

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WAYNE PHILLIP PITTS,

Defendant - Appellant.

No. 22-6191
(D.C. No. 5:22-CR-00104-SLP-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH, KELLY, and MORITZ**, Circuit Judges.

This appeal involves the reasonableness of a sentence imposed on Mr. Wayne Phillip Pitts.

This case began when Mr. Pitts drunkenly threw a puppy against a shed, threatened to kill himself, and fired four gunshots into the ground. Mr. Pitts' wife then placed a domestic violence call to 911.

Upon arriving at the scene, officers spotted Mr. Pitts in a truck and followed him. Mr. Pitts raced away, and the officers unsuccessfully pursued him at high speeds until they lost him. The next day, Mr. Pitts sent

* This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

messages to his wife, threatening to commit suicide by cop. Officers again responded, and Mr. Pitts surrendered. After he surrendered, Mr. Pitts was convicted of unlawfully possessing ammunition after a felony conviction. *See* 18 U.S.C. § 922(g)(1). The sentence was 96 months.¹

In selecting a sentence, the district court started with the guideline range of 37–46 months of imprisonment, then varied upward by 50 months.

Mr. Pitts argues that the district court abused its discretion by imposing a substantively unreasonable sentence that varied too far above the guideline range. In addressing this argument, we consider “whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a).” *United States v. Lente*, 759 F.3d 1149, 1155 (10th Cir. 2014) (quoting *United States v. Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007)). Because the district court has leeway in considering those factors, we apply the abuse-of-discretion standard. *Id.* at 1158. “Under this standard, we will ‘deem a sentence unreasonable only if it is arbitrary, capricious, whimsical, or manifestly unreasonable.’” *Id.* (quoting *United States v. Gantt*, 679 F.3d 1240, 1249 (10th Cir. 2012)).

¹ When Mr. Pitts possessed the ammunition, he was on supervised release for a separate conviction. The court revoked the supervised release and imposed a revocation sentence of 18 months’ imprisonment. This appeal involves only the 96-month sentence for unlawful possession of ammunition.

The district court pointed to four statutory factors in explaining the upward variance:

1. the seriousness of the circumstances of the offense,
2. the defendant's underrepresented criminal history (including convictions for burglary, theft, aggravated assault on a peace officer, evading arrest, and possession of a stolen firearm) and violent characteristics,
3. the desire to deter Mr. Pitts from further criminal conduct, and
4. the concern for the public.

The district court considered the mitigating factors presented by Mr. Pitts, including his drug addiction and mental health issues. But the court gave greater weight to the need to deter future criminal conduct and protect the public.

Mr. Pitts points out that the prosecutor requested a sentence of only 46 months. But the district court needed to use its independent judgment and did not have to cap the sentence at what the prosecutor had recommended. *See, e.g., United States v. Hamilton*, 822 F. App'x 792, 797 (10th Cir. 2020) (unpublished) (concluding that a sentence was substantively reasonable even though the sentence had been higher than what the prosecutor had recommended).

Mr. Pitts also argues that if the court had used the highest possible criminal history category (VI), the guideline range would have topped out at only 63 months (33 months lower than the eventual sentence). But an

underrepresented criminal history is only one of the statutory factors, and the district court relied on other factors that are not subject to easy calculation.

The district court rationally supported the sentence, and it was not arbitrary or unreasonable. We thus conclude that the sentence is substantively reasonable.

Affirmed.

Entered for the Court

Robert E. Bacharach
Circuit Judge