

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1281

UNITED STATES OF AMERICA

v.

DAVEE WARD,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:18-CR-00148-001)
District Judge: Hon. Cathy Bissoon

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on September 16, 2024

Before: RESTREPO, PHIPPS, and McKEE, *Circuit Judges*

(Filed: February 25, 2025)

OPINION*

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

RESTREPO, *Circuit Judge*

Appellant Davee Ward pled guilty to possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). He was sentenced as a career offender to 144 months in prison. Ward appeals his sentence, arguing that the District Court erred in sentencing him as a career offender. He claims the sentence was unreasonable because the District Court improperly applied the career offender enhancement when calculating the Sentencing Guidelines range for his sentence and, in the alternative, failed to consider his policy-based argument against the enhancement. Because the District Court did not err in applying the enhancement and the sentence was procedurally and substantively reasonable, we will affirm.

I. Background¹

The U.S. Probation Office calculated Ward’s advisory Guideline range using the 2018 Guidelines Manual. The Presentence Investigation Report (“PSR”) identified Ward’s 2010 state conviction and 2014 federal conviction for controlled substance offenses as predicates for a career offender enhancement.² The PSR provided that Ward qualified as a career

¹ Since we write primarily for parties already familiar with this case, we include only those facts necessary to reach our conclusion.

² In 2009, Ward was arrested for selling heroin and charged in state court with four counts: Count 1 and Count 2 for possession with intent to deliver a controlled substance (“PWID”), Count 3 for possession of a controlled substance and Count 4 for criminal conspiracy. Ward ultimately pled guilty to the charges and was sentenced in September 2010 to two and a half years of probation. That sentence was imposed at Count 1, while Counts 2 and 3 were merged for sentencing purposes and Count 4 received no further penalty imposed. In 2012, Ward was charged by a federal grand jury with intent to distribute and distribution of heroin. In 2013, he pleaded guilty, and in 2014, he was sentenced to 37 months’ imprisonment. Out of prison and under supervision for the 2014

offender because (1) he was older than 18, (2) his offense of conviction was a controlled substance offense, and (3) he had at least two prior felony convictions for a controlled substance offense. *See* U.S.S.G. § 4B1.1(a).

The Probation Office assigned Ward a base offense level of 34 and a criminal history category of VI. After a 3-level reduction for acceptance of responsibility, his total offense level reached 31. Based on an offense level of 31, the Probation Office calculated a Guidelines range of 188 to 235 months. Without the career offender enhancement, the Guidelines range would have been 10 to 16 months. The District Court adopted the Probation Office’s calculations but varied downward—sentencing Ward to 144 months in prison and six years of supervised release. At the sentencing hearing, the District Court explained its sentence independent of Ward’s status as a career offender. On appeal, Ward challenges his sentence, arguing the District Court wrongly designated him a career offender and failed to consider his policy-based mitigation argument against application of the career offender enhancement to non-violent offenders like him.

II. Discussion³

A. Ward Qualifies as a Career Offender Under the Guidelines.

Interpretation of the Guidelines is a legal question subject to plenary review. *United States v. Nasir*, 17 F.4th 459, 468 (3d Cir. 2021) (en banc). “Unless the guideline’s text is

conviction, Ward was again arrested and charged with possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Ward pled guilty and received the sentence at issue here.

³ The District Court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

ambiguous and the comment provides clarity, the text alone controls.” *United States v. Chandler*, 104 F.4th 445, 450 (3d Cir. 2024). The Supreme Court has instructed that a court “must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.” *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) (internal quotation marks omitted).

The United States Sentencing Guidelines (U.S.S.G.) provide for a “career offender” enhancement that increases an adult defendant’s base offense level if “the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense” and “the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a). Ward admits he has two prior felony convictions for controlled substance offenses—a 2010 state conviction and a 2014 federal conviction. Yet he contends that his 2010 state conviction should not count as a predicate offense because it did not individually receive criminal history points under U.S.S.G. § 4A1.1(a)-(c). Ward is mistaken—the Guidelines do not require that a prior offense individually receive criminal history points to be treated as a predicate offense for the career offender enhancement.

Our analysis begins and ends with the text. The career offender enhancement applies when a defendant has “at least *two prior felony convictions* of either a crime of violence or a controlled substance offense.” § 4B1.1(a) (emphasis added). Ward bases his argument on the definition provided for “Two Prior Felony Convictions” in U.S.S.G. § 4B1.2(c). That subsection defines “Two Prior Felony Convictions” as two qualifying felony

convictions that “are *counted separately* under the provisions of § 4A1.1(a), (b), or (c).” § 4B1.2(c) (emphasis added).

Relying on the “counted separately” phrase, Ward argues that his 2010 PWID conviction cannot be considered a qualifying predicate. Section 4A1.1 provides how criminal history points are assigned to determine a defendant’s criminal history category based on prior sentences: (a) three points for a prior sentence of at least one year and one day, (b) two points for a prior sentence of at least sixty days, and (c) one point for any other sentence. Section 4A1.1 is read together with § 4A1.2(a)(2), which provides the “single sentence” rule:

If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. *See also* § 4A1.1(d).

For purposes of applying § 4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

§ 4A1.2(a)(2).

Ward argues that the “single sentence” rule reduces his 2010 PWID conviction to a non-qualifying offense because he received a single sentence for that conviction and two other non-qualifying convictions. Ward received a single sentence of probation in 2010

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.