resentencing hearing, Finch asked the district court to reduce his offense level by two levels under § 3E1.1(a), for accepting responsibility, arguing that he admitted all of the charged conduct and that he made “dramatic and very significant” efforts to rehabilitate himself, including renouncing his gang membership. The government opposed a two-level reduction for accepting responsibility, arguing that Finch’s post-arrest assault of another inmate “should negate acceptance of responsibility” and that any rehabilitation that occurred after Finch’s first sentencing hearing should be considered only in the context of the 18 U.S.C. § 3553(a) factors, not when deciding to grant a reduction under § 3E1.1(a). The district court stated that it “agree[d] with the government,” and it denied a § 3E1.1(a) reduction for both the reasons stated by the government and “the reasons . . . stated in [Finch’s] prior sentence.” Finch faced a guidelines range of 262 to 327 months of imprisonment. After hearing further arguments from the parties, including

significant testimony about Finch's post-sentencing rehabilitation, the district court sentenced Finch to a total term of 262 months of imprisonment with a subsequent three years of supervised release.

On appeal, Finch argues that the district court erred by refusing to consider his evidence of post-sentencing rehabilitation and voluntary withdrawal from criminal activities when deciding whether to grant his request for a reduction under § 3E1.1. He contends that he admitted his guilt by pleading guilty to all charged offenses, he voluntarily withdrew from criminal associations by renouncing his gang membership, and he engaged in substantial rehabilitative efforts following his initial sentencing.

The parties dispute which standard of review applies on appeal. In essence, Finch is arguing that the district court failed to "properly calculate the guidelines range" because it "failed to consider [relevant] factor[s]," which is a challenge to the procedural reasonableness of his sentence. *United States v. Rayyan*, 885 F.3d 436, 440, 442 (6th Cir. 2018). As the government notes, if a claim of procedural error is not preserved at sentencing, it is reviewed for plain error on appeal. *See, e.g., United States v. Price*, 901 F.3d 746, 749 (6th Cir. 2018); *United States v. Bostic*, 371 F.3d 865, 872-73 (6th Cir. 2004).

To preserve a procedural error at sentencing, a defendant must raise a contemporaneous objection or "object when properly invited at the conclusion of the sentencing hearing." *Price*, 901 F.3d at 749. Finch contends that he was not required to object at the conclusion of the sentencing hearing because he had already argued for the § 3E1.1 reduction based on his post-sentencing conduct. *See United States v. Kamper*, 748 F.3d 728, 740 (6th Cir. 2014). But Finch's argument "that the district court committed procedural error by failing even to consider his arguments . . . must be preserved by an objection after the sentencing because it 'cannot be preserved in advance of a sentencing event that has yet to occur.'" *Id.* (quoting *United States v. Lamb*, 431 F. App'x 421, 424 (6th Cir. 2011)). Finch did not object either immediately after the district court ruled that it would not consider his post-sentencing rehabilitation arguments in the § 3E1.1 context or at the conclusion of the sentencing proceeding. We therefore review his appellate argument for plain error.

To satisfy the plain-error standard, Finch must show “(1) error, (2) that ‘was obvious or clear,’ (3) that ‘affected [his] substantial rights’ and (4) that ‘affected the fairness, integrity, or public reputation of the judicial proceedings.’” *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc) (quoting *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006)).

Section 3E1.1 authorizes a two-level reduction to a defendant’s offense level “[i]f the defendant clearly demonstrates acceptance of responsibility for his offense.” USSG § 3E1.1(a). Guideline commentary lists “voluntary termination or withdrawal from criminal conduct or associations” and “post-offense rehabilitative efforts” as “appropriate considerations” when applying the guideline. USSG § 3E1.1 n.1(B), (G). Nothing in § 3E1.1 bars a district court from considering post-sentencing conduct under § 3E1.1, and Congress has warned that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661. Thus, the district court arguably erred by failing to consider Finch’s post-sentencing rehabilitation arguments in support of his request for a § 3E1.1 reduction.

Even if the district court erred, though, the error was not “obvious or clear” and did not affect Finch’s substantial rights or the “fairness, integrity, or public reputation of the judicial proceedings.” *Vonner*, 516 F.3d at 386. In a similar case involving a post-sentencing remand, the district court declined to grant an acceptance-of-responsibility reduction despite concluding that the defendant “fully accepted responsibility” after his initial sentencing hearing. *United States v. Cook*, 238 F.3d 786, 789 (6th Cir. 2001). We noted that, “even if the district court could have considered evidence of Cook’s post-sentence acceptance of responsibility, the district court still should not have granted the reduction” because such belated “[e]xpressions of regret and responsibility do not mandate reductions.” *Id.* at 790. The same is true here. The commentary to § 3E1.1 repeatedly instructs district courts to consider “the timeliness” of the defendant’s conduct in accepting responsibility. USSG § 3E1.1, comment. n.1(H), n.6, background. We previously affirmed the district court’s judgment that Finch had not accepted responsibility at the time of his initial sentencing hearing. *Finch*, 764 F. App’x at 536. And Finch did not renounce his gang

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membership until 2021, almost three years after his initial sentencing. He first began taking educational courses in June 2020, more than two years after his initial sentencing proceeding. In light of the belated nature of Finch's rehabilitation and other evidence counseling against granting the reduction, the district court did not plainly err by denying the acceptance of responsibility reduction.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk