

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-3067

UNITED STATES OF AMERICA

v.

DAVID CUNNINGHAM,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D. C. Criminal No. 2:07-cr-00298-001)
District Judge: Honorable Cathy Bissoon

Submitted Under Third Circuit L.A.R. 34.1(a)
July 2, 2026

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

(Opinion filed: August 18, 2026)

OPINION*

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

McKEE, *Circuit Judge*.

David Cunningham violated the terms of his supervised release by posting a partially nude photo of his girlfriend with accompanying obscene comments about her on social media.¹ Although he admitted the violation,² he challenges the reasonableness of his 11-month, within-Guidelines revocation sentence. For the reasons set forth below, we will affirm the District Court’s judgment.³

When assessing a sentence for reasonableness, we first consider whether the district court committed any “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.”⁴ Second, we consider the substantive reasonableness of the sentence imposed, “tak[ing] into account the totality of the circumstances.”⁵

¹ In January 2025, Cunningham began a 20-year term of supervised release after serving a 240-month federal prison sentence for receiving, possessing, and distributing child sexual abuse material. Not six months later, Cunningham violated his release conditions by posting content on social media harassing his girlfriend.

² Before his final revocation hearing, the parties agreed that Cunningham’s conduct constituted harassment in violation of 18 Pa. Cons. Stat. § 2709(a)(4).

³ We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

⁴ *Gall v. United States*, 552 U.S. 38, 51 (2007).

⁵ *Id.*

We review the procedural reasonableness of Cunningham’s sentence for plain error because he did not object to any errors at sentencing.⁶ Cunningham bears the burden of demonstrating “(1) error, (2) that is plain or obvious, and (3) that affects a defendant’s substantial rights.”⁷ “If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.”⁸

We find no plain error here. Cunningham argues that the District Court failed to meaningfully consider the applicable § 3553(a) factors⁹ and did not adequately justify its sentencing decision. However, the District Court expressly considered the § 3553(a) factors and made specific reference to § 3553(a)(2)(B) and (C) in stating its duty to “impose a sentence that is sufficient but not greater than necessary to afford adequate deterrence to criminal conduct, and to protect the public from further crimes by the defendant.”¹⁰ The District Court also provided sufficient justification for its decision, finding that Cunningham’s conduct “reflect[ed] a shocking display of revenge designed to humiliate the victim,” and that he continued to engage in “dangerous incidents.”¹¹

⁶ See, e.g., *United States v. Ferguson*, 876 F.3d 512, 514 (3d Cir. 2017) (“[Defendant’s] failure to preserve his objection to the District Court’s arrest record reference at sentencing means we review it only for plain error.”).

⁷ *Id.* (quoting *United States v. Goodson*, 544 F.3d 529, 539 (3d Cir. 2008)).

⁸ *Id.* (citation modified).

⁹ In crafting a sentence for a violation of supervised release, courts may consult some, but not all, of the § 3553(a) factors. 18 U.S.C. § 3583(e); *United States v. Clark*, 726 F.3d 496, 500 (3d Cir. 2013). For example, as noted *infra*, § 3553(a)(2)(A) may not be considered when imposing a sentence for a violation of supervised release.

¹⁰ Supp. App. 7.

¹¹ Supp. App. 17.

Cunningham further argues that the District Court impermissibly considered § 3553(a)(2)(A) by taking into account the need to exact retribution for his underlying criminal offenses.¹² Under plain error review, we will affirm “unless it is clear or obvious that the district court actually relied on § 3553(a)(2)(A)—because it did so either expressly or by unmistakable implication.”¹³ Here, the record provides no clear indication that the District Court relied on § 3553(a)(2)(A) in making its revocation decision. The sentence was procedurally sound because the District Court did not plainly err.

Cunningham also challenges the substantive reasonableness of his sentence, which we review for abuse of discretion.¹⁴ “Defendants bear a heavy burden to show that a sentence within the applicable Guidelines range was substantively unreasonable.”¹⁵ “[I]f the district court’s sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on the particular defendant for the reasons the district court provided.”¹⁶ Here, it cannot be said that no reasonable court would have imposed an 11-month, within-Guidelines sentence on Cunningham for

¹² Section 3553(a)(2)(A) provides that a court must consider “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” A district court, however, may not consider § 3553(a)(2)(A) when revoking supervised release. *Esteras v. United States*, 606 U.S. 185, 195 (2025).

¹³ *Id.* at 202-03 (citation modified).

¹⁴ *United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009). “[A]n abuse of discretion has occurred if a district court based its decision on a clearly erroneous factual conclusion or an erroneous legal conclusion.” *Id.* at 567-68.

¹⁵ *United States v. Seibert*, 971 F.3d 396, 402 (3d Cir. 2020) (citation modified).

¹⁶ *Tomko*, 562 F.3d at 568.

violating the conditions of his supervised release. Therefore, the sentence was substantively reasonable.

For the above reasons, we will affirm the District Court's judgment.