

APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 23-3493

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Apr 10, 2024

KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,)
v.)
Plaintiff-Appellee,)
DEVEN L. SMITH,) ON APPEAL FROM THE UNITED
Defendant-Appellant.) STATES DISTRICT COURT FOR
v.) THE NORTHERN DISTRICT OF
Ohio) OHIO
v.)
Plaintiff-Appellee,)
DEVEN L. SMITH,)
Defendant-Appellant.)

O R D E R

Before: GIBBONS, GRIFFIN, and DAVIS, Circuit Judges.

Deven L. Smith appeals his 211-month sentence for violating federal drug and firearm laws. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because Smith has not shown a reversible procedural error, and because his sentence is substantively reasonable, we affirm.

Smith pleaded guilty to three counts of possessing with intent to distribute a controlled substance, using or carrying a firearm during and in relation to a drug-trafficking crime, and being a felon in possession of a firearm and ammunition. He admitted that law enforcement officers found him in the driver's seat of his parked car with a large bag of narcotics on the front passenger seat and numerous clear, empty bags on his lap. He was seen transferring narcotics from the large bag into one of the small bags, and other bags of individually packaged narcotics were found inside the car. Officers searched the car and found "a digital scale [and] packaging material," as well as a loaded .45-caliber pistol "between the driver's seat and the center console."

Smith's guidelines imprisonment range under the applicable career-offender guideline, U.S.S.G. § 4B1.1(c)(3), was 262 to 327 months. *See* U.S.S.G. §§ 2K2.4(c), 4B1.1(c)(3). Without

the career-offender enhancement, Smith’s advisory guidelines range would have been 211 to 248 months of imprisonment. Concluding that the guidelines range driven by the career-offender enhancement was greater than necessary to serve the purposes of sentencing, the district court varied downward to the 211-to-248-month range and sentenced Smith to 211 months of imprisonment.

On appeal, Smith argues that his sentence is both procedurally and substantively unreasonable. Procedurally, he argues that the district court should have granted a downward departure under U.S.S.G. § 4A1.3, because one of his predicate convictions for the career-offender enhancement falls just within the 15-year window of consideration and his criminal-history category overrepresents his criminal record. Substantively, he contends that the district court did not properly weigh his childhood circumstances, mental-health issues, and struggles with substance abuse.

We decline to review Smith’s procedural-reasonableness argument, because the record does not show “that the district court was unaware of, or did not understand, its discretion to make . . . a departure.” *United States v. Santillana*, 540 F.3d 428, 431 (6th Cir. 2008). Smith did not request a downward departure under § 4A1.3—he requested only a downward *variance*—so the district court had no reason to address § 4A1.3. “[W]e presume that the district court understood its discretion [to depart], absent clear evidence to the contrary,” and the district court’s grant of a downward variance only supports the presumption that the court understood its discretion. *Id.*

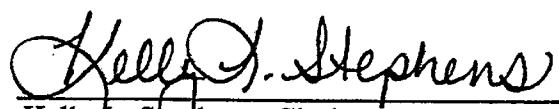
We review the substantive reasonableness of Smith’s sentence for an abuse of discretion to determine whether his sentence “is too long.” *United States v. Johnson*, 95 F.4th 404, 418 (6th Cir. 2024) (quoting *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018)). “This inquiry requires us to consider if ‘the court placed too much weight on some of the [18 U.S.C.] § 3553(a) factors and too little on others.’” *Id.* (alteration in original) (quoting *Rayyan*, 885 F.3d at 442). Sentences that fall within the applicable guidelines range are presumed to be substantively reasonable, *United States v. Baker*, 559 F.3d 443, 448 (6th Cir. 2009), and a defendant whose sentence falls below the guidelines range has an “even more demanding” burden of showing that

his sentence “is unreasonably long,” *United States v. Fields*, 763 F.3d 443, 455 (6th Cir. 2014) (quoting *United States v. Taylor*, 557 F. App’x 475, 475 (6th Cir. 2014) (per curiam)).

The district court discussed Smith’s difficult childhood, even noting that his childhood could be described as “horrific” due to the abuse that he suffered, the neighborhood that he grew up in, the violence that he witnessed, and the absence of his father. The district court also acknowledged Smith’s “substance abuse history,” pointing out that it began at an early age and acknowledging that Smith had received “some limited . . . treatment.” The district court also listed Smith’s mental-health diagnoses. It determined that a 211-month sentence was sufficient, but not greater than necessary, to effectuate the purposes of sentencing by balancing the mitigating circumstances just mentioned against Smith’s lengthy criminal history; the lack of deterrence provided by a prior, lengthy federal sentence; and the seriousness of the instant offenses. As the district court pointed out, Smith would have fallen within criminal-history category VI even without the career-offender enhancement, he had repeatedly been convicted of drug-trafficking crimes despite having “a skill set,” he had violated his supervised release after serving 84 months of imprisonment for a “prior federal trafficking conviction,” and the instant offenses were serious. Ultimately, the district court reasonably balanced the relevant factors and did not abuse its discretion in settling on a 211-month sentence.

We therefore **AFFIRM** the district court’s judgment.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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No. 23-3493

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEVEN L. SMITH,

Defendant-Appellant.

Before: GIBBONS, GRIFFIN, and DAVIS, Circuit Judges.

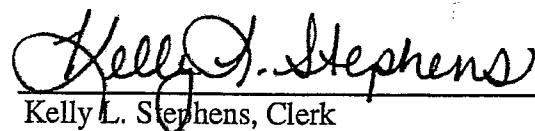
JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was submitted on the
briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court
is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,

vs.

DEVEN L. SMITH, Defendant.

Case No. 1:21-cr-00696
September 27, 2022, Decided; September 27, 2022, Filed

Counsel: [*1] For Deven L. Smith, Defendant: Jacqueline A. Johnson, LEAD ATTORNEY, Office of the Federal Public Defender - Cleveland, Cleveland, OH.

For United States of America, Plaintiff: Scott C. Zarzycki, LEAD ATTORNEY, Henry F. DeBaggis, II, Office of the U.S. Attorney - Cleveland, Northern District of Ohio, Cleveland, OH.

Judges: Jonathan D. Greenberg, United States Magistrate Judge. Judge Sara Lioi.

Opinion by: Jonathan D. Greenberg

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to General Order 99-49, this matter was referred to the undersigned United States Magistrate Judge for the purpose of receiving, after consent, the Defendant's plea of guilty. The following, along with the transcript or other record of the proceedings submitted herewith, constitutes this Court's Report and Recommendation concerning the Defendant's plea of guilty:

1. On September 27, 2022, the Defendant, accompanied by counsel, proffered a plea of guilty;
2. The Defendant was examined as to his competency to participate in a plea proceeding and was found to be competent;
3. The Defendant acknowledged understanding the nature of the charges contained in the indictment and the maximum possible sentence consequent thereto;
4. The Defendant [*2] was advised of his rights to tender a plea of not guilty or stand upon such a plea previously entered, to trial, to representation by counsel, including appointed counsel, at all stages of the proceedings, to confront and cross-examine adverse witnesses, to present witnesses and to compel their presence, to compel production of exhibits or documents for trial on his behalf, to stand upon or waive the privilege against self-incrimination, and acknowledged understanding that if a plea of guilty was accepted each of those rights would be waived;

- 5. The Defendant was advised that the government would have the right, in a prosecution for perjury, to use any statement he makes under oath;
- 6. The parties provided the undersigned with sufficient information about the charged offenses and the Defendant's conduct to establish a factual basis for the plea; and,
- 7. The undersigned questioned the Defendant under oath about the knowing, intelligent, and voluntary nature of the plea of guilty, and finds that the Defendant's plea was offered knowingly, intelligently, and voluntarily.

In light of the foregoing and the record submitted herewith, the undersigned finds that all requirements imposed by the [*3] United States Constitution and Fed. R. Crim. P. 11 have been satisfied. Therefore, the undersigned recommends that the plea of guilty be accepted and a finding of guilty be entered by the Court.

/s/ Jonathan D. Greenberg

Jonathan D. Greenberg
United States Magistrate Judge

Date: September 27, 2022

Subsequent History:

Adopted by, Judgment entered by *United States v. Smith*, 2022 U.S. Dist. LEXIS 227219 (N.D. Ohio, Dec. 16, 2022)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

DEVEN L. SMITH, DEFENDANT

CASE NO. 1:21-cr-696

December 16, 2022, Decided; December 16, 2022, Filed

Counsel: [*1] For Deven L. Smith, Defendant: Jacqueline A. Johnson, LEAD ATTORNEY, Office of the Federal Public Defender - Cleveland, Cleveland, OH.

For United States of America, Plaintiff: Scott C. Zarzycki, LEAD ATTORNEY, Henry F. DeBaggis, II, Office of the U.S. Attorney - Cleveland, Northern District of Ohio, Cleveland, OH.

Judges: Honorable Sara Lioi, United States District Judge.

Opinion by: Sara Lioi

ORDER

This matter is before the Court upon Magistrate Judge Jonathan D. Greenberg Report and Recommendation that the Court ACCEPT the plea of guilty of defendant Deven L. Smith and enter a finding of guilty against defendant. (Doc. No. 24.)

On September 30, 2021, the government filed an Indictment against defendant. (Doc. No. 1.) On September 9, 2022, this Court issued an order assigning this case to Magistrate Judge Greenberg for the purpose of receiving defendant's guilty plea. (Doc. No. 21.)

On September 27, 2022, a hearing was held in which defendant 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 [*2] 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).

Magistrate Judge Greenberg received defendant's guilty plea and issued a Report and Recommendation ("R&R") recommending that this Court accept the plea and enter a finding of guilty. (Doc. No. 24.)

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

Upon de novo review of the record, the Magistrate Judge's R&R is ADOPTED. Specifically, the Court finds as follows: that the defendant is competent to enter a plea, that he understands his constitutional rights, that he is aware of the consequences of entering a plea, and that there is an adequate factual basis for the plea. The Court further finds that the plea was entered knowingly, intelligently, and voluntarily. Accordingly, the defendant's plea of guilty is APPROVED.

Therefore, the defendant is adjudged guilty of Counts 1, 2, 3, 4 and 5 of the indictment. The sentencing will be held on April 6, 2023, at 12:00 p.m., in Courtroom 530.

IT IS SO ORDERED.

Dated: December 16, 2022

/s/ Sara Lioi
Honorable Sara Lioi
United States District Judge

Subsequent History:

Decision reached on appeal by *United States v. Smith*, 2024 U.S. App. LEXIS 8666 (6th Cir. Ohio, Apr. 10, 2024)

Prior History:

United States v. Smith, 2022 U.S. Dist. LEXIS 227772 (N.D. Ohio, Sept. 27, 2022)