

NONPRECEDENTIAL DISPOSITION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**

Submitted December 2, 2024

Decided December 2, 2024

BeforeFRANK H. EASTERBROOK, *Circuit Judge*AMY J. ST. EVE, *Circuit Judge*NANCY L. MALDONADO, *Circuit Judge*

No. 23-3240

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*NAJEE C. MOORE,
*Defendant-Appellant.*Appeal from the United States District
Court for the Eastern District of
Wisconsin.

No. 13-CR-84

Lynn Adelman,
*Judge.***ORDER**

The district court adjudicated Najee Moore guilty of five violations of his supervised release conditions, revoked his supervised release, and sentenced him to 15 months in prison and another year of supervised release. Moore appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw under the procedures of *Anders v. California*, 386 U.S. 738, 744 (1967). A defendant has a presumptive right to counsel when, as here, he plausibly contests the violations on which revocation of his supervised release is based, and so we apply the *Anders* framework. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Counsel's brief explains the

nature of the case and addresses the issues that a case of this kind might be expected to involve. Moore has responded to counsel's motion with arguments he wishes to raise on appeal. *See* CIR. R. 51(b). Because counsel's brief appears thorough, we limit our review to the subjects that counsel and Moore discuss. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Moore was convicted of four counts of conspiracy to commit sex trafficking, 18 U.S.C. §§ 371, 1591(a)(1), (b)(1), 1952(a)(3), and started his three-year term of supervised release in 2021 after completing a ten-year prison sentence. He soon violated the conditions of his release: He strangled his girlfriend at least twice and pointed a gun at her face, failed two drug tests, skipped several others, and was cited by Wisconsin police for possession of drugs and drug paraphernalia. Based on these violations, the probation office obtained a warrant in June 2023 requiring Moore to appear for revocation proceedings.

Moore was eventually charged with five violations. He denied his guilt, and so the district court held a contested revocation hearing. The government called two witnesses—Moore's girlfriend and his probation officer—to testify about Moore's conduct. The government also introduced text messages between Moore and his girlfriend; in one, she stated that pointing a gun at her face was "the last straw." On cross-examination, the defense attacked the credibility of Moore's girlfriend by highlighting how long it took her to report the violence against her, the potential inconsistencies in the details of her story, and her request to drop a restraining order she had obtained against Moore. Moore testified in his own defense; he admitted to receiving a drug citation and to violating drug-testing procedures, but he denied the violence against his girlfriend and the firearm possession. The court found that his girlfriend's testimony about the abuse and the firearm was "credible" and corroborated by the text messages. It concluded that the government proved each of the charged violations by a preponderance of the evidence and revoked Moore's supervised release.

The probation officer prepared a sentencing recommendation stating that Moore's statutory maximum revocation sentence was two years' imprisonment and three years of supervised release because his underlying sex trafficking offense was a Class D felony. *See* 18 U.S.C. §§ 371, 3559(a)(4), 3583(b)(2), (e)(3). Separately, the court determined that strangulation in Wisconsin, WIS. STAT. § 940.235(1) (2024), is a violent felony and thus a grade A offense under the Sentencing Guidelines. *See* U.S.S.G. § 7B1.1; *United States v. Mancillas*, 880 F.3d 297, 303–04 (7th Cir. 2018) (concluding near-identical Indiana strangulation statute is a violent felony). Moore's grade A offense, coupled with his criminal history category of I, yielded a Guidelines range of 12 to 18 months in

prison. U.S.S.G. § 7B1.4(a). The government filed a sentencing memorandum asking for an above-range sentence of 24 months.

Moore objected to the Guidelines range because the revocation petition originally characterized strangulation as a grade C violation. He argued that he might have changed his defense strategy if he had realized it was the most serious offense—not possessing the firearm, a grade B violation. But at the sentencing hearing, the court concluded that Moore was not prejudiced by the recharacterization because the hearing was about all the violations, and Moore could not have done anything differently to undermine the testimony about the strangulation.

After hearing both parties' arguments about the appropriate sentence, the court imposed concurrent 15-month terms of imprisonment and 12-month terms of supervised release for each violation (a within-Guidelines term for a grade A violation but exceeding the Guidelines range for a grade B violation, U.S.S.G. § 7B1.4(a)). The court explained that 15 months was necessary to reflect the seriousness of Moore's firearm possession and the violence against his girlfriend and to protect the public from his "escalating pattern of violence" against women. Further, Moore had struggled to comply with basic supervision requirements. Recognizing Moore's objection to the violation grade and Guidelines range, the court added that it would impose the same sentence under 18 U.S.C. § 3553(a) "regardless of the guidelines," meaning that "even if the violations were grade C, I would impose the same sentence to account for the repeated instances of violence and the other violations."

In the *Anders* brief, counsel confirms that Moore wishes to challenge the decision to revoke his supervision. See *United States v. Wheeler*, 814 F.3d 856, 857 (7th Cir. 2016). Thus, counsel first considers whether Moore could challenge the factual findings underlying the district court's decision. We review factual findings for clear error, and we "virtually never" find clear error when findings turn on witness credibility. *United States v. Olson*, 41 F.4th 792, 802 (7th Cir. 2022) (quoting *United States v. Biggs*, 491 F.3d 616, 621 (7th Cir. 2007)). Here, Moore's girlfriend provided detailed and extensive testimony about his violence and gun possession. Although Moore's attorney questioned her truthfulness and her motives for testifying, the district court was unpersuaded. Thus, counsel is correct that a challenge to the credibility finding would be frivolous, and so there was ample evidence from which the court could conclude that Moore violated the relevant condition.

In his response, Moore argues that he could also challenge the sufficiency of the evidence that he possessed drugs, but this argument, too, would be frivolous.

Supervised release violations must be proved only by a preponderance of the evidence, 18 U.S.C. § 3583(e)(3), and we reverse only for an abuse of discretion. *United States v. Perez*, 99 F.4th 972, 976 (7th Cir. 2024). Moore argues that although he admitted to receiving a local citation for drug possession, he did not admit the citation's substantive accuracy and was actively challenging it in court. But when determining whether to revoke supervised release, the court stated that Moore had essentially admitted to the possession violation and Moore's attorney did not object. An admission of a supervised release violation proves the violation by a preponderance of the evidence. *See United States v. Flagg*, 481 F.3d 946, 949–50 (7th Cir. 2007). Moreover, Moore was not just cited for drug possession; he was convicted. That also satisfies the burden of establishing a violation of this condition. *United States v. Huusko*, 275 F.3d 600, 602 (7th Cir. 2001).

Moore also proposes arguing that the revocation was improper because the district court admitted irrelevant and prejudicial evidence about him beating his girlfriend's dog. But the Rules of Evidence do not apply in revocation proceedings, *United States v. Ford*, 798 F.3d 655, 660 (7th Cir. 2015), and there was no jury to be prejudiced by the evidence, *see United States v. Shukri*, 207 F.3d 412, 419 (7th Cir. 2000) (presumption against prejudice from improper evidence at bench trials). Therefore, even if the evidence was not relevant to the charged violations, it would be frivolous to argue that its admission requires overturning the revocation decision.

Next, counsel correctly concludes that any other procedural challenge to the revocation proceedings would be frivolous. Moore had an opportunity to appear, present evidence, and question adverse witnesses. FED. R. CRIM. P. 32.1(b)(2)(C). Further, he was represented by counsel, and he had an opportunity to present information in mitigation and make a statement at sentencing. FED. R. CRIM. P. 32.1(b)(2)(D), (E). Although Moore alleges that he was never provided with a copy of the written notice of the allegations against him, *see* FED. R. CRIM. P. 32.1(b)(2)(A), this was never raised in the district court. And it would be frivolous to raise this issue under plain-error review because Moore had access to the revocation petition through his counsel and the public docket, and “[w]e are given no reason why [he] would not have been able to retrieve that [petition].” *See United States v. Lee*, 795 F.3d 682, 687 (7th Cir. 2015) (access to the document containing the charges precludes plain error).

Counsel next considers whether Moore could mount any nonfrivolous procedural challenge to his sentence and correctly concludes that he could not. The district court determined that committing the Wisconsin crime of strangulation and suffocation is a grade A violation. *See* U.S.S.G. § 7B1.1(a)(1)(A)(ii); WIS. STAT. § 940.235(1). Combined with his original criminal history category of I,

see U.S.S.G. § 7B1.4 cmt. n.1, a grade A violation results in a reimprisonment range of 12 to 18 months, *see id.* § 7B1.4(a). And because the underlying crime of sex trafficking is a class D felony, his reimprisonment range was statutorily capped at two years. See 18 U.S.C. § 3583(e)(3). Thus, his 15-month reimprisonment term was within the statutory maximum. And even if the most serious violation should have been grade B, the court made an inoculating statement that renders any error harmless. *See United States v. Caraway*, 74 F.4th 466, 468–69 (7th Cir. 2023). The court gave specific attention to the contested Guidelines issue—whether the strangulation violation was grade A—and explained why the sentence would remain the same if it had resolved that issue differently. *See id.*

Counsel also correctly rejects any argument that Moore’s within-Guidelines prison sentence is “plainly unreasonable.” *United States v. Childs*, 39 F.4th 941, 944–45 (7th Cir. 2022). The district court considered the Guidelines, the maximum sentence permitted by statute, and the sentencing factors under § 3553(a), including Moore’s criminal history and the need to deter criminal conduct, promote respect for the law, and protect the public. The court explained that although Moore was charged with only one violation of his supervised release for violent conduct, he had been violent toward his girlfriend more than once—continuing a broader trend of violence. And his possession and use of a firearm during one encounter further concerned the court. Moore cannot make a nonfrivolous argument that the sentence is inconsistent with the § 3553(a) factors. And the court’s explanation also justifies the one-year term of additional supervision. *United States v. Allgire*, 946 F.3d 365, 367–68 (7th Cir. 2019).

Counsel lastly informs us that Moore expressly waived all objections to the proposed supervised release conditions; thus, any challenge would be frivolous. Counsel is correct—waiver precludes appellate review. *See United States v. Flores*, 929 F.3d 443, 449–50 (7th Cir. 2019). Moore replies that his attorney’s waiver was against his wishes and that certain conditions are overbroad and unreasonable. To the extent that this is an argument about counsel’s performance, a claim of ineffective assistance of counsel is better reserved for collateral review with a fully developed record. *See United States v. Cates*, 950 F.3d 453, 456–57 (7th Cir. 2020) (citing *Massaro v. United States*, 538 U.S. 500, 504–05 (2003)). In any case, conditions can be modified “at any time” before the term expires, so Moore still has recourse. See 18 U.S.C. § 3583(e)(2); *United States v. Lee*, 950 F.3d 439, 450 (7th Cir. 2020).

We GRANT counsel's motion to withdraw and DISMISS the appeal.