FILED
United States Court of Appeals
Tenth Circuit

September 1, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RIVER DEAN WALSH,

Defendant - Appellant.

No. 20-8074
(D.C. No. 2:20-CR-00017-ABJ-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.

River Dean Walsh challenges the district court's ruling that his federal sentence be served *consecutively* to an unrelated existing state sentence. Though he agrees that federal courts have general authority to impose their sentences consecutively to still-active state sentences on unrelated charges, he argues that the district court did so here to serve an impermissible purpose—to promote his correction and rehabilitation. Walsh didn't raise this objection in the district court, so we review under the plain-error standard. Because Walsh fails to meet that standard's stringent requirements, we affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

In June 2020, a Wyoming state court sentenced Walsh to 30–60 months of imprisonment on automobile-theft charges. Months later, after the federal court obtained custody of Walsh to face a federal felon-in-possession-of-a-firearm charge, he pleaded guilty and received a 27-month term of imprisonment.

Before Walsh's federal sentencing, his counsel filed a sentencing memorandum.[1] At the sentencing hearing, the court briefly reviewed the nature and timing of the state and federal prosecutions. The court then mentioned that the pandemic had kept Walsh from any opportunity to "participate meaningfully in any programming," apparently referencing treatment programs. R. Vol. 3 at 16.

Next, the parties agreed that Walsh had a total offense level of 12 and a criminal-history category of V, which resulted in an advisory guideline range of 27–33 months of imprisonment. Next, the court noted two disputed issues needing resolved: (1) whether to grant Walsh's motion for a downward variance, and (2) whether to run the federal sentence consecutively or concurrently to the already-imposed state sentence. The court asked for the parties' respective positions.

Walsh's attorney requested a two-level downward variance to an advisory range of 21–27 months of imprisonment to run concurrently to the existing state sentence. In support, she emphasized that Walsh had been unable to "do any programming." *Id.* at 22. She stated that when Walsh "gets to the Bureau of Prisons, hopefully, he will be allowed

[1] Walsh has not included this document in the record on appeal.

to do some programming there." *Id.* at 23. Later, she noted that "[h]e needs drug treatment; he needs mental-health treatment, and right now he is not getting it." *Id.* Several times, she reiterated this to justify the requested downward variance.

The government agreed that "Mr. Walsh needs drug treatment." *Id.* at 26. Despite that need, the government noted that Walsh's federal sentence wouldn't be long enough to qualify him for the Residential Drug Abuse Program (RDAP). The government stated that "unfortunately, he will not have that ability to do that intense residential treatment in prison, which is unfortunate because that is clearly what he needs[.]" *Id.* No one argued for an upward variance that would enable Walsh to qualify for RDAP.

After hearing the arguments, the court "agreed with counsel that this defendant needs programs to address his past use of controlled substances." *Id.* at 31. Here, the court was responding to Walsh's view that "he can be released without treatment and remain sober on his own as long as he releases to a different community." *Id.* at 34. But the court believed that "[h]e needs programming and support in any community where he lives that he can go to immediately whenever there is a craving or a temptation to use . . . ." *Id.* After reviewing Walsh's continued criminal behavior, the court reiterated that "this defendant would benefit from programming within the Federal Bureau of Prisons." *Id.*

Along this line, the court spoke these words: "I feel that this man's life is so important and that he will continue to benefit from programming that he can receive within the Bureau of Prisons and the follow-on programming that he will receive through supervised release, and, hopefully, he will develop a lifetime support system that will

carry him on." *Id.* at 35. Walsh reads this as the court saying that it would impose a consecutive federal sentence to the existing state sentence *so* that he would receive treatment in federal custody (the treatment while on supervised release obviously would not require incarceration).

The court sentenced Walsh "to a term of 27 months in custody at the Bureau of Prisons to be served consecutive to the [state sentence]." *Id.* Neither party objected despite being given an opportunity to do so.[2]

DISCUSSION

On appeal, Walsh contends that the district court improperly imposed a consecutive sentence as a "means of promoting correction and rehabilitation." *See* 18 U.S.C. § 3582(a).[3] Because Walsh didn't raise this issue in the district court, we review

[2] Apart from the consecutive-versus-concurrent question, the court as mentioned imposed a low-end, 27-month sentence. It referenced the factors under 18 U.S.C. § 3553(a). Walsh never objected to this term of imprisonment or to the court's explanation of the sentence. On appeal, he argues that the district court needed to better explain its reasoning for the term of imprisonment. The district court's explanation suffices. *See United States v. Tindall*, 519 F.3d 1057, 1065 (10th Cir. 2008) ("In sentencing [the defendant] within the advisory guidelines range, the district court explained, 'the sentence I am about to impose is the most reasonable sentence upon consideration of all factors enumerated in 18 United States Code 3553.' [This] one-sentence explanation accompanying a within-guideline sentence—in the absence of the need to address specific § 3553(a) arguments brought to the district court's attention—satisfies the district court's duty to impose a procedurally reasonable sentence." (citation omitted)).

[3] Along the same lines, the Act also instructs the Sentencing Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." *See* 28 U.S.C. § 994(k).

for plain error. *See United States v. Thornton*, 846 F.3d 1110, 1114 (10th Cir. 2017). To prevail under this standard of review, Walsh has the burden to show (1) the district court erred, (2) the error was plain, (3) the error prejudiced his substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*.

Walsh agrees that a federal court may typically impose a consecutive sentence. *See* 18 U.S.C. § 3854(a) ("Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."). But he disputes that a court may do so for the disallowed purpose of achieving rehabilitation.

In *Tapia v. United States*, 564 U.S. 319 (2011), a district court imposed a high-end, 51-month sentence on a defendant convicted of "smuggling unauthorized aliens into the United States." *Id.* at 321. The Supreme Court noted that the district court had imposed the high-end sentence after "refer[ring] several times to Tapia's need for drug treatment, citing in particular the Bureau of Prison's Residential Drug Abuse Program (known as RDAP or the 500 Hour Drug Program)." *Id.* at 321–22. The Supreme Court found that "the sentencing transcript suggests the possibility that Tapia's sentence was based on her rehabilitative needs." *Id.* at 334. More specifically, it found that the record showed that the district court "may have selected the length of the sentence to ensure that Tapia could complete the 500 Hour Drug Program." *Id.* Though a court may "discuss[] the opportunities for rehabilitation within prison or the benefits of specific treatment or

training programs," the Supreme Court concluded that the district court had gone further.[4] *Id.*

In *Thornton*, 846 F.3d 1110, we addressed whether a district court had "committed procedural error by basing the length of Thornton's sentence, in part, on the treatment and vocational services he would receive in jail." *Id.* at 1112. There, the district court denied a downward variance partly because the defendant "needs enough time in prison to get treatment and vocational benefits." *Id.* (citation omitted). In fact, the district court described this as the "overriding reason" for denying a downward variance. *Id.* at 1114. We announced several principles that now govern our post-*Tapia* cases: (1) that any imprisonment beyond what a defendant would have gotten absent rehabilitative reasons violates *Tapia*, even imprisonment resulting from the denial of a downward variance, *id.* at 1115; (2) that any alternative and permissible reasons for the sentence would not validate any sentence partially based on rehabilitation, *id.* at 1115–16; (3) that *Tapia* errors can occur even if the court makes no "specific link between the length of the sentence and specific treatment programs or services in prison," *id.* at 1116; and (4) that a district court errs in imposing a prison sentence if "motivated, in part, by a desire to give

[4] It wasn't dispositive that the 36-month mandatory-minimum statutory sentence would have qualified Tapia for the RDAP. *Tapia*, 564 U.S. at 337 (Sotomayor, J., concurring) (expressing skepticism that the "thoughtful District Judge imposed or lengthened Tapia's sentence to promote rehabilitation," but acknowledging that his "comments at sentencing were not perfectly clear.").

[a defendant] the benefits of treatment in prison," even if the defendant himself or herself raises the prospect of rehabilitation, *id.* at 1117.[5]

In *United States v. Kelley*, 757 F. App'x 684 (10th Cir. 2018), a defendant appealed "the district court's decision to run his 63-month federal sentence consecutively to sentences in state prison for unrelated offenses." *Id.* at 685. The issue was whether the district court had imposed a consecutive sentence, at least in part, to promote the defendant's rehabilitation. *Id.* Kelley had failed to argue this point in the district court, leaving us to plain-error review. *Id.* So in important respects, Walsh's case tracks *Kelley*.

In explaining why it would impose the federal imprisonment consecutively to the existing state sentences, the court gave two reasons: (1) that concurrent federal prison time would likely expire before Kelley's release from state prison, which would leave no "punishment at all for the new criminal conduct," *id.* at 686–87, and (2) that "[y]ou need the programs that the Federal Bureau of Prisons can offer you. You need residential drug abuse treatment [RDAP]," *id.* at 687.

We held that "even if the district court's reference to rehabilitation was error," Kelley had "not shown a reasonable probability that his sentence was thereby increased." *Id.* at 685–86. In short, he failed to show that "compliance with *Tapia* would likely have led to a shorter sentence." *Id.* at 687 (quoting *United States v. Tidzump*, 841 F.3d 844, 847 (10th Cir. 2016)). We contrasted the sentence with those imposed in other cases in

[5] Ultimately, we affirmed the sentence after concluding that the *Tapia* error was not plain, because no binding case had then held that "*Tapia* does not require such a direct connection between a treatment program and the length of the prison sentence[.]" *Thornton*, 846 F.3d. at 1118.

which the court "had indicated that it was tailoring the sentence to make the defendant eligible for rehabilitative services. *Kelley*, 757 Fed. App'x at 688 (citing *Tidzump*, 841 F.3d at 847 (imposing a 31-month sentence so defendant would qualify for RDAP)); *United States v. Mendiola*, 696 F.3d 1033, 1042 (10th Cir. 2012) (imposing a sentence double the top of the advisory range to qualify the defendant for RDAP); *United States v. Cordery*, 656 F.3d 1103, 1108 (10th Cir. 2011) (imposing the minimum sentence to qualify the defendant for RDAP)).

In contrast, we noted that the court had sentenced Kelley to "the shortest term recommended by the guidelines and followed the guidelines recommendation that the sentence be consecutive to his state sentences." *Id.* at 688. The same is true here. Walsh fails plain error's third prong requiring substantial prejudice for the same reason.[6] *See United States v. Blackmon*, 662 F.3d 981, 987 (10th Cir. 2011) (ruling that the defendant failed to meet his burden show substantial prejudice, because the court would have to speculate that he would have received a lesser sentence except for the alleged *Tapia* error).

[6] Further, we note that Walsh has failed to cite a Supreme Court or Tenth Circuit case holding that imposing consecutive time as here would lengthen his sentence within the meaning of *Tapia*, even if the court's purpose were to secure federal treatment for the defendant. We do not rule on that prong-two issue.

CONCLUSION

The district court's imposition of a consecutive sentence wasn't plainly erroneous. Accordingly, we AFFIRM the sentence.

Entered for the Court

Gregory A. Phillips
Circuit Judge