

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2011

Argued: April 3, 2012

Decided: July 11, 2012

Amended: July 25, 2012

Docket No. 10-2210-cr

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL CASSESSE,
Defendant-Appellant.¹

Before: NEWMAN, KATZMANN, and PARKER, Circuit Judges.

Appeal from the June 19, 2009, judgment of the United States District Court for the Eastern District of New York (Sandra L. Townes, District Judge), sentencing the Defendant for a racketeering conviction and for a violation of supervised release. The Defendant contends that twelve months of imprisonment imposed for the supervised release violation should have been subtracted from the lifetime term of supervised release also imposed for the violation.

Affirmed.

Bradley W. Moore, New Haven, Conn.
(James I. Glasser, Wiggin and
Dana LLP, New Haven, Conn., on
the brief), for Defendant-
Appellant.

¹The Clerk is directed to change the official caption.

1
2 Amy Busa, Asst. U.S. Atty., Brooklyn,
3 N.Y. (Loretta E. Lynch, U.S.
4 Atty. for the Eastern District of
5 New York, Peter A. Norling, Asst.
6 U.S. Atty., Brooklyn, N.Y., on
7 the brief), for Appellee.
8

9 JON O. NEWMAN, Circuit Judge.

10 This appeal presents primarily the almost metaphysical issue of
11 how, if at all, a lifetime term of supervised release, imposed for a
12 supervised release violation, should be reduced by the number of
13 months of a prison term imposed for that same violation, a subtraction
14 we are willing to assume is required by the literal terms of the
15 provisions governing supervised release. Defendant-Appellant Michael
16 Cassesse appeals from the June 19, 2009, judgment of the District
17 Court for the Eastern District of New York (Sandra L. Townes, District
18 Judge) revoking his previous term of lifetime term of supervised
19 release and sentencing him to a term of twelve months in prison
20 followed by a renewed lifetime term of supervised release. We affirm.

21 Background

22 In 1987, Cassesse was convicted of conspiracy to distribute
23 heroin and sentenced to five years' probation. In 1991, he was
24 convicted of possession with intent to distribute more than 500 grams
25 of heroin and sentenced to 87 months of imprisonment, a consecutive
26 term of 87 months for violating his probation, and a lifetime term of
27 supervised release, the maximum possible term of supervised release
28 under the statute. See 21 U.S.C. § 841(b)(1)(B) (1991). One of the
29 conditions of lifetime supervised release for the narcotics offense
30 was that Cassesse refrain from new criminal conduct.

1 In 2007, while Cassesse was out of prison but continuing to serve
2 his term of supervised release, he was indicted on several new
3 charges, including racketeering in violation of 18 U.S.C. § 1962.
4 Cassesse was subsequently charged with violating a condition of
5 supervised release by committing a new crime. Following his guilty
6 plea to the racketeering charge, the District Court sentenced Cassesse
7 for both the racketeering conviction and the supervised-release
8 violation.

9 Speaking with respect to the racketeering offense, Judge Townes
10 noted that she had considered all of the submitted documents, all of
11 the statements made by the defense, the United States Sentencing
12 Guidelines ("the Guidelines"), and the factors enumerated by 18 U.S.C.
13 § 3553(a), including the Defendant's history and characteristics, the
14 nature of the crime committed, and the need for specific and general
15 deterrence. Judge Townes noted that Cassesse's racketeering offense
16 was a violation of his term of supervised release:

17 He committed the crime to which he pled guilty [i.e.,
18 racketeering] while serving . . . a term of supervised
19 release. Mr. Cassesse's difficulties in life do not relieve
20 him of his responsibilities for [the consequences of]
21 continuing to commit crimes. [Yet] he does not seem
22 inclined to stop. . . . I truly don't think Mr. Cassesse
23 has fully accepted responsibility for his criminal conduct.
24 I believe he's just been caught.
25

26 The District Court imposed a sentence of 90 months of
27 imprisonment and three years of supervised release for the
28 racketeering crime.

29 Judge Townes next turned to the violation of supervised release.
30 At this point the parties presented to the Court a plea agreement, in

1 which Cassesse apparently agreed to plead guilty to the supervised
2 release violation in exchange for the Government's recommendation that
3 any additional prison term for that violation be served concurrently
4 with the 90-month racketeering sentence. The parties agreed that the
5 relevant advisory range for the supervised release violation was six
6 to twelve months of imprisonment.

7 The District Court accepted Cassesse's guilty plea but rejected
8 the parties' recommendation of a concurrent term, imposing instead a
9 sentence of twelve months of imprisonment for the supervised release
10 violation to run consecutively to the 90 month term for the
11 racketeering conviction. Having revoked the previously imposed term
12 of lifetime supervised release for the narcotics violation, the
13 District Court then imposed a new lifetime term of supervised release.

14 Although Judge Townes provided no detailed explanation for the
15 sentence for the supervised release violation, she stated, "I have
16 reviewed everything." At the conclusion of the hearing, defense
17 counsel objected to the lifetime term of supervised release but did
18 not object either to the Court's failure to subtract the twelve month
19 term of imprisonment from it or to the brevity of the Court's
20 explanation of that term.

21 Discussion

22 A. Standard of Review

23 On appeal, sentences may be challenged for substantive and
24 procedural reasonableness. See United States v. Verkhoglyad, 516 F.3d
25 122, 127 (2d Cir. 2008). Cassesse argues on appeal that the lifetime

1 term of supervised release should somehow have been reduced by twelve
2 months, which is a procedural objection. Although Cassesse did not
3 specifically object in the District Court to the lack of a twelve
4 month reduction, we will assume that his general objection to the
5 length of the new lifetime term comprehended this point. Because this
6 claim presents a question of statutory interpretation, we review the
7 District Court's decision de novo. See United States v. Aleynikov,
8 676 F.3d 71, 76 (2d Cir. 2012).

9 Cassesse also complains that the District Court inadequately
10 explained its reasons for the lifetime term, which is a procedural
11 objection, and in the absence of any objection in the District Court,
12 plain error review applies. See United States v. Villafuerte, 502 F.3d
13 204, 208, 211 (2d Cir. 2007) (holding that "rigorous" plain error
14 analysis applies to unpreserved claims of procedural sentencing error
15 under 18 U.S.C. § 3553(a) and (c)).²

16 B. Whether and How to Reduce the Lifetime Term of Supervised Release

17 Cassesse contends that the District Court erred when, after
18 revoking his previously imposed term of lifetime supervised release
19 for his narcotics offense, it imposed both twelve months of
20 imprisonment and a new lifetime term of supervised release for the
21 supervised release violation. More specifically, he contends that the

²Although we have questioned the appropriateness of plain error review where a sentencing error allegedly increased a sentence, see United States v. Sofsky, 287 F.3d 122, 125-26 (2d Cir. 2002), we see no reason to weaken the plain error standard where a court has allegedly inadequately fulfilled a long-standing and uncomplicated procedural requirement of sentencing. See Villafuerte, 502 F.3d at 208, 211.

1 District Court was required by statute to deduct the former from the
2 latter, limiting the supervised release term to something at least
3 twelve months less than the "lifetime" maximum authorized for the
4 narcotics violation for which his original term of supervised release
5 was imposed.

6 Sentencing for a violation of supervised release is governed by
7 18 U.S.C. § 3583. The parties agree that the relevant form of section
8 3583 is the one that was in force in 1991, at the time that Cassesse
9 was sentenced to his original lifetime term of supervised release. See
10 United States v. Smith, 354 F.3d 171, 172 (2d Cir. 2003). The version
11 of section 3583 in effect in 1991 provides in relevant part:

12 The court may . . . revoke a term of supervised release, and
13 require the person to serve in prison all or part of the
14 term of supervised release without credit for time
15 previously served on postrelease supervision, if it finds by
16 a preponderance of the evidence that the person violated a
17 condition of supervised release
18

19 18 U.S.C. § 3583(e)(3) (1991). The 1991 version is silent on the
20 question of whether a renewed term of supervised release may be
21 imposed in addition to a prison term as punishment for a supervised
22 release violation. Interpreting this version of the statute, the
23 Supreme Court in Johnson v. United States, 529 U.S. 694 (2000),
24 concluded that a court may "revoke the release term and require
25 service of a prison term equal to the maximum authorized length of a
26 term of supervised release." id. at 705. Moreover, the Court added,
27 because a term of supervised release "continues . . . after revocation
28 even when part of it is served in prison, . . . the balance of it []
29 remain[s] effective as a term of supervised release when the

1 incarceration is over[.]” Id. at 706. As we have noted, section
2 841(b)(1)(B) provided for the original term of supervised release and
3 authorized a maximum term of lifetime supervised release. In 1994,
4 before Johnson was decided, but after Cassesse was sentenced, Congress
5 amended the supervised release provisions to provide explicitly that
6 a renewed term of supervised release may be imposed for a supervised
7 release violation. See Violent Crime Control and Law Enforcement Act
8 of 1994, Pub. L. No. 103-322, § 110505, 108 Stat. 1796, 2017, codified
9 at 18 U.S.C. § 3583(h). The amending language not only authorized a
10 renewed term of supervised release not to exceed the maximum allowable
11 for the underlying violation, but also introduced the concept,
12 relevant to this appeal, of a reduction of the maximum allowable term
13 of supervised release by the length of time spent in prison for the
14 supervised release violation. The amendment added section 3583(h),
15 which provides:

16 When a term of supervised release is revoked and the
17 defendant is required to serve a term of imprisonment, the
18 court may include a requirement that the defendant be placed
19 on a term of supervised release after imprisonment. The
20 length of such a term shall not exceed the term of
21 supervised release authorized by statute for the offense
22 that resulted in the original term of supervised release,
23 less any term of imprisonment that was imposed upon
24 revocation of supervised release.
25

26 18 U.S.C. § 3583(h) (2012) (emphasis added).

27 Both parties agree, in effect, that once the Supreme Court ruled
28 in Johnson that a renewed term of supervised release may be imposed
29 for violations that occurred under the 1991 version of section
30 3583(e)(3), the imprisonment reduction concept of the later enacted

1 section 3583(h) should apply to such a renewed term. The Appellant
2 reasons as follows:

3 Under current law, "[t]he length of such a term of
4 supervised release shall not exceed the term of supervised
5 release authorized by statute for the offense that resulted
6 in the original term of supervised release, less any term of
7 imprisonment that was imposed upon revocation of supervised
8 release." 18 U.S.C. § 3583(h); see also USSG § 7B1.3(g)(2).
9 The law in effect when Mr. Cassesse committed his narcotics
10 offense is to the same effect, even though the underlying
11 statutory basis is different. As the Supreme Court stated,
12 under Section 3583(e):
13

14 [I]t is not a "term of imprisonment" that is to
15 be served, but all or part of "the term of
16 supervised release." But if "the term of
17 supervised release" is being served, in whole or
18 part, in prison, then something about the term of
19 supervised release survives the preceding order
20 of revocation.
21

22 Johnson, 529 U.S. at 705. Thus, if some "part" of the term
23 of supervised release is served in prison after a violation,
24 then the "part" of the term that remains after that prison
25 sentence is served is less than the whole, original release
26 term.
27

28 . . .
29

30 Thus, the pre-1994 Section 3583(e) and the current Section
31 3583(h) are in accord on this point. That is, any reimposed
32 supervised-release term must be reduced by the length of the
33 prison term the defendant serves for the violation.
34

35 Brief for Appellant at 14-16 (footnote omitted).
36

37 The Government essentially reaches the same result by contending
38 that although "the pre-1994 version of § 3583(e) did not require
39 subtraction of the incarceratory sentence," it did require that "the
40 combined term of supervised release and incarceration did not exceed
41 the original term of supervised release." Brief for Appellee at 26.
42 Thus, for example, if the prior term of supervised release was ten
43 years and the period of incarceration for the violation was one year,

1 the only way the "combined term" could not exceed the original term is
2 if the one year term of imprisonment is subtracted from the prior ten
3 years of supervised release, yielding a maximum allowable renewed term
4 of nine years.

5 The intriguing question is whether and how the prison term
6 reduction concept applies to a renewed lifetime term of supervised
7 release. The Government elides this question by converting the
8 subtraction concept into an addition concept. It observes that
9 although Cassesse's one year term in prison plus the renewed lifetime
10 term of supervised release "may equal the original lifetime term of
11 supervised release, they do not exceed it." Id.

12 Cassesse advances the subtraction concept and insists that his
13 one year of imprisonment must somehow be subtracted from his lifetime
14 term of supervised release. He suggests three techniques. First, he
15 contends that the lifetime term should be abandoned in favor of a
16 fixed term of years from which the one year term of imprisonment would
17 be subtracted. See Brief for Appellant at 21. Second, he suggests
18 that the lifetime term of supervised release should be converted to
19 the corresponding offense level 43 in the Sentencing Table of the
20 Sentencing Guidelines from which some appropriate reduction should be
21 made, after which the reduced offense level would presumably be
22 converted back into a term of years. Cf. United States v. Nelson, 491
23 F.3d 344, 349 (7th Cir. 2007) (affirming conversion of mandatory life
24 sentence to offense level 43 and then reducing that level by 40
25 percent to reflect substantial assistance). Third, he suggests that

1 one year could be subtracted from his life expectancy at the time of
2 sentencing.³

3 Intriguing as are the question and some possible answers to it,
4 we conclude that the more appropriate course is simply to recognize
5 that this is one of those rare situations where Congress did not
6 expect the literal terms of its handiwork to be applied to a lifetime
7 term of supervised release, even if we assume that the subtraction
8 concept of section 3583(h) should be applied to a fixed term of
9 supervised release imposed under the pre-1994 version of section
10 3583(e)(3). Cf. Holy Trinity Church v. United States, 143 U.S. 457,
11 472 (1892) (statute prohibiting prepayment of transportation of alien
12 into United States to perform service of any kind held inapplicable to
13 church's contract to bring resident of England to render service as
14 rector and pastor, even though contract was "within the letter" of
15 statute).

16 First, it is highly unlikely that Congress expected the
17 subtraction concept to be applied to a lifetime term of supervised
18 release. Second, even if a sentencing judge were to feel obliged to
19 make a subtraction in some fashion, the judge could easily circumvent
20 such a requirement by selecting a supervised release term of many
21 years, 99 for example, and then imposing a term of "only" 98 years.

³A variant of Cassese's third suggestion was offered by the Seventh Circuit, in the context of a reduction for substantial assistance from a mandatory life sentence. That Court suggested making the substantial assistance reduction from 470 months, the average life expectancy of federal defendants at the time of sentencing, as determined by the United States Census Bureau. See Nelson, 491 F.3d at 349-50.

1 Third, use of the defendant's life expectancy would introduce a
2 variable bearing little, if any, relation to penological purposes for
3 defendants who outlive their life expectancy and would introduce
4 reverse age discrimination. We conclude that the unadjusted lifetime
5 term of supervised release was not unlawful. See United States v.
6 Rausch, 638 F.3d 1296, 1303 (10th Cir. 2011) ("Because it is
7 impossible to predict the precise length of any individual's life, a
8 [supervised release] sentence of 'life less two years[' imprisonment]'
9 has only conceptual--not practical--meaning."). But see United States
10 v. Shorty, 159 F.3d 312, 316 (7th Cir. 1998) ("[T]he maximum amount of
11 supervised release possible would have been life minus the amount of
12 imprisonment imposed during the sentencing for revocation"; no method
13 of subtraction suggested).⁴

14 C. Explanation of Sentence

15 Cassesse contends that the District Court committed procedural
16 error during the sentencing for his supervised release violation by
17 failing to consider the statutory factors required by 18 U.S.C.
18 § 3583(e) and by failing to explain the reasons for the sentence as
19 required by 18 U.S.C. § 3553(c). The statutory requirements are set

⁴We note that in a recent summary order, United States v. McNaught, 396 F. App'x 772 (2d Cir. 2010), our Court appeared to endorse Cassesse's argument. See id. at 774 (stating that section 3583(h) "required the district court to subtract Appellant's term of 30 months' imprisonment from the maximum lifetime term of supervised release"). That statement, made without considering whether or how such a subtraction should be made, was dictum; the holding was that a five-year term of supervised release was lawful. In any event, the summary order in McNaught was non-precedential. See 2d Cir. I.O.P. 32.1.1.

1 out in the margin.⁵

2 The District Court's failure to explicitly consider the section
3 3553(a) factors does not rise to the level of plain error. "As long
4 as the judge is aware of both the statutory requirements and the
5 sentencing range or ranges that are arguably applicable, and nothing

⁵Section 3583(e) requires courts to "consider[]" a subset of the section 3553(a) factors, namely:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - . . .
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (4) the kinds of sentence and the sentencing range established for--
 - . . .
 - (B) in the case of a violation of . . . supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28 . . . ;
- (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . that . . . is in effect on the date the defendant is sentenced[;]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Section 3553(c) provides:

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.

18 U.S.C. § 3553(c).

1 in the record indicates misunderstanding about such materials or
2 misperception about their relevance, we will accept that the requisite
3 consideration [required by 18 U.S.C. § 3583(e)] has occurred." United
4 States v. Fleming, 397 F.3d 95, 100 (2d Cir. 2005). Here, there is
5 every reason to believe that Judge Townes knew she had to consider,
6 and did consider, the relevant statutory factors. She thoroughly
7 considered nearly identical factors during her discussion of the
8 racketeering conviction that resulted from the same criminal acts.
9 During that discussion, moreover, she commented on Cassesse's
10 supervised release violation and how that violation affected her
11 overall assessment of the Defendant as an unremorseful repeat
12 offender. Then, after turning specifically to the supervised release
13 violation itself, in lieu of a detailed explanation she stated
14 generally, "I have reviewed everything." Finally, the record shows
15 that Judge Townes was aware of the appropriate policy statements and
16 the relevant advisory terms of imprisonment.

17 The explanation requirement of section 3553(c) is also
18 sufficiently satisfied to preclude a finding of plain error. Section
19 3553(c) requires no specific formulas or incantations; rather, the
20 length and detail required of a district court's explanation varies
21 according to the circumstances. See Villafuerte, 502 F.3d at 210.
22 Where, as here, the sentence concerns a violation of supervised
23 release and the ultimate sentence is within the recommended range ,
24 compliance with the statutory requirements can be minimal. See
25 Verkhoglyad, 516 F.3d at 132-33 ("[A] court's statement of its reasons
26 for going beyond non-binding policy statements in imposing a sentence

1 . . . need not be as specific as has been required when courts
2 departed from [G]uidelines" (emphases original)); Villafuerte,
3 502 F.3d at 210 ("When the district court imposes a Guidelines
4 sentence, it may not need to offer a lengthy explanation").
5 Furthermore, section 3553(c) has likely been satisfied when a court's
6 statements meet the goals "of (1) informing the defendant of the
7 reasons for his sentence, (2) permitting meaningful appellate review,
8 (3) enabling the public to learn why the defendant received a
9 particular sentence, and (4) guiding probation officers and prison
10 officials in developing a program to meet the defendant's needs." Id.

11 The District Court adequately fulfilled its duties under the
12 statute, and the error, if any, was not plain. First, Judge Townes
13 briefly described some reasons for her supervised release violation
14 sentence, stating that she would not reduce the sentence for
15 Cassesse's cooperation because she had already given him credit for
16 that in her racketeering sentence and noting that Cassesse differed
17 from his co-defendants because he was the only one with a violation of
18 supervised release. Second, and more importantly, Judge Townes's
19 intertwined analysis of the supervised release violation and the
20 racketeering crime clearly provided a sufficient explanation of the
21 sentence she ultimately imposed for the violation.

22 United States v. Lewis, 424 F.3d 239 (2d Cir. 2005), upon which
23 Cassesse principally relies, involved quite different circumstances.
24 First, in Lewis the District Court imposed a sentence above that
25 recommended by the relevant Sentencing Commission policy statements,
26 triggering a higher descriptive obligation on the part of the District

1 Court. Id. at 245; see 18 U.S.C. § 3553(c)(2) (requiring district
2 court to provide "the specific reason for the imposition of a sentence
3 different from that described" in the relevant policy statements or
4 Guidelines). Second, unlike in Lewis, Judge Townes provided a lengthy
5 explanation, albeit one that technically occurred during the
6 discussion of a different (but closely related) crime.

7 Conclusion

8 For the foregoing reasons, the judgment of the District Court is
9 affirmed.