

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Argued April 25, 2023

Decided August 24, 2023

BeforeKENNETH F. RIPPLE, *Circuit Judge*AMY J. ST. EVE, *Circuit Judge*DORIS L. PRYOR, *Circuit Judge*

No. 22-1377

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*CHARLES B. THOMAS,
*Defendant-Appellant.*Appeal from the United States District
Court for the Southern District of Illinois.

No. 4:98-CR-40004-JPG-1

J. Phil Gilbert,
*Judge.***ORDER**

Charles Thomas, who is serving a 60-year state prison sentence for murder, was sentenced to serve a consecutive 12 years in federal prison for possession with intent to distribute cocaine base, commonly referred to as crack cocaine. *See* 21 U.S.C. § 841(a)(1). He appeals the federal sentence, arguing for the first time that the district court misapplied the Sentencing Guidelines when it imposed a sentence that was consecutive. *See* U.S.S.G. §§ 5G1.3(b)(2), 5G1.3(d) (policy statement). Regardless of whether he waived or forfeited the argument, the court did not plainly err by imposing a consecutive sentence, so we affirm.

Background

Charles Thomas's partner, Anissa Green, died from blunt force trauma to the head on November 6, 1997. The following day, Thomas was charged in Illinois court with two counts of murder. In the Amended Bill of Indictment, the State provided alternative theories of how Thomas murdered Green—that he either beat her to death “and/or” forced her to ingest cocaine. In Count One, it provides:

[Thomas], without lawful justification and with the intent to do great bodily harm to Anissa Green, beat Anissa Green causing blunt trauma to her face and head, and/or forced Anissa Green to ingest cocaine, a controlled substance, thereby causing the death of Anissa Green.

Count Two charged Thomas with beating Green, stating:

[Thomas], without lawful justification, beat Anissa Green causing blunt trauma to her face and head, knowing such act created a strong probability of death to Anissa Green, thereby causing the death of Anissa Green.

A jury convicted Thomas of both counts, without specifying which theory it relied on, and the state court sentenced him to 60 years' imprisonment.

At the time of Green's death, Thomas had been under investigation by local police and the FBI for the distribution of crack cocaine. And, on November 7, 1997, the day after Green's murder, officers executed a search warrant at Thomas' home, where they discovered crack cocaine, drug paraphernalia, and a pistol with ammunition.

On January 7, 1998, Thomas was charged in the Southern District of Illinois with two counts, including possession with intent to distribute cocaine base, 21 U.S.C. § 841(a)(1), and unlawful possession of a firearm by a convicted felon. 18 U.S.C. § 922(g)(1). While he was acquitted of the gun charge, a jury convicted Thomas of possession with intent to distribute crack cocaine.

Based in part on his guidelines designation as a career offender under the residual clause of U.S.S.G. § 4B1.2(a)(2) (1998), Thomas was sentenced to 25 years' imprisonment, to run consecutively to the 60-year state sentence. Several years later, after his conviction was affirmed, *see United States v. Thomas*, 210 F.3d 377 (7th Cir. 2000), and his petition under 28 U.S.C. § 2255 was denied, we permitted Thomas to file

a successive habeas petition. *Thomas v. United States*, No. 16-1788, Dkt. 5 at 1–2 (7th Cir. May 5, 2016). Thomas argued, and the government agreed, that he was entitled to resentencing using the non-career-offender guideline range under *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), which invalidated the mandatory residual clause of § 4B1.2(a)(2) on grounds of unconstitutional vagueness. See *Thomas v. United States*, No. 16-cv-744, Doc. 11 at 6 (N.D. Ill. Oct. 30, 2018), Doc. 15 at 7 (N.D. Ill. Dec. 13, 2018). The district court vacated Thomas’s sentence. *Id.* Doc. 18 at 1 (N.D. Ill. May 27, 2020).

Upon resentencing, a probation officer updated Thomas’ presentence report (“PSR”) and calculated a guidelines range of 121 to 151 months, down from 262 to 327 months. In the PSR’s summary of Thomas’ federal offense conduct, the officer described the defendant’s drug distribution history and the evidence recovered during the execution of the search warrant on November 7, 1997. In the criminal history portion of the PSR, the officer also explained that Thomas had been found guilty of two counts of murder for the death of Anissa Green in state court. According to the PSR, “Thomas [had] beat Green” and “she died from blunt trauma to the head.”

Of significance here, the probation officer concluded that Thomas’s possession with intent to distribute crack cocaine federal conviction was “not related” to the state court murder conviction. By not considering the state murder conviction as relevant conduct meant that the district court could run Thomas’s federal sentence concurrent with, partially concurrent with, or consecutive to the undischarged state sentence. See U.S.S.G. § 5G1.3(d) (policy statement) (providing that if a prior offense is not relevant conduct to the instant offense, the judge may impose a sentence concurrent, partially concurrent, or consecutive “to the prior undischarged term of imprisonment”).

In a written response to the PSR, Thomas failed to object the probation officer’s finding that the two convictions were unrelated, but instead, objected to the officer’s estimate of drug quantity that Thomas was alleging responsible for possessing and distributing. After briefing from the parties, the district court limited the scope of resentencing. The court ruled that it would use prior factual findings but apply current law and consider Thomas’s post-sentencing rehabilitation.

At the resentencing hearing, the district court overruled Thomas’s objection to the estimated drug quantity and asked whether he had further objections to the PSR. Thomas responded that he did not. The court then adopted the PSR.

After adopting the PSR's sentencing guidelines calculation, the court heard argument from both sides regarding the appropriate sentence under the sentencing factors for Thomas. *See* 18 U.S.C. § 3553(a). The government argued for a 151-month sentence and asked the court to consider Thomas's serious criminal history, including his murder of Green. In response, Thomas objected to any consideration of his murder conviction because it exceeded the bounds of what the court was considering for purposes of resentencing. According to Thomas' reading of the court's order, the court limited the resentencing hearing to the new sentencing parameters around crack cocaine and Thomas' post-sentencing rehabilitation. The court did not specifically address the objection, apart from saying that it would allow the government some "latitude." Continuing his argument, Thomas petitioned the court to impose a 121-month sentence and to run this sentence concurrently with the state sentence, because a consecutive sentence would be overly punitive.

The district court sentenced Thomas to 12 years' imprisonment, consecutive to his 60-year state sentence. The court deemed a consecutive sentence necessary because Thomas's cocaine conviction had nothing to do with the murder, and he needed to be punished for his cocaine conviction:

I know you want this to run concurrent with the state sentence, but if I did that, there would be absolutely no punishment for your federal crime, none whatsoever, and I can't do that. I have to—you have to serve some punishment for the federal crime you committed. It's unrelated—totally unrelated—to the state sentence you're currently serving.

So the sentence I'm going to give you will be running consecutive to your current state sentence because there needs to be some accountability for the [federal] crime you committed

The court later reiterated the importance of a consecutive sentence: "I cannot and will not run this thing concurrent because that would mean no punishment for your federal crime."

Analysis

Thomas appeals his sentence. For the first time, he now challenges the district court's decision to adopt the PSR in its entirety, including its determination that the convictions were unrelated. This determination is at the heart of this appeal because the

sentence for an unrelated offense “may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.” U.S.S.G. § 5G1.3(d) (policy statement). But if the murder were deemed relevant conduct (as Thomas urges), then § 5G1.3(b) directs that the sentence “be imposed to run concurrently.”

The government argues that Thomas waived this argument, but Thomas—who concedes that he did not preserve his challenge in the district court—asks the court to treat his failure to object as a forfeiture, reviewed for plain error. “The lines between waiver and forfeiture are not always clear.” *United States v. Robinson*, 964 F.3d 632, 640 (7th Cir. 2020). Waiver occurs when a party intentionally abandons an argument, while forfeiture results from negligence. See *United States v. Olano*, 507 U.S. 725, 731, 733 (1993); *Robinson*, 964 F.3d at 639–40. The key concern is “whether a defendant chose, as a matter of strategy, not to present an argument.” *United States v. Garcia*, 580 F.3d 528, 541 (7th Cir. 2009).

For sentencing arguments, we typically find waiver when the defendant (1) objected to other parts of the PSR that do not concern the asserted error, (2) stated on the record that he had no further objections, and (3) had sound strategic reasons for failing to press the argument in the district court. See *United States v. Hathaway*, 882 F.3d 638, 641–42 (7th Cir. 2018); *United States v. Brodie*, 507 F.3d 527, 531–32 (7th Cir. 2007). Only the third element—strategic reasons—is at issue here.

We agree with the government that Thomas had obvious strategic reasons not to argue that the murder conviction was relevant conduct to his drug conviction. As the government notes, an objection from Thomas would have highlighted his culpability for a much more serious crime (murder) while he was being sentenced for a non-violent drug offense. Even if the district court sustained Thomas’s objection to the PSR, the district court still could have sentenced him to a consecutive sentence, given that the Guidelines are only advisory. See *United States v. Brown*, 973 F.3d 667, 713 (7th Cir. 2020). And the resultant sentence likely would have exceeded his current one: If the murder were considered “relevant conduct,” then Thomas’s guidelines range would increase to life imprisonment. Because his prison term was capped by the 20-year statutory maximum, his sentence could have been lengthened by eight years. See 21 U.S.C. §§ 841(a)(1), (b)(1)(C). Moreover, Thomas hinted at this strategy himself when, at the sentencing hearing, he objected to the government’s references to the murder conviction. Unlike the circumstances in *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005), there are strategic reasons, as the government pointed out, for why Thomas would choose not to

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object to the alleged relevant-conduct error and for why this unpreserved argument could be deemed waived.

Even if we reviewed Thomas's challenge to the court's relevant-conduct determination for plain error, he would face an insurmountable hurdle on appeal. To establish plain error, he would need to show that the error is "clear" or "obvious" and that it affected his substantial rights and the fairness or integrity of the proceedings. *Olano*, 507 U.S. at 732, 734; *United States v. Boyle*, 28 F.4th 798, 802 (7th Cir. 2022). To demonstrate by a preponderance of the evidence that his murder conviction was relevant conduct to his drug possession with intent to distribute conviction, Thomas bore the burden, *see United States v. Nania*, 724 F.3d 824, 832–33 (7th Cir. 2013), of establishing that the murder occurred "during the commission of the offense of conviction" or constituted "harm that resulted from" the offense of conviction. U.S.S.G. §§ 1B1.3(a)(1)(A), (a)(3).

Relevant conduct must "involve the same victims, stem from the same underlying conduct, or [be] similar offenses." *United States v. Sanchez*, 814 F.3d 844, 850–51 (7th Cir. 2016). Here, Thomas maintains that because Green's death occurred "during the commission" of his drug trafficking offense and "constituted harm that resulted from his trafficking of cocaine," the court plainly erred in finding the two offenses unrelated. This argument is misplaced.

While the state amended indictment and the federal indictment charged conduct that occurred on the same day, relevant conduct requires a more direct link than "mere temporal overlap." *United States v. Agyekum*, 846 F.3d 744, 751 (4th Cir. 2017). As to his second argument, Thomas reads too much into the language of the state amended indictment. The State proceeded on two alternative murder theories, and he was convicted on both. In Count One, Thomas was charged with intending to do great bodily harm to Green by beating her causing blunt trauma to the face and head and/or forcing Green to ingest cocaine. As the government points out, the record does not indicate, as Thomas suggests, that he was convicted under the alternative forced-ingestion theory. Without sufficient evidentiary support that cocaine played a part in Green's death, Thomas is unable to meet his burden by a preponderance of the evidence, and we are unable to find error.

Plain error is not "subtle, arcane, debatable, or factually complicated." *United States v. Ramirez*, 783 F.3d 687, 694 (7th Cir. 2015) (citation omitted). Here, the record shows no clear connection between the murder and cocaine offenses. Moreover,

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Thomas points to no favorably analogous case, nor could we find one. *See id.* at 695; *see also United States v. Clark*, 935 F.3d 558, 571 (7th Cir. 2019) (error not plain where “[defendant could] not establish with precedent or otherwise that the district court should have acted *sua sponte* to treat his Illinois offense as conduct relevant to his Wisconsin charge”). For these reasons, the district court’s judgment and sentence calculation is AFFIRMED.