

In the
United States Court of Appeals
For the Seventh Circuit

No. 22-1447

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEANDRE SMITH,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 20-cr-20051 — **Michael M. Mihm**, *Judge*.

ARGUED NOVEMBER 28, 2022 — DECIDED DECEMBER 8, 2022

Before ROVNER, ST. EVE, and KIRSCH, *Circuit Judges*.

ST. EVE, *Circuit Judge*. DeAndre Smith appeals his sentence of 120 months' imprisonment for five narcotics and firearms convictions. For the reasons stated below, we affirm.

I. Background

This appeal arises out of a Vermilion County Metropolitan Enforcement Group ("VMEG") investigation into drug dealing in Danville, Illinois. On November 7, 2018, a confidential

source working with VMEG purchased 3.1 grams of methamphetamine from Smith. On July 15, 2019, an undercover VMEG agent purchased 0.7 grams of fentanyl and heroin from Smith. On February 3, 2020, VMEG agents arrested Smith on an outstanding warrant. On his person, the agents found a loaded semiautomatic handgun equipped with a 16-round magazine containing 11 live bullets, plus a bullet in the chamber; 23 foil packages collectively containing 3.1 grams of fentanyl and heroin; several hundred dollars in cash; and a digital scale bearing fentanyl residue.

Federal prosecutors took charge of the case and indicted Smith on five counts. Counts 1, 2, and 3 were narcotics offenses. They charged Smith with violations of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) based, respectively, on the 2018 confidential-source purchase, the 2019 undercover purchase, and the drugs recovered during Smith's 2020 arrest. Counts 4 and 5 charged Smith with firearms offenses based on his possession of a firearm on February 3, 2020. Count 4 charged him with carrying a firearm during and in relation to a drug-trafficking crime—Count 3's offense conduct—in violation of 18 U.S.C. § 924(c). Count 5 charged Smith with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Smith pleaded guilty to Counts 1, 2, 3, and 5, and he was convicted in a jury trial on Count 4.

The presentence investigation report ("PSR") grouped Counts 1, 2, 3, and 5 together. The base offense level on these counts was 22 because Smith's semiautomatic firearm was "capable of accepting a large capacity magazine," U.S.S.G. § 2K2.1(a)(3), and a one-level multiple-count enhancement applied, for a total offense level of 23. The district court awarded Smith one point for acceptance of responsibility,

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reducing his offense level to 22. Smith's substantial criminal history placed him in the highest criminal history category. The advisory Sentencing Guidelines range on the grouped counts was 84–105 months, and the § 924(c) conviction carried a mandatory minimum sentence of 60 months, to be served consecutively, for an effective Guidelines range of 144–165 months.

At sentencing, the government requested a sentence of 152 months: 92 months on the grouped counts and 60 months on the § 924(c) conviction. The government emphasized that Danville is a dangerous city due to crimes like Smith's and argued that Smith deserved a substantial sentence because of his long criminal history. Smith argued that a total sentence of 84 months was appropriate and noted that under *Dean v. United States*, 137 S. Ct. 1170 (2017), the court could take the mandatory consecutive sentence on the § 924(c) conviction into account when imposing the sentence on the grouped counts. Smith requested a sentence of 24 months on the grouped counts, plus 60 months on the § 924(c) conviction. He raised several arguments in mitigation, including that he had possessed small quantities of drugs, that his criminal history was nonviolent, and that he only carried a gun for protection.

The district court adopted the facts found in the PSR, noting that although Smith dealt in small quantities of drugs, fentanyl was especially dangerous, and the court was troubled by the fact that Smith carried a gun, which "made his presence there at that time a very dangerous event." The court nevertheless determined that the 18 U.S.C. § 3553(a) factors made a downward variance appropriate, and it sentenced Smith to 60 months on each of the grouped counts, to run concurrently,

and 60 months on the § 924(c) conviction, to run consecutively, for a total of 120 months. Smith appealed.

II. Discussion

When a defendant appeals his sentence, we first review the district court's procedures de novo. *United States v. Gates*, 51 F.4th 271, 273 (7th Cir. 2022). The court must "(1) correctly calculate the applicable guidelines range; (2) give meaningful consideration to the § 3553(a) factors and any nonroutine sentencing arguments raised by the defense; and (3) state the factors on which the sentence is based." *Id.* (quoting *United States v. Swank*, 37 F.4th 1331, 1334 (7th Cir. 2022)). If procedurally sound, we review the sentence's substantive reasonableness for abuse of discretion. *Id.*

Smith purports to raise both procedural and substantive challenges to his sentence, but his only real arguments are procedural. His substantive arguments merely recast the procedural errors he identifies as abuses of discretion. Such cursory arguments cannot overcome the "nearly irrebuttable presumption that a below-range sentence is reasonable." *United States v. Miller*, 829 F.3d 519, 527 (7th Cir. 2016) (citation omitted). Thus, Smith's appeal rises and falls with his procedural arguments, which we consider in turn.

A. Sentencing Guidelines Application

Smith argues that the district court erred by applying the guideline for carrying a firearm compatible with a large capacity magazine, U.S.S.G. § 2K2.1(a)(3), because he did not modify the firearm. Smith argues that he "should not be penalized because the firearm itself had been manufactured" to carry such a magazine—it came from the manufacturer "in violation of this guideline."

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This argument is meritless. The guideline applies to an offense involving a “semiautomatic firearm that is capable of accepting a large capacity magazine,” which is defined in part as a firearm that “had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition.” § 2K2.1(a)(3)(A)(i) & comment. (n.2). The plain text of the guideline does not require that the defendant modified the firearm—it applies regardless of whether the defendant intended to carry a firearm with a large capacity magazine or modified his firearm. The fact that Smith’s weapon could accept a 16-round magazine means that § 2K2.1(a)(3) applies. Moreover, Smith is mistaken that his weapon was manufactured in violation of this provision—his choice to carry it while committing a narcotics crime triggered the guideline.

B. *Dean v. United States*

Next, Smith contends that the district court erred by failing to consider whether his total sentence—the discretionary sentence on the grouped counts, plus the mandatory minimum on the § 924(c) conviction—was appropriate under the 18 U.S.C. § 3553(a) sentencing factors. He relies on *Dean v. United States*, which held that a district court may consider the fact that a defendant will receive a mandatory consecutive § 924(c) sentence when determining an appropriate sentence on other counts. 137 S. Ct. at 1178. In Smith’s view, *Dean* requires a district court to make an express finding that the total sentence is appropriate anytime it sentences a defendant convicted of a § 924(c) violation.

Smith misreads *Dean*. The question presented in *Dean* was whether “a judge *must ignore* the fact that the defendant will serve the mandatory minimums imposed under § 924(c)” when sentencing him on other counts of conviction. *Id.* at 1174

(emphasis added). The Court answered in the negative. It explained that 18 U.S.C. § 3553(a) “specifies the factors courts are to consider in imposing a sentence” and that ordinarily a judge “imposing a sentence on one count of conviction [may] consider sentences imposed on other counts.” *Id.* at 1175–76. The Court then analyzed the language of § 924(c), which “simply requires any mandatory minimum ... to be imposed ‘in addition to’ the sentence for [any other] offense, and to run consecutively to that sentence.” *Id.* at 1178. “Nothing,” the Court concluded, “prevents a sentencing court from considering a mandatory minimum under § 924(c) when calculating an appropriate sentence” for other counts of conviction. *Id.* *Dean*, therefore, is a permissive decision. It allows district courts to consider a § 924(c) consecutive mandatory minimum when determining an appropriate sentence, but it does not require a district court to make any particular finding.

Here, the district court considered an appropriate sentence under the § 3553(a) factors when sentencing Smith on the grouped counts. The court did not indicate that it believed it was bound to ignore the § 924(c) sentence when sentencing Smith on the grouped counts, which was the error identified in *Dean*. Indeed, during his sentencing argument, Smith reminded the court of its “discretion under both 3553(a) and *Dean v. United States* to impose a total sentence that is appropriate under the circumstances.” While the district court did not explicitly state that it considered the total sentence, it relied on the § 3553(a) factors, explaining that it needed to “impose a sentence that reflects the seriousness of the offense, promotes respect for law, provides just punishment, provides adequate deterrence to others and adequate deterrence to you.” The fact that the court imposed a below-Guidelines

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sentence further indicates that the court deemed 120 months an appropriate total sentence under the § 3553(a) factors.

C. Mitigating Arguments

Finally, Smith argues that the district court erred by inadequately considering eight mitigating arguments. We disagree. The district court adequately addressed the arguments it needed to.

1. Addressed Arguments

The district court explicitly discussed four of the arguments Smith claims it ignored. Although the district court did not address all of his arguments at length, “[a] short explanation [of why an argument is rejected] will suffice where the context and record make clear the reasoning underlying the district court’s conclusion.” *United States v. Kennedy-Robey*, 963 F.3d 688, 691 (7th Cir. 2020) (quoting *United States v. Schroeder*, 536 F.3d 746, 755 (7th Cir. 2008)).

First, Smith argues that he was a small-time drug dealer with no history of violence. The district court noted this argument but was unconvinced by it: “The defense counsel has noted the small amounts of drugs involved. It was, indeed, fentanyl, which is very dangerous. [And] I’m troubled by the ... gun.”

Second, Smith argues that he carried a gun for protection because Danville is a dangerous city, he had been shot previously, and several of his friends had been killed by firearms. The court acknowledged that “the gun was there to protect him and his drugs” and that “it may also be true that Danville ... is a dangerous place,” but it found that Smith contributed to the danger by carrying “a weapon that had 12 bullets in it at the time. I think that’s very serious.”

Third, Smith argues that the district court ignored his “family support, as evidenced by his several family character letters.” Far from ignore these letters, the district court read them, acknowledged they were mitigating, and even commented on one that discussed Smith’s artistic talent.

Fourth, Smith argues that the district court stated that it wanted Smith “to obtain his GED and attend vocational classes,” but it failed to consider the fact that he would be unable to take these classes because of his § 924(c) conviction. Smith misinterprets the district court’s statement about vocational training. The court stated that it “sincerely hope[s]” Smith gets his GED and attends vocational training, and the court recommended that the Bureau of Prisons “maximize [Smith’s] exposure to educational and vocational opportunities.” The court did not, however, condition Smith’s sentence on his eligibility for any particular program. Additionally, Smith is mistaken about the effect of his § 924(c) conviction. That conviction bars him from receiving good-time credit under the First Step Act of 2018 for participating in educational or vocational programs, *see* 18 U.S.C. §§ 3632(d)(4)(D)(xxii), 3635(3), but it does not necessarily bar him from participating in those programs. *See* 28 C.F.R. §§ 544.20–.21, 544.50–.52.

The district court adequately, if somewhat briefly, considered each of these arguments. *See Kennedy-Robey*, 963 F.3d at 691. It committed no procedural error.

2. Routine Arguments

Two of Smith’s arguments are “stock argument[s] that the district court was not required to address.” *United States v. Cheek*, 740 F.3d 440, 455–56 (7th Cir. 2014) (citation omitted).

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First, Smith argues that the district court failed to consider the fact that “[h]is prior criminal history had never involved aggressive conduct against other individuals” and “[h]is prior firearm offenses had been merely possessions.” But an “argument that none of [a defendant’s] numerous prior convictions involved violence is essentially an argument that his criminal history category substantially over-represents the seriousness of his past crimes,” which the district court need not address. *Cheek*, 740 F.3d at 455.

Second, Smith argues that the district court failed to consider the fact that his weapon was designed—not modified—to accept a large capacity magazine. As discussed above, this argument is meritless as a challenge to this guideline’s application. When framed as a mitigating argument, it is a “blanket challenge to [a] guideline rather than one tailored to [Smith’s] unique characteristics and circumstances,” so “it [is] not one that the district judge [must] explicitly address.” *United States v. Brown*, 880 F.3d 399, 409 (7th Cir. 2018) (quoting *United States v. Schmitz*, 717 F.3d 536, 542 (7th Cir. 2013)). Even so, the district court implicitly addressed this argument. It noted that “there have been a lot of arguments about the gun,” but these arguments did not change the fact that Smith “was in the process of selling drugs at a time when he had the gun ... on his person.” Modified or not, the court found that carrying a firearm in those circumstances was “very serious.”

The district court’s failure to explicitly discuss these arguments was not an error.

3. Forfeited Arguments

Finally, Smith correctly notes that the district court failed to address his last two mitigating arguments: (1) that he

committed the offenses several months apart and did not carry a firearm during the 2018 and 2019 drug purchases and (2) that he cooperated upon his arrest. But the district court had good reason not to address these points at the sentencing hearing—Smith did not raise them. The closest he came to making these arguments was saying that he had “never resisted arrest,” but this statement was part of his argument about his nonviolent criminal history.

Failing to present an argument to the district court constitutes either waiver—if the failure was intentional—or forfeiture—if it was negligent. *United States v. Burgess*, 22 F.4th 680, 685 (7th Cir. 2022). Because we construe waiver principles liberally in favor of criminal defendants and we can discern no strategic advantage Smith could have gained by failing to raise these arguments, we hold that Smith has forfeited, not waived, them. *See id.* at 685–86. While waiver precludes our review, we review arguments forfeited by a criminal defendant for plain error. *Id.* To succeed on plain-error review, a defendant must show that: “(1) there was an error; (2) the error was plain; (3) the error affected [his] substantial rights ...; and (4) the error seriously impacted the fairness, integrity, or public reputation of the proceedings.” *Id.* at 686 (quoting *United States v. Clark*, 935 F.3d 558, 569–70 (7th Cir. 2019)).

Smith fails at step one because the district court committed no error. The PSR reported the facts Smith believes the district court should have discussed, and because the district court adopted the PSR’s factual findings and based Smith’s sentence in part on those facts, it implicitly considered them. In the absence of an objection or a nonroutine sentencing argument, a district court is not obligated to discuss specific facts from the PSR, provided that it “give[s] meaningful

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consideration to the § 3553(a) factors” and “state[s] the factors on which the sentence is based.” *Gates*, 51 F.4th at 273 (quoting *Swank*, 37 F.4th at 1334). The court did so here.

III. Conclusion

Smith has failed to show that the district court committed any procedural error, and his below-Guidelines-range sentence is substantively reasonable.

AFFIRMED