

2024 WL 825621

Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

Jondell MIDDLEBROOKS, Defendant-Appellant.

23-6320(L), 23-6322(Con.)

|

February 28, 2024

Appeal from two judgments of the United States District Court for the Northern District of New York (Suddaby, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the district court are **AFFIRMED**.

Attorneys and Law Firms

For Defendant-Appellant: Melissa A. Tuohey, Assistant Federal Public Defender, Syracuse, NY.

For Appellee: Thomas R. Sutcliffe, Assistant United States Attorney, for Carla B. Freedman, United States Attorney for the Northern District of New York, Syracuse, NY.

Present: Debra Ann Livingston, Chief Judge, Gerard E. Lynch, Beth Robinson, Circuit Judges.

SUMMARY ORDER

*1 Defendant-Appellant Jondell Middlebrooks appeals from two judgments entered on March 31, 2023 in connection with his pleas and sentencing in the United States District Court for the Northern District of New York (Suddaby, J.). The court sentenced Middlebrooks principally to 192 months' imprisonment and six years of supervised release for possession with intent to distribute a controlled substance (cocaine base) in violation of [21 U.S.C. §§ 841(a)(1) and [841(b)(1)(C), and to 18 months' imprisonment for violations of supervised release during the commission of the controlled substance offense, to be served consecutive to the 192-month sentence. On appeal, Middlebrooks challenges both sentences. In addressing these challenges, we assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we discuss here only as necessary to explain our decision to **AFFIRM**.

* * *

This Court reviews sentences for procedural and substantive reasonableness under "a particularly deferential form of abuse-of-discretion review." [*United States v. Broxmeyer*, 699 F.3d 265, 278 (2d Cir. 2012) (quoting [*United States v. Cavera*, 550 F.3d 180, 188 n.5 (2d Cir. 2008) (en banc)). The same standard applies to sentences for supervised release violations. See *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005). We find procedural error where, *inter alia*, the district court "makes a mistake in its Guidelines calculation," "does not consider the [18 U.S.C.] § 3553(a) factors," or "fails adequately to explain its chosen sentence." [*Cavera*, 550 F.3d at 190. We review *de novo* a district court's interpretation of the United States Sentencing Guidelines ("Guidelines") as to whether a crime is a "crime of violence." [*United States v. Gamez*, 577 F.3d 394, 397 (2d Cir. 2009). We will vacate a sentence as substantively unreasonable "only in exceptional cases where the

trial court's decision 'cannot be located within the range of permissible decisions.' " *Id.* at 189 (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). Where a defendant does not object to a factual error at sentencing, we generally review for plain error, *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011), meaning error that is clear or obvious, affected substantial rights, and "seriously affects the fairness, integrity, or public reputation of judicial proceedings," *United States v. Stevenson*, 834 F.3d 80, 83 (2d Cir. 2016) (quoting *United States v. Marcus*, 560 U.S. 258, 262 (2010)).

I. Controlled Substance Offense

Middlebrooks first argues that the district court committed procedural error by sentencing him as a career offender pursuant to U.S.S.G. § 4B1.1(a). We disagree. Specifically, Middlebrooks contends that one of his previous convictions, for attempted murder in the second degree in violation of N.Y. Penal Law § 125.25(1), does not constitute a predicate "crime of violence" under the career offender definition following the Supreme Court's decision in *United States v. Taylor*. See 596 U.S. 845, 852 (2022) (holding that attempted Hobbs Act robbery is not a crime of violence). Intervening Second Circuit case law has squarely rejected Middlebrooks' argument. Following *Taylor*, we issued an amended opinion in *United States v. Pastore*, clarifying that *Taylor* does not change this Court's conclusion that attempted murder in the second degree, in violation of § 125.25(1), is a "crime of violence." 83 F.4th 113, 120 (2d Cir. 2023). Although *Pastore* considered whether attempted second degree murder under § 125.25(1) is a "crime of violence" for purposes of 18 U.S.C. § 924(c), its analysis squarely applies to the question whether attempted second degree murder is a "crime of violence" for the purposes of U.S.S.G. § 4B1.1(a). Compare 18 U.S.C. § 924(c)(3)(A) with U.S.S.G. § 4B1.2(a). Since Middlebrooks also had a prior conviction for a controlled substance offense, the district court properly concluded here that Middlebrooks had two prior convictions that qualified as valid predicates for the career offender enhancement.

*2 Middlebrooks next argues that his 192-month sentence is substantively unreasonable because, *inter alia*, his criminal history cannot bear the weight assigned to it and the sentence fails to account adequately for his background and characteristics, including mitigating factors. This argument, too, is without merit.

At Middlebrooks' sentencing hearing, the district court noted that it had considered "all the pertinent information," including the § 3553(a) factors, the Presentence Report and addendum, submissions by counsel, the Sentencing Guidelines Manual, and the Guidelines imprisonment range of 188 to 235 months. A199. Judge Suddaby concluded that Middlebrooks' criminal history, in light of his return to narcotics distribution within six months of his release from prison, indicated "a lack of willingness to refrain from illegal activity," and that Middlebrooks was "undeterred by community supervision." A200. The district court determined that the 192-month sentence, near the bottom of the Guidelines range, was "sufficient, but not greater than necessary, to reflect the seriousness of [the] offense[;] provide just punishment[;] afford adequate deterrence[;] and to protect this community from further crimes of this defendant." A199–200.

The district court's determination was substantively reasonable. Middlebrooks points to mitigating factors present in his case, but our precedent makes clear that "[t]he particular weight to be afforded aggravating and mitigating factors 'is a matter firmly committed to the discretion of the sentencing judge.'" *Broxmeyer*, 699 F.3d at 289 (quoting *United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir. 2006)). Taking into account "the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of [the] district court[]," *Cavera*, 550 F.3d at 190, we conclude that the district court's determination was "located within the range of permissible decisions," *id.* at 191.

Finally, Middlebrooks argues that the district court relied on unsupported factual findings in making its sentencing determination as to the controlled substance offense. We review for plain error, as Middlebrooks failed to object to these alleged errors during his sentencing hearing. *See* ¹ *United States v. Rybicki*, 354 F.3d 124, 128–29 (2d Cir. 2003) (en banc). We discern no such error here. Considering the district court's comments as a whole, the record is clear that the court's characterization of Middlebrooks' "violent criminal behavior" and his "destructive" conduct in the community referenced his ongoing involvement in drug offenses which, as the district court explained, "destroy ... people's lives." A198. Contrary to Middlebrooks' claim on appeal, the record reflects no confusion as to his post-1998 offense conduct. Accordingly, his argument fails.

II. Supervised Release Violations

Finally, Middlebrooks argues that his sentence of 18 months' imprisonment—at the bottom of the Guidelines range of 18 to 24 months—for the supervised release violations, to run consecutively, was substantively unreasonable. We again disagree.

First, the district court did not abuse its discretion in imposing the revocation sentence to run consecutively to the term imposed for the new conviction. The Sentencing Guidelines Manual policy statement covering "Revocation of Probation or Supervised Release" provides:

***3** [a]ny term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served *consecutively* to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.

¹ U.S. Sentencing Guidelines Manual § 7B1.3(f) (U.S. Sentencing Comm'n 2015) (emphasis added). And the district court acted well within its discretion in determining that given Middlebrooks' breach of trust, "the goals of sentencing as enumerated in ² 18 U.S.C. Section 3553(a) are best served by consecutive sentences in this case." A206.

Second, the court provided adequate reasons for the sentence, again focusing principally on Middlebrooks' breach of trust. The court noted its intention to provide deterrence and promote respect for the law. Further, the court affirmed that it declined to run the term concurrently in order to best serve ³ § 3553(a)'s sentencing goals due to the "serious breach of the trust of this Court." Addressing Middlebrooks, the court explained: "You were under the supervision of this Court for less than six months when you chose to engage in the same criminal conduct of distributing drugs in our community." A206. The sentence was substantively reasonable.

* * *

We have considered Middlebrooks' remaining arguments and conclude they lack merit. We therefore **AFFIRM** the district court's judgments.

All Citations

Not Reported in Fed. Rptr., 2024 WL 825621

UNITED STATES DISTRICT COURT

Northern District of New York

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Jondell Middlebrooks

Case Number: DNYN522CR000390-001

USM Number: 25874-052

Randi Juda Bianco
Office of the Federal Public Defender's Office
4 Clinton Square, 3rd Floor
Syracuse, NY 13202
315-701-0080

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count 1 of the Superseding Information on March 29, 2023.
 pleaded nolo contendere to count(s) which was accepted by the court.
 was found guilty on count(s) of the on after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) & 841(b)(1)(C)	Possession with Intent to Distribute Cocaine Base	06/23/2022	1

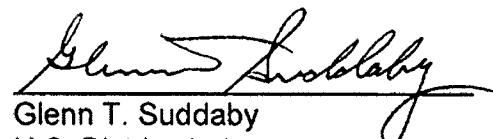
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed in accordance with 18 U.S.C. § 3553 and the Sentencing Guidelines.

The defendant has been found not guilty on count(s)
 Count(s) is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 29, 2023

Date of Imposition of Judgment



Glenn T. Suddaby
U.S. District Judge

March 31, 2023

Date

DEFENDANT: Jondell Middlebrooks
CASE NUMBER: DNYN522CR000390-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

192 months.

The court makes the following recommendations to the Bureau of Prisons:

The defendant to participate in substance abuse treatment while incarcerated with the Bureau of Prisons and be designated to a facility as close as possible to Syracuse, New York.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

BY DEPUTY UNITED STATES MARSHAL

A 5

DEFENDANT: Jondell Middlebrooks
CASE NUMBER: DNYN522CR000390-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

6 years

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(deselect if inapplicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that you pay in accordance with the Schedule of Payments sheet of this judgment.

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: Jondell Middlebrooks
CASE NUMBER: DNYN522CR000390-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the court determines in consultation with your probation officer that, based on your criminal record, personal history and characteristics, and the nature and circumstances of your offense, you pose a risk of committing further crimes against another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.
14. You must provide the probation officer with access to any requested financial information.
15. You must submit your person, and any property, house, residence, vehicle, papers, effects, computer, electronic communications devices, and any data storage devices or media, to search at any time, with or without a warrant, by any federal probation officer, or any other law enforcement officer from whom the Probation Office has requested assistance, with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct by you. Any items seized may be removed to the Probation Office or to the office of their designee for a more thorough examination.

DEFENDANT: Jondell Middlebrooks
CASE NUMBER: DNYN522CR000390-001

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program for substance abuse which shall include testing for use of controlled substances, controlled substance analogues, and alcohol. This may include outpatient treatment as recommended by the treatment provider based upon your risk and needs. You may also be required to participate in inpatient treatment upon recommendation of the treatment provider and upon approval of the Court. The probation office shall approve the location, frequency, and duration of outpatient treatment. You shall abide by the rules of any treatment program which may include abstaining from the use of any alcohol. You shall contribute to the cost of any evaluation and/or treatment in an amount to be determined by the probation officer based on your ability to pay and the availability of third party payments.
2. You must participate in a mental health program which may include medical, psychological, or psychiatric evaluation and outpatient treatment as recommended by the treatment provider based upon your risk and needs. You may also be required to participate in inpatient treatment upon recommendation of the treatment provider and upon approval of the Court. The probation office shall approve the location, frequency, and duration of outpatient treatment. You shall abide by the rules of the program which may include a medication regimen. You shall contribute to the cost of any evaluation and/or treatment in an amount to be determined by the probation officer based on your ability to pay and the availability of third party payments.
3. You must not associate with any member, associate, or prospect of the 110 gang, or any other criminal street gang.

DEFENDANT'S ACKNOWLEDGMENT OF APPLICABLE CONDITIONS OF SUPERVISION

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

The conditions of supervision have been read to me. I fully understand the conditions and have been provided a copy of them. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant

Date

U.S. Probation Officer/Designated Witness

Date

DEFENDANT: Jondell Middlebrooks
CASE NUMBER: DNYNS22CR000390-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>AVAA Assessment**</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100	N/A	N/A	Waived	N/A

The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
	\$	\$	
Totals	\$	\$	

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

**Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

***Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Jondell Middlebrooks
CASE NUMBER: DNYN522CR000390-001**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A In full immediately; or
- B Lump sum payment of \$ due immediately; balance due
 - not later than, or
 - in accordance with D, E, F, or G below; or
- C Payment to begin immediately (may be combined with D, E, or G below); or
- D Payment in equal installments of \$ over a period of , to commence after the date of this judgment; or
- E Payment in equal installments of \$ over a period of , to commence after release from imprisonment to a term of supervision; or
- F Payment during the term of supervised release will commence within after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- G Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to Clerk, U.S. District Court, Federal Bldg., 100 S. Clinton Street, P.O. Box 7367, Syracuse, N.Y. 13261-7367, or to pay electronically, visit www.nynd.uscourts.gov for instructions, unless otherwise directed by the court, the probation officer, or the United States attorney. If a victim cannot be located, the restitution paid to the Clerk of the Court for that victim shall be sent to the Treasury, to be retrieved when the victim is located.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several
 - Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
 - The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

A 10