

24-5588

CASE NO. 24-5588

IN THE UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEVEN L. SMITH,
Defendant-Appellant.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

QUESTION NO. I:

Whether the Sixth Circuit's decision affirming the judgment of the district court was error, where one of Defendant-Appellant's predicate convictions for the career-offender enhancement falls just within the 15-year window of consideration and his criminal-history category overrepresented his criminal record, did the district court err and abuse its discretion by not granting a downward departure under U.S.S.G. § 4A1.3?

QUESTION NO. II:

Whether the Sixth Circuit's decision affirming the judgment of the district court was error, where the district court placed too much weight on some of the 18 U.S.C. § 3553(a) factors and too little on others, did the court err and abuse its discretion by imposing a sentence is unreasonably long?

LIST OF ALL PARTIES

The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

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N.D. Ohio No. 1:21-cr-00696
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Exhibit B: Plea Entry

United States District Court, Northern District of Ohio, Eastern Division
N.D. Ohio No. 1:21-cr-00696
United States v. Smith, 2022 U.S. Dist. LEXIS 227219 (N.D. Ohio, Dec. 16, 2022)

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STATEMENT OF THE BASIS FOR JURISDICTION

The date on which the United States Court of Appeals for the Sixth Circuit decided Defendant-Appellant's appeal was the 10th day of April, 2024. No petition for rehearing was requested. Jurisdiction of the Supreme Court to review cases in the courts of appeals is invoked under 28 U.S.C. § 1254(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions.

- 14 amend., U.S. Constitution.

B. Statutory Provisions.

- U.S.S.G. §4A1.2(e)
- U.S.S.G. §4A1.3
- 18 U.S.C. § 3553(a)

STATEMENT OF THE CASE

On September 30, 2021, the government filed an Indictment against Defendant-Appellant charging him with the following:

- Counts 1-3: Possession with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. Sections 841(a)(1) and (b)(1)(C);
- Count 4: Using or Carrying a Firearm During and in Relation to a Drug Trafficking Crime, in violation of 18 U.S.C. 924(c)(1)(A)(i);
- Count 5: Felon in Possession of Firearm and Ammunition, in violation of 18 U.S.C. 922(g)(1).

On September 9, 2022, the United States District Court for the Northern District of Ohio, Eastern Division, issued an order assigning the case to a Magistrate Judge for the purpose of receiving Defendant-Appellant's guilty plea.

On September 27, 2022, a hearing was held in which Defendant-Appellant entered a plea of guilty, as follows:

- Counts 1-3, charging him with Possession with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. Sections 841(a)(1) and (b)(1)(C);
- Count 4, charging him with Using or Carrying a Firearm During and in Relation to a Drug Trafficking Crime, in violation of 18 U.S.C. 924(c)(1)(A)(i);
- Count 5, charging him with Felon in Possession of Firearm and Ammunition, in violation of 18 U.S.C. 922(g)(1).

On September 27, 2022, the Magistrate Judge received Defendant-Appellant's guilty plea and issued a Report and Recommendation ("R&R") recommending the Court accept the plea and enter a finding of guilty.

Neither party objected to the Magistrate Judge's R&R in the fourteen days after it was issued.

On December 16, 2022, upon de novo review of the record, the Court made the following findings: that the Defendant-Appellant was competent to enter a plea, that he understood his constitutional rights, that he was aware of the consequences of entering a plea, and that there is an adequate factual basis for the plea. The Court further found that the plea was entered knowingly, intelligently, and voluntarily. Accordingly, the Court approved Defendant-Appellant's plea of guilty and adjudged him guilty of Counts 1, 2, 3, 4 and 5 of the indictment.

Defendant-Appellant proceeded to his sentencing hearing on May 31, 2023, and defense counsel entered an objection towards the guideline range and that a variance was appropriate. The district court deem that a downward variance was appropriate, and imposed a sentence of 151 months as to Counts 1, 2, and 3, and 60 months as to Count 4; to be served consecutively with Counts 1, 2, 3 and 5; for a total aggregate term of imprisonment for 211 months.

On June 7, 2023, Defendant-Appellant filed a Notice of Appeal in the Sixth Circuit Court of Appeals and presented two arguments for review:

- I. When the trial court fails to grant a downward departure from the defendant's criminal history category, the sentence imposed is unreasonable. Specifically, the trial court failed to grant a downward departure regarding the defendant's criminal history category in relation to a 2000 conviction. Therefore, Smith should have his case remanded for a new sentencing hearing.
- II. When the trial court fails to consider pertinent § 3553(A) factors or gives an unreasonable amount of weight to any pertinent factor, the sentence imposed is unreasonable. Specifically, the trial court failed to properly weigh the "history and characteristics" of the defendant even when

imposing a sentence “below the guideline range.” Therefore, Smith should have his case remanded for a new sentencing hearing.

On April 10, 2024, the Sixth Circuit issued an Order affirming the judgment of the district court. *United States v. Smith*, 6th Cir. No. No. 23-3493, 2024 U.S. App. LEXIS 8666.

The United States District Court for the Northern District of Ohio, Eastern Division is the court of first instance, and the basis for federal jurisdiction in the district court was invoked on September 30, 2021, when the government filed an Indictment.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING THE WRIT

In this case, the sentence is both procedurally and substantively unreasonable. The sentence is procedurally unreasonable because the district court failed in utilizing its discretion to grant a downward departure towards the defendant’s criminal history category, thus triggering a “career offender” status. Specifically, the court counted Defendant-Appellant’s federal conviction from 2000 for possession with the intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), pursuant to U.S.S.G. §4A1.2(e), because Defendant-Appellant was released from custody in 2007. As a result of being incarcerated for purposes of this conviction in relation to the fifteen-year period prior to his instant offense, this conviction was counted towards Defendant-Appellant’s career offender status. However, the court failed to recognize U.S.S.G. §4A1.3, which allows for a downward departure from the defendant’s criminal history category, especially when a conviction is close to the cutoff period in relation to the instant offense. Because the

district court failed to grant the downward departure, Defendant-Appellant sentence is procedurally unreasonable and must be vacated.

Further the sentence is substantively unreasonable. Defendant-Appellant submits that due to mitigating factors present in his case, a sentence of 211 months was greater than necessary to meet 18 U.S.C. § 3553(a) statutory purposes of sentencing, and as such, the sentence imposed was substantively unreasonable. Specifically, the district court failed to sufficiently weigh characteristics related to Defendant-Appellant's tragic childhood, mental health, and substance use issues.

REASONS FOR GRANTING THE WRIT

QUESTION NO. I:

Whether the Sixth Circuit's decision affirming the judgment of the district court was error, where one of Defendant-Appellant's predicate convictions for the career-offender enhancement falls just within the 15-year window of consideration and his criminal-history category overrepresented his criminal record, did the district court err and abuse its discretion by not granting a downward departure under U.S.S.G. § 4A1.3?

QUESTION NO. II:

Whether the Sixth Circuit's decision affirming the judgment of the district court was error, where the district court placed too much weight on some of the 18 U.S.C. § 3553(a) factors and too little on others, did the court err and abuse its discretion by imposing a sentence is unreasonably long?

Axiomatic, a criminal sentence must be both procedurally and substantively reasonable. *United States v. Parish*, 915 F.3d 1043, 1047 (6th Cir.2019) (citing *United States v. Morgan*, 687 F.3d 688, 693 (6th Cir.2021)). Accordingly, “[s]entences imposed post-Booker are reviewed for procedural and substantive reasonableness.” *United States v. Conaster*, 514 F.3d 508, 519 (6th Cir.2008) (citing *United States v. Booker*, 543 U.S. 220, 261, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)). Appellate courts

must first ensure that the district court committed no significant procedural error. *Id.* A district court's sentence must be vacated if it is found to be procedurally unreasonable. *United States v. Williams*, 214 Fed.App'x 552, 554 (6th Cir.2007) (citing *United States v. Collington*, 461 F.3d 805, 808 (6th Cir.2006)).

If the sentence is procedurally sound, the appellate court must then review the substantive reasonableness of the sentence. *Conaster*, 514 at 520 (citing *Gall v. United States*, 552 U.S. 38, 46, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)); *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). “A sentence may be vacated on appeal if it is substantively unreasonable—that is, where the ‘sentence is too long . . . or too short.’” *United States v. Demma*, 948 F.3d 722, 727 (6th Cir.2020).

A. Defendant-Appellant’s sentence was procedurally unreasonable.

A sentence may be held procedurally unreasonable if it is marked by “significant procedural error, such as failing to calculate or improperly calculating the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guideline range.” *United States v. Houston*, 529 F.3d 743, 753 (6th Cir.2008).

The instant case is procedurally unreasonable because the trial court failed to grant a downward departure regarding Defendant-Appellant’s criminal history category in relation to a 2000 conviction. This was an abuse of the court’s discretion.

At sentencing, the district court clearly made it known that it was adopting the report and calculations of the Presentence Investigation Report. Specifically, Probation determined Defendant-Appellant was a career offender. Defendant-Appellant acknowledges that his instant offense, and his prior federal conviction under 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), and prior state conviction under Ohio Revised Code § 2925.03(A)(2), are controlled substances offenses. However, the court failed to recognize U.S.S.G. §4A1.3, which allows for a downward departure from the defendant's criminal history category, especially when a conviction is close to the cutoff period in relation to the instant offense.

U.S.S.G. §4A1.3(b), states the standard for a downward departure is when "reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes," thus, a downward departure may be warranted. It is clear based upon Defendant-Appellant's tragic childhood, mental health, and substance use issues, that his poor criminal history can be drawn to these traumatic events. Further, Defendant-Appellant's arrest for his underlying conviction presented no violence, Defendant-Appellant cooperated fully with law enforcement's demands, and the instant offense occurred nearly fifteen years apart from any prior offenses. The district court failed to consider the above factors. Instead, it treated the Guidelines as mandatory. The district court should have disregarded this conviction in counting towards Defendant-Appellant's career

offender status all together. Where the district court did not grant a downward departure, the sentence in this case was procedurally unreasonable.

B. Defendant-Appellant's sentence was substantively unreasonable.

A claim that a sentence is substantively unreasonable is a claim that a sentence is too long. *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir.2018). 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), (citing *United States v. Webb*, 403 F.3d 373, 385 (6th Cir.2005)). The point of a substantive reasonableness challenge “is not that the district court failed to consider a factor or considered an inappropriate factor; that’s the job of procedural unreasonableness.” *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019) (quoting *Rayyan, supra*). Rather, substantive unreasonableness is “a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual.” Id.

Here, the sentence was substantively unreasonable because the district court selected an arbitrary aggregate sentence of 211 months without properly considering the § 3553(a) factors in light of Defendant-Appellant’s tragic childhood, mental health, and substance use issues. Specifically, the district court imposed an aggregate sentence of 211 months, on the idea of sentencing Defendant-Appellant to a term without the §4B1.1(c)(3) factor coming into play. Defendant-Appellant acknowledges

this sentence equates to a below the Guideline sentence, based upon the district court's adoption of the report and calculations contained within the Presentence Report, however, the logic behind the recommendation is void of the § 3553(a) factors.

Although the district court did list three factors as to why it was varying downward: (1) drug and alcohol dependence, (2) lack of youthful guidance, and (3) mental health conditions, however, it failed to consider the most glaring fact that Defendant-Appellant has experienced nine specific traumatic events, with the most being that of sexual abuse. Based upon Defendant-Appellant's Sealed Sentencing Memorandum, he suffered both physical and sexual abuse as a child. His childhood also exposed Defendant-Appellant to first hand to gun violence at an early age, which is supported by the fact that he has witnessed four different episodes of gun violence, some resulting in fatalities. Finally, Defendant-Appellant was raised by a mother addicted to drugs and was even placed in foster care for a period of time. As a result, Defendant-Appellant's substance use issues are directly correlated to his ongoing mental symptoms, which include Post-Traumatic Stress Disorder, major depressive disorder, and anxiety. Finally, Defendant-Appellant has also been found to function at a low-average range of intelligence. Thus, the district court did not properly give weight to these factors and circumstances in light of the § 3553(a) factors.

Because the resulting sentence was too high and substantively unreasonable, it must be vacated. Therefore, the Sixth Circuit should have remanded the matter to the district court for a more thorough review of the § 3553(a) factors and the potential

of imposing incarceration to less than the aggregate sentence of 211 months imposed. Its failure to do so constitutes an error warranting this Court review.

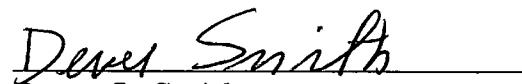
CONCLUSION

Based on the above-stated arguments, where one of Defendant-Appellant's predicate convictions for the career-offender enhancement falls just within the 15-year window of consideration and his criminal-history category overrepresented his criminal record, the district court erred and abused its discretion by not granting a downward departure under U.S.S.G. § 4A1.3. Thus, the answer to Question No. I, is an affirmative "yes" the Sixth Circuit's decision affirming the judgment of the district court was error.

And, where the district court placed too much weight on some of the 18 U.S.C. § 3553(a) factors and too little on others, the court erred and abused its discretion by imposing a sentence that is unreasonably long. Thus, the answer to Question No. II, is an affirmative "yes" the Sixth Circuit's decision affirming the judgment of the district court was error.

WHEREFORE, the Court should grant certiorari.

Respectfully submitted,



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