FILED
United States Court of Appeals
Tenth Circuit

September 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL LEE SUNRHODES,

Defendant - Appellant.

No. 20-8070
(D.C. No. 1:20-CR-00068-NDF-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **KELLY** and **HARTZ**, Circuit Judges.

Michael Lee Sunrhodes pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He later moved to withdraw his plea, which the district court denied. The court sentenced him to 46 months' imprisonment followed by 3 years of supervised released. He appeals the denial of his motion to withdraw his plea and also contends his sentence was substantively unreasonable. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

BACKGROUND

On March 21, 2020, police officers responded to a report of gunshots near an apartment complex in Gillette, Wyoming. The officers first spoke with the resident who heard the shots. He stated that as he was leaving his apartment, he saw a Native American male sitting at the top of the apartment staircase holding a pistol. He then heard gunshots as he was walking to his car and believed they came from the man he had seen holding a pistol. After going door-to-door to interview residents of the apartment complex, the officers eventually spoke with a woman who stated that Sunrhodes, a Native American male, had been in her apartment earlier that day. She explained that he had a pistol, possibly a 9mm, in his possession and that he was intoxicated and angry when he left her apartment. The officers then reviewed Sunrhodes's history and determined he had a conviction for a violent felony.

Law enforcement was unable to locate Sunrhodes that evening. However, the following day, an officer responded to a report of a man stumbling along a highway and recognized the man as Sunrhodes. After placing him in handcuffs, the officer asked Sunrhodes where the pistol was, and he admitted it was in his jacket. The officer then located a 9mm pistol loaded with six bullets in Sunrhodes's jacket pocket and an additional magazine loaded with fifteen 9mm bullets on Sunrhodes's person.

Several days later, an individual with whom Sunrhodes had been staying reported to police that Sunrhodes had stolen, among other things, his 9mm pistol and two magazines for the pistol early on the morning of March 21. Law enforcement

subsequently confirmed that the serial number on the pistol found in Sunrhodes's jacket matched the serial number of the pistol reported as stolen.

On May 21, Sunrhodes was indicted with being a felon in possession of a firearm in violation of § 922(g)(1). On July 20, he pleaded guilty pursuant to a written plea agreement, with the government agreeing to recommend a sentence at the low end of the sentencing guidelines range. The district court accepted the plea and adjudged him guilty. About a month later, and before he was sentenced, Sunrhodes, through counsel, moved to withdraw his plea and sought new counsel. But he offered no explanation and asked to withdraw his motion that same day, which the court allowed.

The United States Probation Office then submitted a presentence investigation report (PSR), in which it recommended a base offense level of 20 on the ground that Sunrhodes had previously been convicted of a crime of violence—aggravated assault on a pregnant woman causing injury. *See* U.S. Sentencing Guidelines Manual (USSG) § 2K2.1(a)(4)(A) (U.S. Sent'g Comm'n 2018). The PSR recommended a two-level enhancement under § 2K2.1(b)(4)(A) because the firearm was stolen and a three-level reduction for acceptance of responsibility under USSG § 3E1.1(a)-(b), for a total offense level of 19. Next, the PSR reviewed Sunrhodes's extensive criminal record and determined he had a criminal history category of IV. Based on a total offense level of 19 and a criminal history category of IV, the PSR recommended a guidelines range of 46 to 57 months' imprisonment. Neither the government nor Sunrhodes filed objections to the PSR by the respective deadlines.

On September 30, less than one week before sentencing, Sunrhodes, through counsel, filed a renewed motion to withdraw his plea and for new counsel. Again, he provided no factual basis in the motion for either request. The government opposed the motion to withdraw the plea but took no position on the request for new counsel. At the hearing on his motion on October 5, Sunrhodes stated that he did not want to plead guilty, that he felt rushed, that he did not have enough time to speak with his attorney, and that he did not completely understand the rights he had given up. The district court granted Sunrhodes's request for new counsel and denied without prejudice his motion to withdraw his plea, explaining that new counsel would need to renew the motion and provide an adequate basis for the request.

On October 28, Sunrhodes, through new counsel, filed a renewed motion to withdraw his plea, alleging he felt pressured by his prior counsel to plead guilty but offering no specific factual basis for that allegation. Alternatively, Sunrhodes requested that sentencing be postponed so that his new counsel could investigate the allegation that the firearm was stolen and the corresponding recommendation in the PSR for a two-level enhancement. The district court postponed the sentencing hearing from November 9 to November 17 and gave Sunrhodes until November 10 to file objections to the PSR. The government then filed a response in opposition to the motion to withdraw the plea but indicated it had no objection to affording counsel additional time to object to the PSR. On November 3, the court denied Sunrhodes's motion, concluding that he had not alleged he was innocent and had not shown either that his plea was unknowing and involuntary or that he received ineffective

assistance from his prior counsel. The court did not modify the scheduling related to sentencing, and Sunrhodes did not file any objections to the PSR by the November 10 deadline.

At sentencing, Sunrhodes argued for a sentence of 36 months' imprisonment—10 months below the guidelines range—based on his personal history and characteristics, including a difficult childhood, the tragic deaths of several family members, and his substance abuse and mental health issues. The district court recognized Sunrhodes's difficult history and circumstances but also found he presents a risk to the public. The court ultimately sentenced him at the low end of the guidelines range to 46 months' imprisonment followed by 3 years of supervised release. Sunrhodes timely appealed.

DISCUSSION

I. Motion to Withdraw Guilty Plea

Sunrhodes first contends the district court erred in denying his motion to withdraw his guilty plea. We review the denial of such a motion under the deferential abuse-of-discretion standard and "will not reverse a district court's decision unless the defendant can show that the court acted unjustly or unfairly." *United States v. Sanchez-Leon*, 764 F.3d 1248, 1259 (10th Cir. 2014) (internal quotation marks omitted). "We review factual findings for clear error" and "legal conclusions de novo, such as whether the plea was made knowingly and voluntarily or whether counsel was ineffective." *Id.*

A defendant may withdraw a guilty plea before sentencing if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). We have identified seven factors for district courts to consider in determining whether the defendant has carried his burden: "(1) whether the defendant has asserted his innocence, (2) prejudice to the government, (3) delay in filing defendant's motion, (4) inconvenience to the court, (5) defendant's assistance of counsel, (6) whether the plea is knowing and voluntary, and (7) waste of judicial resources." *Sanchez-Leon*, 764 F.3d at 1258 (internal quotations marks omitted).[1] "If the defendant fails to carry his or her burden on asserted innocence, validity of the plea (whether it was given knowingly and voluntarily), and ineffective assistance of counsel, the court need not address the remaining factors," which "speak to the potential burden on the government and the court, rather than the defendant's *reason* for withdrawal." *Id.* (citation and internal quotation marks omitted).

Sunrhodes contends that "[a] balancing of all of the . . . factors tips the scale in [his] favor." Aplt. Opening Br. at 15. But while the district court discussed several of the factors listed above, it indicated it did not weigh them all in its analysis. Instead, the court, as it was permitted to do, denied the motion because Sunrhodes did not allege innocence, did not demonstrate his waiver was unknowing and involuntary, and did not show he received ineffective assistance of counsel. We find

[1] We also have suggested district courts may consider "the likelihood of conviction." *Sanchez-Leon*, 764 F.3d at 1258 (internal quotations marks omitted).

no error in the court's assessment of those three factors and, therefore, limit our analysis accordingly.[2]

Sunrhodes first contends that he asserted his innocence when he requested time for his new counsel to investigate the allegation that the firearm was stolen and whether the corresponding two-level sentencing enhancement was warranted. We have held that an assertion of innocence must "tend[] to either defeat the elements in the government's prima facie case or make out a successful affirmative defense." *United States v. Marceleno*, 819 F.3d 1267, 1275 (10th Cir. 2016) (internal quotation marks omitted). Sunrhodes admits "the fact that the firearm was stolen was not a direct element of the offense" but states "it is a significant sentencing enhancement." Aplt. Opening Br. at 10. He cites no authority extending the assertion-of-innocence factor to allegations underlying a sentencing enhancement, let alone a request to investigate such allegations. *See* Fed. R. App. P. 28(a)(8)(A) (requiring an appellant to cite authorities). In any event, Sunrhodes did not raise this theory in district court and has not argued for plain-error review, thus "mark[ing] the end of the road for [his] argument." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011).

Sunrhodes also has not adequately contested the district court's determination regarding the assistance-of-counsel factor. He cites *Strickland v. Washington*,

[2] We thus do not consider the district court's additional findings that: (1) the government would be prejudiced because its counsel and witnesses would need to refamiliarize themselves with the case; (2) Sunrhodes's motion was delayed because he filed it more than three months after pleading guilty, and although he filed two prior motions, he withdrew the first and offered no basis for the second; and (3) the court would be inconvenienced by a trial in light of the COVID-19 pandemic.

466 U.S. 668 (1984), which, in the context of a guilty plea, requires him to show: "(1) his counsel's performance fell below an objective standard of reasonableness"; and (2) "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *United States v. Dominguez*, 998 F.3d 1094, 1110-11 (10th Cir. 2021) (internal quotation marks omitted).[3] But Sunrhodes does not actually contend that he satisfied this test. Instead, he insists the record is inadequate to review his counsel's performance, which he faults the court for not developing. The court however gave him the opportunity to fully explain the basis for his request to withdraw his plea, both in open court and in his filings. As the court observed, other than stating that he felt pressured, Sunrhodes did "not point to anything specific in previous counsel's conduct that appeared to constitute pressure, rushing, unprofessional conduct or ineffective assistance of counsel." R. Vol. 1 at 51. And vague, unsupported, and conclusory allegations are insufficient under *Strickland*. *See Stafford v. Saffle*, 34 F.3d 1557, 1564-65 (10th Cir. 1994). The court thus correctly found that Sunrhodes failed to carry his burden on this factor for withdrawing his plea.

Finally, Sunrhodes insists his plea was not knowing and voluntary. He told the district court that he did not fully understand his rights, that he felt rushed and did not "have adequate time to sit down and discuss anything with [his] attorney," and that

[3] Although we typically have applied the *Strickland* test, this court has not held that the assistance-of-counsel factor for a motion to withdraw a guilty plea "is invariably governed by that test." *Dominguez*, 998 F.3d at 1110 n.10.

he felt pressured by his attorney. R. Vol. 3 at 15. But, as the court found, Sunrhodes did "not point to anything specific." R. Vol. 1 at 51. *See United States v. Kramer*, 168 F.3d 1196, 1200 (10th Cir. 1999) (finding conclusory statements insufficient to show a plea was involuntary). Moreover, the record shows that: (1) prior to the change-of-plea hearing, he signed the written plea agreement and discussed with his counsel how the sentencing guidelines may apply in his case; and (2) during the hearing, he requested, and was given, time to separately consult with his counsel. Ultimately, Sunrhodes indicated during his change-of-plea hearing that he understood his plea and its consequences and was satisfied with his attorney. "[S]uch solemn declarations made in open court carry a strong presumption of verity" and "should be regarded as conclusive in the absence of a believable, valid reason justifying a departure from the apparent truth of his . . . statements." *Dominguez*, 998 F.3d at 1106 (internal quotation marks omitted). The court therefore properly concluded that Sunrhodes failed to show his plea was not knowing and voluntary.

Sunrhodes has not established that the district court erred in its assessment of the relevant factors for his motion to withdraw his plea. Accordingly, we find no abuse of discretion in the denial of his motion.

II. Substantive Reasonableness of Sentence

Sunrhodes next contends that his sentence was substantively unreasonable. "We review the substantive reasonableness of a sentence for abuse of discretion . . . and will only overturn a sentence that is arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Lawless*, 979 F.3d 849, 855 (10th Cir.

2020) (internal quotation marks omitted). "[W]e look at the totality of the circumstances," *United States v. Balbin-Mesa*, 643 F.3d 783, 787 (10th Cir. 2011) (internal quotation marks omitted), and "defer not only to a district court's factual findings but also to its determinations of the weight to be afforded to such findings," *Lawless*, 979 F.3d at 855 (internal quotation marks omitted).

Sunrhodes acknowledges that his sentence, which was within the guidelines range, is presumed reasonable. *See Rita v. United States*, 551 U.S. 338, 341 (2007). But he contends the district court failed to adequately consider all of the factors in 18 U.S.C. § 3553(a)—specifically, his tragic personal history, *see* § 3553(a)(1), and his need for mental health care, *see* § 3553(a)(2)(D).

A district court "is not required to consider individually each factor listed in § 3553(a), nor is it required to recite any magic words to show us that it fulfilled its responsibility to be mindful of the [§ 3553(a)] factors." *United States v. Steele*, 603 F.3d 803, 808 (10th Cir. 2010). Nonetheless, the record shows that the court addressed Sunrhodes's history and characteristics, observing that several of his family members had tragically died and that, "[f]or a relatively young man, he's had a horrible life, to the point where he is so troubled with addiction and mental health he considered ending his own life." R. Vol. 3 at 34. The court also recognized Sunrhodes's need for mental health care, finding that "incapacitating" him and "giving him time to really think about and work on his problems where he can find a mental health approach that works for him and gain some tools to avoid a return to addiction is really his only chance of living any kind of productive life." *Id.* at 35.

Although Sunrhodes posits he "will be incapacitated without the treatment he needs," Aplt. Opening Br. at 19, his argument is too speculative and conclusory. And in any event, the court ordered substance abuse and mental health treatment as special conditions of his supervised release.

To the extent Sunrhodes suggests the district court should have given greater weight to his mitigating circumstances, "reweighing the factors is beyond the ambit of our review." *Lawless*, 979 F.3d at 856. The court recognized the mitigating circumstances but found that Sunrhodes posed a risk to the public. Although the court considered a sentence in the middle of the guidelines range, it agreed to the government's recommendation, consistent with the plea agreement, to a sentence at the low end of the guidelines range. At bottom, Sunrhodes's sentence "fell within the range of rationally available choices that facts and the law at issue can fairly support." *United States v. Blair*, 933 F.3d 1271, 1274 (10th Cir. 2019) (internal quotation marks omitted).

Accordingly, Sunrhodes has failed to establish that his sentence was substantively unreasonable and that the district court abused its discretion.

CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Chief Judge