

NONPRECEDENTIAL DISPOSITION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 August 6, 2024

Decided August 20, 2024

*Before*FRANK H. EASTERBROOK, *Circuit Judge*AMY J. ST. EVE, *Circuit Judge*JOSHUA P. KOLAR, *Circuit Judge*

No. 23-2565

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*DEPRONCE BURNETT,
*Defendant-Appellant.*Appeal from the United States District
Court for the Western District of
Wisconsin.

No. 3:22CR00102-001

William M. Conley,
*Judge.***ORDER**

Depronce Burnett pleaded guilty to possession with intent to distribute 500 grams or more of a mixture containing cocaine. *See* 21 U.S.C. § 841(a)(1), (b)(1)(B). At his sentencing hearing, the district court referred to a gun that had been found at Burnett's house weeks after he was arrested; it inferred, for purposes of 18 U.S.C. § 3553(a), that Burnett was a danger to the public. The court did not use possession of the gun as grounds for increasing Burnett's offense level under the Sentencing Guidelines, however. Burnett appeals, arguing that because the evidence was insufficient to support an adjustment for his possession of the gun—as he, the government, the probation

office, and the district court all acknowledged—it was also off-limits for consideration among the discretionary sentencing factors. But because the court permissibly inferred Burnett’s dangerousness from undisputedly accurate information, we affirm.

On September 30, 2021, police officers in Beloit, Wisconsin, arrested Burnett after finding marijuana and illegal drugs in his car, where they had found him when responding to a report of child abuse. The police executed a search warrant on his home the next day and found evidence of drug- and gun-related activity. In the kitchen, they found digital scales, a 9 mm cartridge, and a .40 caliber cartridge. In his wife’s “makeup room” (adjacent to the couple’s bedroom) they found cocaine, two .40 caliber magazines, a .40 caliber cartridge, and two boxes of ammunition. Relevant to this appeal, however, the police did not find any firearms.

While he was in jail, Burnett directed his wife (over a recorded phone line) to continue his drug-dealing operation. His wife began selling cocaine to a confidential informant, and presumably based on that conduct, the police executed another search of Burnett’s home weeks later, on October 27. This time they found a loaded 9 mm semiautomatic handgun in his wife’s makeup room. Burnett’s wife stated that the gun belonged to Burnett and that she had found it in the home the day before and then moved it to her makeup room for safekeeping.

A grand jury later charged Burnett and his wife for violations of 21 U.S.C. §§ 841(a)(1) and 856(a)(1). Burnett pleaded guilty to count ten, possession with intent to distribute 500 grams or more of cocaine, *see* § 841(a)(1), in April 2023. This count related to drugs that were discovered in his home during the October 27 search, while Burnett was jailed.

Before sentencing, the probation office prepared a presentence investigation report (PSR) that proposed an offense-level increase for possession of a dangerous weapon under § 2D1.1(b)(1) of the Sentencing Guidelines. The government objected to the enhancement. It explained that it would have “proof problems in establishing Burnett’s possession” of the gun: The first search had yielded no firearm, the second search occurred almost a month after Burnett was taken into custody, and no evidence corroborated his wife’s statements that the gun was his. Burnett repeated this objection (and raised others) in his own response to the PSR. The probation office agreed and removed the offense-level adjustment from the calculations in the revised PSR.

At the sentencing hearing, the district court noted the objections to an adjustment under § 2D1.1(b)(1) and declared them “moot” because of the revised PSR, which the court adopted. The court stated that Burnett’s offense level was 33: a base level of 34 with a two-level increase for maintaining a premise for the purpose of distributing controlled substances, and a three-level decrease for acceptance of responsibility. With Burnett’s criminal history category of VI, his guideline range of imprisonment was 235 to 293 months. But the court noted that the sentencing disparities between offenses involving powder cocaine and crack, as well as methamphetamine and “ice,” had subjected Burnett to excessive sentences in the past; it also noted the “astronomical” career-offender enhancement triggered by relatively low-level offenses. The court decided on a below-guidelines sentence of 132 months’ imprisonment followed by four years’ supervised release. In arriving at this sentence, the court weighed the sentencing factors under 18 U.S.C. § 3553(a), including mitigating factors, like Burnett’s difficult childhood and drug addiction, and aggravating ones, like his repeated convictions and nearly twenty-year history of drug dealing, which had “escalated.”

The court also discussed the gun that Burnett’s wife had attributed to him when police found it in their home during the second search. The court stated: “Although not a factor in the guidelines, obviously this too is a concern.” It explained the first search had uncovered handgun magazines and ammunition, and so Burnett “has posed a continued risk to the public.” The court reiterated this concern in its statement of reasons: “While not sufficient to apply the enhancement for possession of a dangerous weapon, the search of defendant’s home also resulted in the recovery of two handgun magazines and several rounds of ammunition.” It concluded that he was a “continued risk to the public” until he quit his “escalating drug distribution activities.”

On appeal, Burnett primarily argues that the district court procedurally erred in considering the gun in its § 3553(a) analysis because it did not find by a preponderance of the evidence that he possessed the gun—the only way, he contends, to ensure that a sentence is based on reliable facts. He submits that the court was required to connect Burnett to the gun by a preponderance of the evidence to ensure that the “fact” of their connection was reliable. And he further contends that such a finding was impossible because insufficient evidence connected him to the gun: It was found weeks after he was brought into custody, the initial search presumptively demonstrated there was no gun, and no evidence corroborated his wife’s statement that the gun was his. A court procedurally errs when it selects a sentence based on unreliable or inaccurate facts. *United States v. Campbell*, 99 F.4th 957, 960 (7th Cir. 2024) (citing *United States v. England*,

555 F.3d 616, 622 (7th Cir. 2009)). This court reviews procedural errors at sentencing de novo. *Id.* at 959.

Burnett's argument fails because the district court was not required to make a specific finding, nor a finding by a preponderance of the evidence, that Burnett could be connected to the gun to take the gun into account under the § 3553(a) factors. To start, a court can consider evidence not addressed in a guidelines adjustment in the context of the § 3553(a) factors. *See United States v. Dickerson*, 42 F.4th 799, 803–04 (7th Cir. 2022). And with that evidence, the court does not need to make a finding supporting each § 3553(a) factor (i.e., "This evidence establishes by a preponderance of the evidence that you are a danger to the public"). It can make "commonsense inferences" from the information before it. *See, e.g., Campbell*, 99 F.4th at 959, 961 (district court's inference, when considering nature and circumstances of offense, that firearms defendant stole could end up in hands of felons was "commonsense"); *United States v. Brown*, 880 F.3d 399, 405–07 (7th Cir. 2018) (district court's inference that prevalence of Medicare fraud warranted a serious penalty to deter others was rooted in common sense). The fundamental requirement is that a court base its assessments on reliable and accurate information. *See Campbell*, 99 F.4th at 960. When considering the gun and the ammunition in the context of § 3553(a), the court permissibly inferred danger to the public.

The cases that Burnett cites to establish that assessments under the § 3553(a) factors must be found by a preponderance of the evidence are distinguishable. True, when district courts make *factual findings* at sentencing, even outside the guidelines calculations, this court has required proof by a preponderance of the evidence. *See United States v. Major*, 33 F.4th 370, 379–80 (7th Cir. 2022). But here, the court did not make a factual finding when it opined that its sentence was necessary, in part, because Burnett posed a danger to the public. *See* 18 U.S.C. § 3553(a)(2)(C). In some of the cases Burnett cites, by contrast, the district court found underlying facts and considered them as they related to the § 3553(a) factors; those had to be supported by a preponderance of the evidence. *See Major*, 33 F.4th at 379–80 (district court found that defendant supplied drugs to a victim who later died); *United States v. Musgraves*, 883 F.3d 709, 712–13, 716 (7th Cir. 2018) (district court justified sentence length by finding that defendant had engaged in acquitted conduct); *see also England*, 555 F.3d at 622–23 (district court "found" that defendant would have attempted murder if released on bond and chose sentencing range accordingly). Here, in contrast, the district court relied on undisputed evidence in the record and drew reasonable inferences based on it.

The other cases Burnett cites are inapt: They stand for the uncontroversial proposition that any factual findings used to support a guidelines adjustment must be made by a preponderance of the evidence, and the courts in these cases did not discuss those facts again under § 3553(a). *See, e.g., United States v. Rollerson*, 7 F.4th 565, 572 (7th Cir. 2021) (drug quantity); *United States v. Dean*, 414 F.3d 725, 726–27 (7th Cir. 2005) (firearm possessed “in connection with another felony offense”). Indeed, *Dean* separately holds that a judge generally does *not* have a duty to make findings about the statutory factors unless contested facts underlie the analysis. 414 F.3d at 729–30. Here, the fact that the gun was found at Burnett’s home along with ammunition, drugs, and tools of the drug trade was not contested—it was the significance of those facts that was disputed. So *Dean*, too, does not support his argument that his dangerousness had to be established by a preponderance.

A closer look at the district court’s analysis at the sentencing hearing and in its written statement of reasons confirms that it relied only on uncontested facts. When reviewing the § 3553(a) factors, the court acknowledged the impossibility of connecting the gun to Burnett by a preponderance of the evidence. It stated, “*Although not a factor in the guidelines*, this obviously too is a concern.” (Emphasis added.) The court then referred to the magazines and ammunition found in the house shortly after Burnett’s arrest (and thus plainly not stale) and inferred that Burnett posed a danger to the public. It repeated this thought in the statement of reasons: Although the evidence did “not support the enhancement for possession of a dangerous weapon,” the first search of Burnett’s home “also” recovered magazines and rounds of ammunition, allowing the inference that Burnett posed “a continued risk to the public.”

Although Burnett frames his arguments as entirely procedural, at times he wanders into what sounds like a substantive-reasonableness challenge. Burnett argues, in essence, that the court unreasonably assessed the § 3553(a) factors by attributing weight to the gun (among other things) when considering the need to protect the public from his future criminal activity. Challenging what factors the court cited and how it weighed them is substantive. *See United States v. Jerry*, 55 F.4th 1124, 1133 (7th Cir. 2022) (defendant’s challenge to district court’s consideration of actual conduct and victim impact was substantive, not procedural). But the district court did not abuse its discretion in substantively weighing the § 3553(a) factors. *See United States v. Cook*, 108 F.4th 574, 580 (7th Cir. 2024). The court reasonably mentioned the gun because it was found in the home where Burnett kept cocaine, ammunition, and drug-selling equipment, and it permissibly weighed Burnett’s history of recidivism, failed rehabilitation, and escalation in distributing drugs. (The court remarked that drug

No. 23-2565

Page 6

selling had been the “only real business” to which Burnett had been devoted for almost twenty years.) Finally, it imposed a below-guidelines sentence, which this court presumes on appeal is not unreasonably long. And nothing Burnett has argued rebuts that presumption. *See United States v. Bender*, 95 F.4th 507, 512–13 (7th Cir. 2024) (citing *United States v. Haskins*, 511 F.3d 688, 696 (7th Cir. 2007)).

AFFIRMED