

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 11, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ARTHURMAN SILAS,

Defendant - Appellant.

No. 18-1448
(D.C. No. 1:18-CR-00188-RM-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **SEYMOUR, BALDOCK**, and **MURPHY**, Circuit Judges.

Arthurman Silas pled guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The presentence report (“PSR”) applied a six-level enhancement to reflect Mr. Silas’ prior conviction for a violent crime and a two-level enhancement because the firearm Mr. Silas possessed had been reported stolen. Mr. Silas disputed both enhancements and the district court ruled at sentencing that neither enhancement applied. The court

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties’ request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

calculated the advisory sentencing guidelines at 27 to 33 months' imprisonment but nevertheless imposed an upward variant sentence of 48 months. On appeal, Mr. Silas argues this sentence is substantively unreasonable. We affirm.

I.

The PSR chronicled Mr. Silas' troubled childhood, involving frequent early abuse and trauma, and Mr. Silas' adolescence and teenaged years when he lived in foster-care and institutional settings. His record is riddled with juvenile criminal activity and subsequent convictions as a young adult. In December 2012, when Mr. Silas was twenty years old, he pled guilty to conspiracy to commit armed robbery. He served four years of a five-year sentence before being paroled in February 2017. Upon his release, Mr. Silas went to live with his mother in Atlanta to pursue a "fresh start." Rec., vol. II at 83. But Mr. Silas ultimately returned to Colorado where he was apprehended in possession of a pistol on March 29, 2018 by the Denver Police Department, which had received information that he would be attending a concert at a local bar in violation of his parole agreement. He was 26 years old at the time.

Mr. Silas entered into a plea agreement with the government for being a felon in possession of a loaded firearm. Mr. Silas' anticipated offense level depended on whether his prior conviction for conspiracy to commit aggravated robbery qualified as a crime of violence under U.S.S.G. § 2K2.1(a)(4)(A), and whether the gun Mr. Silas possessed was stolen and therefore qualified for the two-level enhancement under U.S.S.G. § 2k2.1(b)(4)(A). Mr. Silas objected to both enhancements.

At sentencing, the district court found in favor of Mr. Silas on both objections and calculated an advisory sentencing guideline range of 27-33 months' imprisonment. Mr. Silas presented a variety of mitigating arguments to contend that a sentence of 27 months would be reasonable: that his possession of a firearm was in part due to his traumatic upbringing, that his time in Atlanta demonstrated he could live as a law-abiding citizen, and that prolonged sentences do not have a deterrent effect for former juvenile offenders. The government countered that in light of Mr. Silas' extensive criminal history and the possession offense's proximity to his parole date, he should receive a 60 months sentence. Mr. Silas' juvenile criminal history included second degree burglary, two escape felonies, a second degree assault conviction and a theft. His adult felonies included attempted escape, and conspiracy to commit an aggravated robbery. Citing concern for an escalating pattern of criminal behavior as well as a belief that the categorical approach led to an advisory guideline range that underrepresented Mr. Silas' criminal history, the district court ultimately imposed an upward variant sentence of 48 months' imprisonment. Mr. Silas appeals.

II.

We review the substantive reasonableness of sentences—"whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). Using this standard, we will determine a sentence to be substantively unreasonable "only if it is arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Lente*,

759 F.3d 1149, 1158 (10th Cir. 2014) (quotation omitted). We recognize that often, and particularly in sentencing, there is “a range of possible outcomes the facts and law at issue can fairly support; rather than pick and choose among them ourselves, we will defer to the district court’s judgment so long as it falls within the realm of these rationally available choices.” *United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007).

The sentence imposed in this case is 15 months or 45.4% above the high end of Mr. Silas’ advisory sentencing range. A district court “must consider the extent of the deviation [from the guidelines] and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Gall*, 552 U.S. at 50. In reviewing substantive reasonableness on appeal, we *may* “consider the extent of the deviation[] but *must* give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” *Id.* at 51 (emphasis added). We look to the “district court’s procedurally-required explanation in order to conduct meaningful appellate review of a sentence’s substantive reasonableness” and to determine if the district court abused its discretion in imposing the sentence. *United States v. Cookson*, 922 F.3d 1079, 1091-92 (10th Cir. 2019) (citation and internal quotation marks omitted).

Mr. Silas contends the district court improperly balanced the relevant § 3553(a) factors,¹ resulting in a deviation from the guideline range that is

¹ In *United States v. Cookson*, 922 F.3d 1079 (10th Cir. 2019), we described the factors in the following manner:

substantively unreasonable. He specifically alleges that the district court improperly underweighed mitigating factors and overweighed his previous criminal history. We disagree. The district court clearly considered the relevant § 3553(a) factors in granting an upward variance and supported its variance with an analysis of the factors. *See, e.g., rec.*, vol. III at 94–95 (court discussing Mr. Silas’ random acts of juvenile violence such as beating a sleeping man with no explanation), 96–97 (discussing Mr. Silas’ criminal history and escalating behavior and the need to sentence above the guideline range), 108 (explaining that Mr. Silas is not technically an individual with a conviction for a crime of violence but that he is indistinguishable from such an individual). The court determined that Mr. Silas’ criminal history was underrepresented by the guideline range calculated under the categorical approach and explained that it believes individuals like Mr. Silas were intended to fall under the enhancement for a crime of violence. *Id.* at 96–97, 107–08.

18 U.S.C. § 3553(a) requires district courts to consider seven factors in sentencing: (1) the nature and circumstances of the offenses and the history and characteristics of the defendant; (2) the need for a sentence to reflect the basic aims of sentencing namely (a) just punishment (retribution), (b) deterrence, (c) incapacitation, and (d) rehabilitation; (3) the kinds of sentences available; (4) the sentencing commission Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted sentencing disparities; and (7) the need for restitution.

Id. at 1092 (internal citations and quotations omitted); *see* 18 U.S.C. § 3553(a)(1)–(7).

Despite Mr. Silas' contention that the district court underweighed certain mitigating factors, such as his traumatic personal history, the record reveals the court's repeated consideration of this evidence. *See, e.g., id.* at 90–92 (court determined that the proffered study regarding weapon possession by adults who suffered from abusive childhoods was not persuasive under the circumstances). In light of Mr. Silas' subsequent criminal history, the court decided not to mitigate the sentence. *See United States v. Taylor*, 907 F.3d 1046, 1048, 1052 (7th Cir. 2018) (affirming defendants' sentences where district court thought their history and characteristics "cut both ways"); *see also* rec., vol. III at 94–96 (court explaining defendant's history involves an "indicia of violence" and escalation from physical assaults to use of fake weapons to use of real weapons), 102 (defense conceded proximity in time between Mr. Silas' release and subsequent re-arrest undercuts mitigation from his time as a law-abiding citizen). These judgments and accompanying explanations unquestionably fall within the realm of rationally available choices, and the district court did not abuse its discretion in its weighing of the factors.

We AFFIRM.

Entered for the Court

Stephanie K. Seymour
Circuit Judge