FILED
United States Court of Appeals
Tenth Circuit

July 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC H. ROJAS,

Defendant - Appellant.

No. 22-3170
(D.C. No. 6:10-CR-10022-JWB-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Eric H. Rojas appeals his sentence imposed upon revocation of his term of supervised release. 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND

Mr. Rojas pled guilty in 2010 to two firearms offenses. The district court sentenced him to 156 months in prison, followed by three years of supervised release. He was released to supervision under the United States Probation Office ("USPO") on November 1, 2021.

A. *Supervision Violations and First Revocation Hearing*

On May 6, 2022, the USPO reported that Mr. Rojas had violated numerous conditions of his supervised release by unlawfully possessing a controlled substance, associating with a gang member, leaving a residential reentry center, and failing to notify USPO of his change in employment. The USPO classified all six violations as Grade C under the United States Sentencing Guidelines Manual. At that time, Mr. Rojas had also been charged in state court with a new criminal offense.

On June 6, 2022, the district court held a revocation hearing. Mr. Rojas stipulated to the violations in the Violation Report. Finding that his highest violation grade was Grade C and his criminal history category was V, the court concluded his advisory Guidelines sentencing range was 7 to 13 months in prison.

The parties jointly recommended that the district court postpone its final disposition so that Mr. Rojas could be admitted to inpatient drug treatment rather than immediately sentenced to prison. The court agreed and deferred its disposition for 120 days while Mr. Rojas completed treatment and spent more time on supervised release. The court warned him: "If you get in trouble by violating any of the

conditions of your supervised release before 120 days then I'll bring you back here, we'll amend the Violation Report as necessary to reflect anything new like that, and you'll probably be looking at a significant custody sentence." Supp. ROA, Vol. I at 31. The court scheduled a new revocation hearing for October 11, 2022.

B. ***Additional Supervision Violations and Second Revocation Hearing***

On June 29, 2022, the USPO reported that five days earlier Mr. Rojas had been unsuccessfully discharged from inpatient treatment for inappropriate behavior toward another patient and had failed to report to the USPO upon leaving the treatment facility. An amended Violation Report added two new Grade C violations.

On August 15, 2022, the district court held a final revocation hearing. Mr. Rojas stipulated to the two new violations. The court again calculated an advisory Guidelines sentencing range of 7 to 13 months.

1. **Parties' Arguments**

The Government argued Mr. Rojas had shown he was not amenable to supervised release, as evidenced by the short timeframe between his release from prison and his first violation, the nature of his violations, and the chance the court gave him to undergo inpatient drug treatment, which lasted less than three weeks and resulted in two additional violations. The Government also reported an alleged assault by Mr. Rojas on another inmate the previous week, suggesting it was gang-related. The Government asked the court to sentence Mr. Rojas to 24 months in prison with no following term of supervised release.

Mr. Rojas "object[ed] to the Government's request that the Court consider allegations that are not stipulated to and not even in the petition in fashioning a sentence." ROA, Vol. II at 71. Mr. Rojas argued the district court should consider the stipulated Grade C violations. He challenged the Government's assertion he had been completely unsuccessful on supervision but agreed "he was given an opportunity to go out and show the Court how he could perform and he squandered that opportunity." *Id.* Mr. Rojas asked for a 7-month prison sentence followed by further supervision. The court sentenced him to 21 months in prison followed by 15 months of supervised release.

2. **District Court's Explanation for Mr. Rojas's Sentence**

In deciding Mr. Rojas's sentence, the district court said it "considered the nature and circumstances of these violations, the characteristics of the defendant, and sentencing objectives required by statute, and the nonbinding Chapter 7 policy statements issued by the sentencing commission." *Id.* at 77. The court characterized "the conduct involved" as "not trivial," noting Mr. Rojas had incurred violations shortly after beginning supervision. *Id.* at 79-80.

Because the new state charges against Mr. Rojas were not yet resolved, the district court said they did not constitute a new violation. The court nonetheless indicated "that's going on in the background," and stated it could "consider anything about [Mr. Rojas] in fashioning an appropriate sentence," but it was "not putting a great deal of focus on that." *Id.* at 80. The court then proceeded to discuss the

"troubling" circumstances of Mr. Rojas's charged violations, followed by his failed inpatient treatment:

> Then I give you a chance to go to inpatient treatment and within a couple weeks or so . . . you get kicked out for inappropriate sexual conduct – contact with another client; didn't even make a go of this. And I think I warned you in the other hearing about consequences of squandering the opportunity that you are given.
>
> You know, things come at a cost and when you get an opportunity and you squander [it], an[d] both for you and as well as those who come after you, people need to understand there is a consequence to that.

Id. at 81-82.

In describing how it reached its sentencing decision, the district court noted that Mr. Rojas's "original range" based on his Grade C violations was 7 to 13 months. *Id.* at 82. Because the court considered those violations to be "more serious Grade C violations," it said it "would have looked at probably a mid-range, mid-guideline range sentence." *Id.* But focusing on the opportunity the court had given Mr. Rojas, the court stated that

> [t]he consequence of squandering the opportunity . . . is that the way I think is appropriate to handle that is to move up a grade and so instead of a mid-Grade C violation, we're looking at a mid-Grade B. That is a Criminal History Category V, is 18 to 24 months, so I think the appropriate consequence for what we have been through here is [a] 21-month sentence, followed by 15 months supervised release when you get out.

Id. Addressing this "ultimate sentencing range" and citing the sentencing commission's policy approach to revocation as being "designed and aimed primarily

at addressing a breach of trust," the district court said "that's the way I am looking at this." *Id.* at 83.

The court briefly discussed the alleged assault by Mr. Rojas on another inmate:

> Same with this stuff on the fight in jail. It's serious. I have seen these pictures and this man was brutally beaten. But this happened so recently I just got pictures today. I am not punishing new law violations, in any event. I think that the beating that that man received merits appropriate investigation and consideration of new charges but . . . I'm not really taking that into account here today.

Id. at 83-84.

The court then stated, "Instead, I am looking at the breach of trust underlying the violations that have been established, and the breach of trust that proceeds from squandering of this chance to completely avoid the prison sentence if this defendant successfully completed the inpatient treatment that he asked me to send him to." *Id.* at 84. The court said that opportunity was "extraordinary" and "created . . . a heightened obligation of trust." *Id.* It concluded, "So all that underlies my decision that I am imposing today." *Id.*

Mr. Rojas objected "that he ha[d] been raised a grade from a C to a B in the Court's mind." *Id.* at 85. The district court responded, "I understand that objection" but overruled it. *Id.* The court explained:

> This defendant was facing 7 to 13 months before I gave him the chance to go off to inpatient treatment and so when he comes back having squandered that opportunity and incurred new violations, then that merits a heightened sentence and I think an appropriate way and the way that I

> have chosen to deal with it in this case is just to move up a grade. I think that properly reflects what we went through here. I don't think that the guidelines for revocation as written in the revocation sentencing table contemplate anything like this. They contemplate coming in with your basic set of violations and essentially sentencing him based on the highest grade of violation with nothing else there.
>
> But in cases like this where a defendant asks for an opportunity to nevertheless avoid prison and obtain inpatient treatment, and he fails at that, and incurs new violations on the way that that table doesn't account for, this is my way of helping that -- some structured way of allowing that table to account for it and that's why I'm moving up a grade.

Id. at 85-86.

II. **DISCUSSION**

Mr. Rojas argues the district court procedurally erred by (1) relying on extra-record evidence to determine his sentence, and (2) miscalculating the applicable Guidelines range. "When a party challenges a sentence for procedural reasonableness, our standard of review is ordinarily abuse of discretion, under which we review de novo the district court's legal conclusions regarding the guidelines and review its factual findings for clear error." *United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012).

A. ***Reliance on Extra-Record Evidence***

At sentencing, the Government urged the district court to consider a recent alleged gang-related assault committed by Mr. Rojas. Mr. Rojas objected to the court "consider[ing] allegations that are not stipulated to and not even in the petition." ROA, Vol. II at 71. The district court did not explicitly rule on his objection but did

say, "I'm not really taking that into account here today." *Id.* at 84. Mr. Rojas contends the district court erred by relying on the alleged assault without any record support.

The parties dispute whether the district court considered the alleged assault in determining Mr. Rojas's sentence. We review that question de novo. *See United States v. Jose-Gonzalez*, 291 F.3d 697, 701 (10th Cir. 2002) (reviewing de novo to determine factors district court relied on for a sentencing departure); *cf. United States v. Bruley*, 15 F.4th 1279, 1286 (10th Cir. 2021) (applying plenary review to construe district court's oral judgment for ambiguity or inconsistency with written judgment).

Mr. Rojas relies on the district court's statement it was "not really" taking the alleged assault into account. ROA, Vol. II at 84. He argues the court's use of "not really" rather than "not" diluted its negative statement, such that the court *did* take the alleged assault into account. We are not persuaded.

The district court said it was considering Mr. Rojas's breaches of trust "[i]nstead" of any new law violations. *Id.* at 84. "Instead" means "[i]n place of, in lieu of . . . in substitution for." *Instead*, Oxford English Dictionary (Online ed.). Moreover, reading the decision as a whole, we conclude the court based the sentence on Mr. Rojas's incurring new violations and squandering the opportunity the court gave him to avoid prison. Both before and after briefly discussing the alleged assault, the court explained it was basing Mr. Rojas's sentence on these breaches of trust. *See id.* at 81-82, 84. It then reiterated that reasoning two more times following

a different objection by Mr. Rojas. *See id.* at 85-86. Mr. Rojas fails to show the district court procedurally erred by relying on extra-record evidence of the alleged assault.

B. ***Miscalculating the Applicable Guidelines Range***

"[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49. A court procedurally errs by "select[ing] a sentence from the wrong guideline range." *United States v. Kieffer*, 681 F.3d 1143, 1170 (10th Cir. 2012).

Mr. Rojas contends the district court erred by treating his stipulated Grade C violations as Grade B violations. He acknowledges the court correctly calculated his Guidelines range as 7 to 13 months based on his Grade C violations and his criminal history category of V. But he argues the court failed to use that Guidelines range as the starting point for his sentencing, and instead calculated an inapplicable and inflated Guidelines range as if he had Grade B violations. Mr. Rojas further contends that the court's use of the wrong Guidelines range as a starting point was (1) inconsistent with the Guidelines, which do not call for such a grade-level increase; (2) not justified by the court's focus on his breach of trust; and (3) inconsistent with an alleged sentencing deal the court struck with Mr. Rojas. As discussed below, we read the district court's approach differently.

1. **Preservation**

The Government argues Mr. Rojas's objection at sentencing did not preserve the specific arguments he makes on appeal and we should therefore review this issue only for plain error. "Our precedent is clear that an objection must be definite enough to indicate to the district court the precise ground for a party's complaint." *United States v. Winder*, 557 F.3d 1129, 1136 (10th Cir. 2009) (holding "a blanket objection" to a pre-sentence report "lack[ed] the specificity required to preserve the precise issue . . . raise[d] on appeal") (internal quotation marks omitted). An objection that is vague, ambiguous, fleeting, or perfunctory is insufficient to preserve an issue. *United States v. Ansberry*, 976 F.3d 1108, 1125 (10th Cir. 2020). "[T]he test is whether the district court was adequately alerted to the issue." *United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014).

Mr. Rojas objected "that he ha[d] been raised a grade from a C to a B in the court's mind." ROA, Vol. II at 85. The district court indicated it understood that objection. We conclude that Mr. Rojas's objection was sufficiently specific to alert the court to, and therefore to preserve, his contention that the court failed to use the Guidelines range applicable to his Grade C violations as the starting point for his sentencing.

2. **Merits**

Once again, this issue turns on the parties' disagreement regarding what the district court did at sentencing. We review de novo. *See Jose-Gonzalez*, 291 F.3d at

701. The court began by accurately calculating Mr. Rojas's Guidelines range as 7 to 13 months based upon his stipulated Grade C violations. He concedes that "a particularly serious breach of trust might even justify selecting a sentence *above* the applicable guideline range." Aplt. Opening Br. at 21. Here, the district court did just that. It said that his squandered opportunity and his new violations "merit[ed] a heightened sentence." ROA, Vol. II at 85. The court then chose—again, *after* correctly calculating Mr. Rojas's advisory Guidelines range of 7 to 13 months—to use a higher sentencing range as a "structured way" to determine that heightened sentence. *Id.* at 86.

Mr. Rojas argues it is implausible to conclude the district court varied upward from the Grade C Guidelines range because it did not use the words "variance," "vary," or "upward" and did not expressly discuss the 18 U.S.C. § 3553(a) factors. We disagree. "[A] variance occurs when the district court deviates from the guidelines range based on the sentencing factors in . . . § 3553(a)." *United States v. Kaspereit*, 994 F.3d 1202, 1214 (10th Cir. 2021). That is what the district court did here.

"[W]e have emphasized that we will not demand that the district court recite any magic words to show us that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider." *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1115-16 (10th Cir. 2006) (internal quotation marks omitted). Thus, a district court "must state its reasons for imposing a given sentence," but it "is not

obligated to weigh on the record each of the factors set out in § 3553(a)." *Id.* at 1116 (internal quotation marks omitted). Ultimately, a court need only "provide sufficient reasons to allow for meaningful appellate review." *Id.* at 1117.

Here the district court stated it "considered the nature and circumstances of [Mr. Rojas's] violations, the characteristics of the defendant, and sentencing objectives required by statute," as well as the pertinent policy statement. ROA, Vol. II at 77. It pointed to the rehabilitative programming available in a federal prison facility. *See id.* at 78-79. And it noted the potential deterrent effect of imposing a heightened sentence based upon Mr. Rojas's squandered opportunity. *See id.* at 81-82. Each of these points is a § 3553(a) factor. The court's sentencing rationale is sufficient for us to conclude it varied upward from the correctly calculated Guidelines range. Mr. Rojas fails to demonstrate that the court procedurally erred by using the wrong Guidelines range as its starting point in determining his sentence.

But even if the district court procedurally erred by invoking the 18-to-24-month range for a Grade B violation, the error was harmless given the court's emphasis on Mr. Rojas's breach of trust and new violations as meriting a sentence above the 7-to-13-month range. *See United States v. Porter*, 928 F.3d 947, 963

(10th Cir. 2019); *United States v. Sanchez-Leon*, 764 F.3d 1248, 1264-66 (10th Cir. 2014).

III. **CONCLUSION**

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge