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Case No. 25-3829

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRIAN PRESTON, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO OPINION

Before: SUTTON, Chief Judge; SILER and MOORE, Circuit Judges.

SUTTON, Chief Judge. Brian Preston fired six shots into the air as he left a Cleveland gas station, generating a conviction for unlawfully possessing ammunition as a felon. He now challenges the reasonableness of his resulting 87-month sentence. We affirm.

I.

Preston arrived at a gas station convenience store in the wee hours of an August morning hoping to buy food. He succeeded in buying food but only after an argument with another customer and a store employee. At several points during the argument, Preston mentioned that he had two guns. Both were visible in the front pockets of his pants. Preston eventually left the store and returned to his car. On his way out, he exchanged words with another patron, this one pumping gas. He then fired six shots into the air as he drove away.

Unfortunately for Preston, all of this was caught on tape. Preston's parole officer identified him as the shooter, and a few weeks later a law enforcement officer arrested Preston. The officer found firearm magazines and live rounds of ammunition in his bedroom. The government then charged him with being a felon in possession of ammunition. *See* 18 U.S.C. § 922(g)(1).

Preston pleaded guilty, and the government agreed to recommend a three-level reduction for acceptance of responsibility. All of this generated a guidelines range of 51 to 63 months after accounting for Preston's offense and criminal history. The plea agreement preserved Preston's right to appeal a sentence above this range.

The district court imposed an 87-month sentence. In justifying the upward variance, the court cited the aggravated nature of Preston's conduct, his lengthy and violent criminal history, and his frequent institutional violations while incarcerated.

II.

On appeal, Preston claims that his sentence is procedurally and substantively unreasonable.

Procedural reasonableness. Preston first challenges the process that led to his sentence. That process requires a district court to correctly determine the guidelines range and treat it as advisory, consider the relevant 18 U.S.C. § 3553(a) factors, refrain from considering impermissible factors, base the sentence on facts that are not clearly erroneous, and adequately explain its chosen sentence. *Gall v. United States*, 552 U.S. 38, 51 (2007). If a party objects "at such a high degree of generality that the district court has no opportunity to correct its purported error," *United States v. Simmons*, 587 F.3d 348, 358 (6th Cir. 2009), and if the party fails to take up the district court's inquiry whether the defendant has any other objections to the sentence, we apply plain-error review, *United States v. Bostic*, 371 F.3d 865, 872–73 (6th Cir. 2004). In this instance, Preston's general objections did not direct the court to any specific procedural defects,

even after the court gave him a chance to object to the proposed sentence. *See id.* Plain-error review applies. *See United States v. Vonner*, 516 F.3d 382, 385–86 (6th Cir. 2008) (en banc).

Preston has not identified any procedural error, plain or otherwise. The district court properly calculated the guidelines range and treated the guidelines as advisory. It considered the nature and circumstances of the offense, including the flaunting of his guns and the repeated firing of one of them. 18 U.S.C. § 3553(a)(1). The court also evaluated Preston's personal history, from mitigating factors such as his mental health challenges and childhood abuse to aggravating factors such as his 11 adjudications as a juvenile (including eight violent ones) and 20 convictions as an adult. *Id.* It explained that Preston's sentence was necessary to promote respect for the law, deter further criminal conduct, and protect the public. *Id.* § 3553(a)(2)(A)–(C). And the court weighed the need to avoid unwarranted sentencing disparities and nonetheless deemed an upward variance appropriate. *Id.* § 3553(a)(6). Preston's sentence was procedurally sound.

His arguments to the contrary do not shake this conclusion. Preston contends that the district court improperly looked at his criminal record as an adult (because the guidelines already account for that record) and his record as a juvenile (because the guidelines do not take juvenile criminal history into account). But the guidelines' criminal history calculations offer a starting point, not an ending point. As we have explained, "it is within the prerogative of the sentencing judge to deviate from the advisory Guidelines range where the defendant's criminal history category does not adequately represent and account for the defendant's past criminal conduct." *United States v. Herrera-Zuniga*, 571 F.3d 568, 589 (6th Cir. 2009). That is what the court did. It determined that Preston's criminal history category did not account for his recidivism and that many of his past offenses were non-scoring events, meaning that the guidelines range did not account for them. Although Preston correctly notes that the guidelines do not count juvenile

offenses, there is "[n]o limitation" on the information that a court may consider about a person's background at sentencing apart from constitutional limitations. 18 U.S.C. § 3661. This includes juvenile offenses. *See, e.g.*, *United States v. Mitchell*, 107 F.4th 534, 544 (6th Cir. 2024).

Preston also claims that the court erred by considering his probationary and parolee status as part of the reason for a variance. He notes that the advisory guidelines range already reflects this reality through a one-point increase, *see* U.S.S.G. § 4A1.1(e), and that the district court nonetheless included it as an aggravating circumstance that justified a longer sentence. But the guidelines add a single point for a violation of probation *or* parole. Preston was on probation (for violating a protection order) *and* parole (for attempted domestic violence and endangering children) when he committed the offense. The court did not err in treating that combination as an aggravating circumstance. All in all, these criminal history nuances are meat-and-potatoes § 3553(a) considerations, not impermissible ones.

Preston separately maintains that the court overlooked his childhood and family trauma and mental health struggles and thus failed to consider his "history and characteristics" under § 3553(a)(1). But the court *did* consider Preston's background, including his difficult childhood, family support, and his mental health problems. Regrettably for Preston, the court fairly found that "his history and the escalation of his conduct that resulted in his charges" outweighed those mitigating circumstances. R.36-1 at 4.

Preston's argument that the district court inadequately explained its reasoning faces a different roadblock. True, the court "explained generally why it chose to vary upward, but not why it chose the particular variance." Appellant's Br. 16. But "we do not . . . require that [the district court] exhaustively explain the obverse—*why* an alternative sentence was *not* selected—in every instance." *United States v. Gale*, 468 F.3d 929, 940 (6th Cir. 2006). Taken to its end

point, Preston's proposed imperative would transform every sentencing hearing into an odyssey for the district judge. All that § 3553 requires instead is an adequate explanation of the particular sentence the court landed on, one that permits a reviewing court to determine whether the trial court exceeded its discretion. 18 U.S.C. § 3553(c); *see Rita v. United States*, 551 U.S. 338, 356 (2007). The district court met that mandate here.

Nor did the court err in relying on the probation officer's undisclosed recommendation of an upward variance. The Criminal Rules permit a district court to "direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence." Fed. R. Crim. P. 32(e)(3); *United States v. Goode*, 834 F. App'x 218, 220 (6th Cir. 2020).

Preston claims that the court made unsupported assumptions in sentencing him, pointing to the court's statements that he was "a violent individual" and "on a path to spend the rest of [his] life in prison." R.41 at 18. But in view of his conduct in this case and his criminal history, we cannot say that the former statement is an unfounded assumption. The latter statement counts as more of a warning than an assumption and arose from the court's consideration of the § 3553(a) factors. Preston at any event does not say that the court specifically relied on it in sentencing him.

Substantive reasonableness. Preston also challenges the length of his sentence, claiming that it is "too long" under the circumstances. *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). A district court that considers the right factors and avoids considering the wrong ones may still end up at an unreasonable sentence if it places too much weight on some factors and too little on others. *Id.* We review this weighing for abuse of discretion, with due deference to a trial judge's ring-side view that the § 3553(a) factors justify a variance. *Gall*, 552 U.S. at 51.

The court gave sufficient reasons to justify this 24-month upward variance. Applying the § 3553(a) factors, it determined that this was not a typical felon-in-possession offense and that Preston was not a typical offender.

As to the fact that this was not a run-of-the-mine felon-in-possession case, the court observed that Preston "indicated his dangerousness by his willingness to use [the gun]" and by firing it six times. R.41 at 18. The act conveyed that Preston had guns and was willing to use them. It does not change matters that he shot the gun into the sky. Even shooting at the moon can be dangerous, as the laws of gravity dictate that what goes up must come down. Hence our long history of restricting the practice of "celebratory gunfire"—firing guns into the sky. *See United States v. Rahimi*, 602 U.S. 680, 691 (2024) ("At the founding, the bearing of arms was subject to . . . restrictions on gun use by drunken New Year's Eve revelers.").

As to the fact that Preston was not a typical offender, the court appropriately considered Preston's frequent and serious violations during previous confinements, part of what one former supervising officer called his "horrible" adjustments to supervision. R.32 at 20. It also noted his frequent recidivism. The guidelines captured few of his violations, be they outside or inside of confinement, as a juvenile or as an adult. *See Mitchell*, 107 F.4th at 545. The court considered Preston's personal and family history as mitigating factors and balanced them against the other side of the ledger. It concluded, reasonably, that a firm sentence was required to deter Preston, promote respect for the law, and protect the public. No abuse of the court's discretion occurred.

Preston counters that the district court placed too much weight on his criminal history. But we have long understood past criminal conduct to be legitimate grounds for an upward variance. *See, e.g.*, *United States v. Woodard*, 638 F.3d 506, 510 (6th Cir. 2011). That's true even though the guidelines already placed Preston into the highest criminal history category, because the court

adequately demonstrated that the guidelines did not fully capture his history. Whatever range the guidelines generate, "district courts should not—in truth, may not—lash themselves to" it. *Rayyan*, 885 F.3d at 442.

Preston's final responses are equally unavailing. Pointing to a lack of write-ups between arrest and sentencing, he faults the district court for failing to credit his good behavior in custody. This argument asks a lot of a reviewing court, and too much in this instance, given his scores of violations while previously detained. And while Preston claims that this sentence is unreasonably long because his previous ones were shorter, he overlooks a good explanation for the difference. His "previously lenient sentences did not deter him from further criminal conduct, a consideration that counsels for, not against, the length of today's sentence." *United States v. Crockett*, No. 25-3486, 2026 WL 1103743, at *2 (6th Cir. Apr. 23, 2026).

We affirm.