

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WOLFE JONTAYLOR WILLOW,

Defendant - Appellant.

No. 22-8069
(D.C. No. 2:22-CR-00068-ABJ-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HARTZ, TYMKOVICH,** and **MATHESON,** Circuit Judges.

Wolfe JonTaylor Willow pled guilty to one count of failing to register as required by the Sex Offender Registration and Notification Act (“SORNA”) in violation of 18 U.S.C. § 2250(a). On appeal, he raises one sentencing issue. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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. Willow pled guilty to failing to register from January 1, 2022, to March 1, 2022. The district court sentenced him to 24 months in prison, the low end of the advisory Guidelines range. This appeal concerns the court's calculation of that range.

Mr. Willow's base offense level for failure to register was 16. *See* U.S. Sent'g Guidelines Manual § 2A3.5(a)(1) (U.S. Sent'g Comm'n 2021). Under § 2A3.5(b)(2)(B), the district court should decrease the base offense level by three levels "[i]f the defendant voluntarily . . . attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances." Mr. Willow contends the district court misapplied § 2A3.5(b)(2)(B).

The presentence report ("PSR") did not discuss § 2A3.5(b)(2)(B). Subtracting three levels (two for accepting responsibility and one for assisting in the prosecution) from the base offense level of 16, it adjusted the offense level at 13. With Mr. Willow's criminal history category of IV, the resulting advisory Guidelines range was 24 to 30 months.

Citing § 2A3.5(b)(2) in his objections to the PSR, Mr. Willow asserted he had made good-faith efforts to comply with the registration requirement.¹ He stated that

¹ The briefs and record reflect confusion over whether Mr. Willow requested the district court to apply § 2A3.5(b)(2)(B) as a specific offense characteristic in calculating the advisory Guidelines range, or to support a request for a departure or a

in the fall of 2021 the director of the Wind River SORNA office knew he frequently moved between addresses and allowed him to text her each time he moved. At sentencing, defense counsel said Mr. Willow was confused about how to report after she left her position in December 2021. He also presented the statement of a third party, who said that while he was helping Mr. Willow locate housing in January and February 2022, several law enforcement agencies said that Mr. Willow was in good standing with the registration requirement.²

At sentencing, defense counsel requested a three-month continuance followed by five years of supervised release so that Mr. Willow could try to get treatment for PTSD and addiction through the U.S. Department of Veterans Affairs. In the alternative, counsel requested that the court grant a departure or a variance in recognition of Mr. Willow's good-faith efforts to comply with the registration requirement. After accepting the PSR's calculation of the Guidelines range and sentencing Mr. Willow to 24 months, the district court stated:

I've rejected the offers in this matter. Given the history and given what's pending at this point, . . . it's just

variance. Although our decision does not turn on this point, we note that both in the objections to the PSR and at sentencing, Mr. Willow's counsel requested a "departure" or a "variance." ROA, Vol. II at 63; *id.* Vol. III at 27. Counsel may have intended "departure" as shorthand for applying § 2A3.5(b)(2)(B) to decrease the offense level, but in federal sentencing, "[a] departure is a deviation from the calculated guidelines range based on the enumerated departure provisions in the Guidelines Manual." *United States v. Kaspereit*, 994 F.3d 1202, 1214 (10th Cir. 2021).

² The record indicates that the third party contacted at least four area law enforcement agencies, but not the new director of the Wind River SORNA office.

impossible for me to conclude that I'd be right thinking to grant the requests. The risks to others in terms of their safety and so forth are just too great at this point. Whatever the defendant achieves is going to be on him. Hopefully, he will do it and not because of anything I gave to him. The public needs its protection and a vacation, so to speak, from the risk of further problems.

ROA, Vol. III at 42. The court did not otherwise address § 2A3.5(b)(2)(B), and Mr. Willow did not object.

II. DISCUSSION

Mr. Willow argues that “[t]he court’s decision was not based on the standard contained in [§ 2A3.5(b)(2)(B)], but was, instead, based on the sentencing factors contained in [18 U.S.C.] § 3553(a)(1) and (2).” Aplt. Opening Br. at 7. He contends that “the district court did not follow [the] established order of operations,” *id.* at 9, because instead of considering the facts Mr. Willow presented based on § 2A3.5(b)(2)(B), it “jumped ahead in the proper order of operations and denied Mr. Willow’s request by resorting to the factors contained in § 3553(a),” *id.* at 10. In his reply brief, he clarifies that he is not challenging the timing of the ruling, *see* Aplt. Reply Br. at 3, but only the district court’s reliance on the § 3553(a) factors in calculating Mr. Willow’s offense level, *see id.* at 4 (“[W]hether Mr. Willow posed a risk to the community is wholly irrelevant for determining whether he attempted to register but was prevented from doing so by circumstances outside his control.”).

Because Mr. Willow did not raise this objection before the district court, we review his § 2A3.5(b)(2)(B) argument for plain error. *See United States v. Coulter*,

57 F.4th 1168, 1178 (10th Cir.), *cert. denied*, 2023 WL 3937724 (U.S. June 12, 2023) (No. 22-7557). “Under plain error review, the appellant bears the burden to show the district court committed (1) error (2) that is clear or obvious under current law, and which both (3) affected his substantial rights and (4) undermined the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (brackets and quotations omitted). “[W]e will find plain error only when an error is particularly egregious and the failure to remand for correction would produce a miscarriage of justice.” *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (quotations omitted).

“Although the Guidelines are advisory and district courts have the discretion to vary from the Guideline imprisonment range, the district court still must properly calculate and consider the Guidelines’ advisory recommendation.” *United States v. Lee*, -- F.4th --, No. 21-6167, 2023 WL 4188659, at *3 (10th Cir. June 27, 2023). In *Lee*, this court found the district court committed a procedural error “when it purported to impose a within-Guideline sentence on Defendant without accounting for” a particular Guidelines directive to adjust the offense level downward. *Id.* (brackets and quotations omitted). In light of *Lee*, we assume Mr. Willow has established the first two elements of plain-error review—that is, the district court committed a plain procedural error in denying relief under § 2A3.5(b)(2)(B) by referring to the § 3553(a) factors.

The third plain error element concerns whether the error affected Mr. Willow's substantial rights. To establish that it did, an appellant "must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Rosales-Miranda*, 755 F.3d at 1258 (quotations omitted). "We therefore must ask whether we are in doubt that, had the district court calculated the advisory Guidelines range correctly, it would have imposed the same sentence." *Id.* at 1258-59 (quotations omitted); *see also Lee*, 2023 WL 4188659, at *3 ("[A] procedural error is harmless and not reversible if the record viewed as a whole clearly indicates the district court would have imposed the same sentence had it not relied on the procedural miscue(s)." (quotations omitted)).

Here there is no reasonable probability that the district court would have decreased Mr. Willow's offense level had it relied on § 2A3.5(b)(2)(B)'s standard rather than the § 3553 factors. A defendant is entitled to the three-level decrease only if he "attempted to register but was prevented from registering by uncontrollable circumstances" to which he did not contribute. § 2A3.5(b)(2)(B). Mr. Willow did not show that he made any attempt to register between January 1, 2022, and March 1, 2022. Moreover, neither the replacement of the director of the Wind River SORNA office in December 2021 nor the other law enforcement agencies' assurances of compliance in January and February 2022 rise to the level of "uncontrollable

circumstances” that prevented Mr. Willow from registering. These events did not preclude Mr. Willow from contacting the Wind River SORNA office and updating his registration as required. We have no doubt that, even if the district court had considered § 2A3.5(b)(2)(B) without reference to the § 3553 factors, it would have rejected the three-level decrease. Mr. Willow thus has failed to establish that the district court’s procedural error affected his substantial rights and therefore has failed to satisfy the plain error requirements.

III. CONCLUSION

“We will not reverse a conviction for plain error unless all four prongs of the plain-error test are satisfied.” *Rosales-Miranda*, 755 F.3d at 1258 (quotations omitted). Because Mr. Willow has not shown an error affected his substantial rights, we affirm the district court’s judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge