

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 8, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JORGE BRAVO-SOSA,

Defendant - Appellant.

No. 22-2015
(D.C. No. 2:21-CR-00876-DP-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **CARSON, EBEL, and ROSSMAN**, Circuit Judges.

Courts review sentences for both procedural and substantive reasonableness. United States v. Verdin-Garcia, 516 F.3d 884, 895 (10th Cir. 2008). Our reasonableness review requires consideration of the sentence’s calculation and explanation and, considering all circumstances, its length. Gall v. United States, 552 U.S. 38, 51 (2007); United States v. Alapizco-Valenzuela, 546 F.3d 1208, 1214–15

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

(10th Cir. 2008). In some instances, an extensive criminal history may outweigh other considerations in arriving at a reasonable sentence.

Defendant Jorge Bravo-Sosa faced a guidelines range sentence of 37 to 46 months' imprisonment after he pleaded guilty to illegal entry after removal. The district court sentenced him to 37 months' imprisonment. Defendant argues that the district court excessively relied on his criminal history, while minimizing his reason for reentry, age, and cultural assimilation. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I.

After serving a five-year term for drug trafficking, the United States deported Defendant in November 2020. Only four months later, U.S. Border Patrol agents discovered Defendant hiding just over the United States side of the United States/Mexico border. He pleaded guilty to illegal reentry.

The Presentence Investigation Report (“PSR”), which documented his criminal history from 1995 to 2015, noted Defendant’s convictions for driving under the influence (“DUI”), solicitation to commit possession of narcotics, criminal damage, conspiracy to commit sale or transportation of dangerous drugs, and sale or transportation of dangerous drugs. Of those offenses, Defendant served prison time for both the DUI and drug trafficking convictions. He violated his DUI-related probation terms, resulting in probation revocation. He failed to report four times, tested positive for methamphetamine and cocaine twice, failed to complete drug testing thirteen times,

consumed alcohol, failed to complete his directed substance abuse treatment, and possessed firearms and multiple ammunition rounds.

Defendant's drug trafficking conviction resulted from his attempted sale of fifteen pounds of methamphetamine. He served his five-year term for the offense and was deported. Four months into his three-year probation term, Defendant illegally reentered the United States—the conviction at issue here. The PSR calculated his guideline range at 37 to 46 months' imprisonment based on a category V criminal history and offense level of 15. The government requested a 37-month sentence.

Although Defendant did not object to the PSR, he moved for a downward departure under U.S. Sentencing Guidelines Manual § 2L1.2 comment notes 6 and 8, or a variance under the 18 U.S.C. § 3553(a) factors.¹ He requested a sentence of one year and a day—essentially time served. Under comment note 6, he argued that the court overstated the seriousness of his prior offenses. Defendant also contended comment note 8 provided for downward departure for his assimilation into American culture. He spent most of his life in the United States—from arrival at two months old until deportation in November 2020. Defendant pointed out the sympathetic nature and circumstances of his reentry: he returned to the United States to visit his terminally ill father. He also maintained that he deserved a lower sentence because he presented a low risk of recidivism because he was 51 years old, and his past crimes related to immigration and

¹ An offense level may overstate the seriousness of the offense if “the length of the sentence imposed does not reflect the seriousness of the prior offense. . . .” U.S.S.G. 2L1.2 Comment 6.

drugs. Defendant argued that he no longer had reason to enter the United States because he had lined up ranching jobs in Mexico where his American-based family could visit.

The district court, however, disagreed with Defendant and offered the following rationale:

I understand the humanitarian reasons why you came. I mean you've spent your whole life here and you wanted to see your father who was ill but you were deported after a lengthy prison sentence for drug trafficking and this wasn't just someone who was getting a few bucks for transporting drugs over the border, you were a big time drug dealer. I don't think I've ever seen anyone trying to sell 15 pounds of – 15 pounds of methamphetamine so . . . And you got a five-year prison sentence. You were deported November the 15th, 2020 and you were arrested back in this country less than four months later. ROA Vol. 3 at 7.

It then imposed a 37-month sentence and added:

[B]ecause of this lengthy criminal record and serious criminal record, you're the kind of person that the Government needs to deter from coming back because when you were here, you committed a very serious crime. And as the U.S. Attorney pointed out, you were potentially endangering many, many, many, many people who would have consumed that methamphetamine. *Id.* at 9.

Defendant now appeals the district court's sentence.

II.

We review sentences for reasonableness. *Alapizco-Valenzuela*, 546 F.3d at 1214. “Reasonableness review is a two-step process comprising a procedural and a substantive component.” *Verdin-Garcia*, 516 F.3d at 895 (citing *Gall*, 552 U.S. at 51).

Our review for substantive reasonableness focuses on “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).” *Alapizco-Valenzuela*, 546 F.3d at 1215

(quoting United States v. Conlan, 500 F.3d 1167, 1169 (10th Cir. 2007)).² We review reasonableness “[u]nder a deferential abuse-of-discretion standard, [and] we deem a sentence unreasonable only if it is ‘arbitrary, capricious, whimsical, or manifestly unreasonable.’” United States v. Gantt, 679 F.3d 1240, 1249 (10th Cir. 2012) (quoting United States v. Sayad, 589 F.3d 1110, 1116 (10th Cir. 2009)). “[T]he district court need not afford equal weight to each § 3553(a) factor.” United States v. Cookson, 922 F.3d 1079, 1094 (10th Cir. 2019). And “reweighing the factors is beyond the ambit of our review.” United States v. Lawless, 979 F.3d 849, 856 (10th Cir. 2020) (citing United States v. Smart, 518 F.3d 800, 808 (10th Cir. 2008)). Importantly, we presume a sentence is reasonable if it is within the correctly calculated guidelines range. United States v. McBride, 633 F.3d 1229, 1232–33 (10th Cir. 2011). But “[t]he defendant may rebut this presumption by demonstrating that the sentence is unreasonable in light of the other sentencing factors laid out in § 3553(a).” United States v. Kristl, 437 F.3d 1050, 1055 (10th Cir. 2006).

Our review for procedural reasonableness focuses on whether the district court committed error in calculating or explaining the sentence. Gall, 552 U.S. at 51. We normally review a defendant’s claim of procedural unreasonableness for abuse of

² The factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for a sentence to reflect the seriousness of the crime, deter future criminal conduct, protect the public, and provide rehabilitation; (3) the legally available sentences; (4) the U.S. Sentencing Guidelines; (5) the Sentencing Commission’s policy statements; (6) the need to avoid unwarranted disparities among sentences; and (7) the need for restitution. 18 U.S.C. § 3553(a).

discretion. Gantt, 679 F.3d at 1246. “If, however, Defendant did not preserve the procedural challenge below, we review only for plain error.” Id. “We will find plain error where there is (1) error, (2) that is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity or public reputation of judicial proceedings.” United States v. McComb, 519 F.3d 1049, 1054 (10th Cir. 2007). And a district court—under plain-error review—“must provide only a general statement of its reasons . . . and need not explicitly refer to either the § 3553(a) factors or respond to ‘every argument for leniency that it rejects in arriving at a reasonable sentence.’” United States v. Martinez-Barragan, 545 F.3d 894, 903 (10th Cir. 2008) (first citing United States v. Ruiz-Terrazas, 477 F.3d 1196, 1199 (10th Cir. 2007); and then quoting United States v. Jarrillo-Luna, 478 F.3d 1226, 1229 (10th Cir. 2007)).

III.

The sentence landed within the guideline range. Accordingly, we presume the within guidelines sentence is substantively reasonable. McBride, 633 F.3d at 1232–33. But Defendant attempts to rebut that presumption by arguing the district court emphasized his criminal history while ignoring his personal circumstances. Because the district court did not consider his age, reason for returning to the United States, and job opportunities in Mexico, he says, the district court’s sentence is substantively unreasonable.

The district court did, however, consider defendant’s characteristics under § 3553(a)(1). It acknowledged that he returned to visit his sick father. It also noted that

he had spent nearly his entire life in the United States. The district court also addressed other § 3553(a) factors when it pivoted to Defendant’s criminal history. It explicitly acknowledged that this trafficking conviction stemmed from his actions as “a big time drug dealer.” ROA Vol. 3 at 9. He was “potentially endangering many, many, many, many people who would have consumed that methamphetamine.” Id. This criminal behavior, the district court noted, was the type that the government must deter. The district court did not overstate his prior offense’s seriousness under U.S.S.G. § 2L.1.2 comment 6.

The district court also cited Defendant’s lengthy criminal record which mitigated any reason for a downward departure for cultural assimilation under § 2L.1.2 comment 8, which contrasts cultural ties against a risk of further crimes by a defendant. Before his trafficking and illegal reentry, Defendant received convictions for, among other things, a DUI—and violated its associated probation numerous times. And he illegally reentered the United States only four months after deportation. Nothing in his record suggests that he would be less likely commit further crimes in the United States. These criminal factors weighed heavily against Defendant under both the § 3553(a) factors and the § 2L.1.2 comments.

The district court meaningfully weighed the § 3553(a) factors. While it omitted his age and job opportunities from the colloquy, it included Defendant’s personal circumstances, his criminal record, the dangerousness of his trafficking conviction, the need to deter that conduct, and the sentencing range. In doing so, the court afforded more weight to Defendant’s criminal history. And this is acceptable as “reweighing the factors

is beyond the ambit of our review.” Lawless, 979 F.3d at 856. Ultimately, Defendant did not offer enough evidence to rebut the presumption of reasonableness. Thus, we conclude the sentence is substantively reasonable.

IV.

Defendant admits that he raised no procedural reasonableness challenge in the district court. So we review for plain error. Gantt, 679 F.3d at 1246. Defendant contends that—much like the previous argument—the district court erred by refusing to meaningfully consider his circumstances while also elevating his criminal history.

Under plain-error review, the district court needed to provide only a general explanation of its sentencing rationale. Martinez-Barragan, 545 F.3d at 903. The district court met this obligation. Our precedents did not require the district court to respond to each argument or cite the § 3553(a) factors. Id. As our substantive reasonableness analysis makes clear, the district court reviewed Defendant’s personal circumstances. And it considered his criminal history. While the district court did not specifically reference the § 3553(a) factors, its considerations easily fall within those factors. And though the district court did not address Defendant’s age and potential job opportunities, it did not need to. Reference to his general personal circumstances sufficiently support its decision. Thus, Defendant cannot establish that the district court plainly erred in sentencing him.

In sum, the district court’s sentence is both procedurally and substantively reasonable.

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge