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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KYLE JOSEPH VANNORTWICK,

Defendant - Appellant.

No. 22-7034

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA (D.C. No. 6:20-CR-00062-RAW-1)

Josh Lee, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Denver, Colorado, for Defendant-Appellant.

Linda A. Epperley, Assistant United States Attorney (Christopher J. Wilson, United States Attorney, and Lisa C. Williams, Special Assistant United States Attorney, with her on the brief), Eastern District of Oklahoma, Muskogee, Oklahoma, for Plaintiff-Appellee.

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

BACHARACH, Circuit Judge.

This appeal involves Mr. Kyle Vannortwick's federal sentence for second-degree murder. The sentencing judge allegedly erred in calculating

the guideline range. On its face, the alleged error wouldn't have changed the guideline range. But Mr. Vannortwick argues that without the error, he could have obtained a lower sentence. Because this argument rests on speculation, we affirm the sentence.

I. The district court allegedly errs in calculating the criminal-history points.

In counting the criminal-history points, the district court assessed one point for Mr. Vannortwick's prior conviction for resisting an officer. Mr. Vannortwick argues that the district court erred in assessing this point.

Mr. Vannortwick's criminal-history points stemmed from two incidents.

The first incident led to a state conviction and deferred sentence for resisting an officer, which was a misdemeanor. The district court added one criminal-history point for this sentence. *See* U.S. Sent'g Guidelines Manual § 4A1.1(c) (U.S. Sent'g Comm'n 2021).[1]

The second incident led to a state conviction and deferred sentence for possessing drugs and drug paraphernalia. While the sentence was deferred, however, Mr. Vannortwick was charged with murder. The murder charge led the state court to accelerate the deferred sentence and impose a prison term of one year. Because this term was sixty days or more, the

[1] Mr. Vannortwick was sentenced in July 2022. The 2021 guidelines were then in effect.

federal district court assessed two more criminal-history points. *See* U.S Sent'g Guidelines Manual § 4A1.1(b) (U.S. Sent'g Comm'n 2021) ("Add 2 points for each prior sentence of imprisonment of at least sixty days.").

The district court also assessed two more criminal-history points because Mr. Vannortwick had committed the murder while under a criminal-justice sentence for the drug offenses. *See* U.S. Sent'g Guidelines Manual § 4A1.1(d) (U.S. Sent'g Comm'n 2021) ("Add 2 points if the defendant committed the instant offense while under any criminal-justice sentence.").

Mr. Vannortwick's criminal-history points thus totaled five:

(1) One point for the sentence for resisting an officer,

(2–3) two points for the sentence on the drug offenses, and

(4–5) two points for committing the murder while under a criminal-justice sentence.

Under the guidelines, four to six criminal-history points triggered criminal-history Category III. *See* U.S. Sent'g Guidelines Manual § 5A (U.S. Sent'g Comm'n 2021). Mr. Vannortwick's five points fell within this range, so the guideline range was 292 to 365 months. *Id.*

II. The district court varies downward.

Mr. Vannortwick moved for a downward variance, requesting a sentence between 108 and 135 months.[2] In urging a variance, Mr. Vannortwick pointed to his mitigating conduct, the aberrational nature of the homicide, his minor criminal history, and his good behavior throughout pretrial detention. The district court granted the motion, varying downward to 216 months.

III. The alleged miscalculation of criminal-history points doesn't require reversal.

Mr. Vannortwick claims that the district court erred by assessing one criminal-history point for resisting an officer.

A. We review for plain error.

Mr. Vannortwick did not object in district court to the calculation of his criminal history, so we review only for plain error. *See United States v. Archuleta*, 865 F.3d 1280, 1290 (10th Cir. 2017) ("Because [the defendant] did not raise this argument in the district court, it is subject to review only for plain error."). Under the plain-error standard, Mr. Vannortwick must show that there is "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public

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[2] A *departure* differs from a *variance*: a *departure* occurs when a district court relies on the sentencing guidelines to change the recommended range; a *variance* occurs when a district court sentences outside the guideline range based on the statutory factors. *United States v. Sells*, 541 F.3d 1227, 1238 n.2 (10th Cir. 2008).

reputation of judicial proceedings." *United States v. Caraway*, 534 F.3d 1290, 1298 (10th Cir. 2008) (quoting *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (en banc)).

B. We assume, without deciding, that the district court plainly erred in assessing the criminal-history points.

Under the guidelines, criminal-history points are triggered for offenses similar to "resisting arrest" if

- the sentence was for "a term of probation of more than one year,"
- the sentence was for "a term of imprisonment of at least thirty days," or
- resisting arrest is similar to the new offense at issue.

U.S. Sent'g Guidelines Manual § 4A1.2(c)(1) (U.S. Sent'g Comm'n 2021). Mr. Vannortwick argues that the district court shouldn't have assessed a criminal-history point for his resisting an officer because (1) resisting an officer had constituted or resembled "resisting arrest" and (2) none of the required conditions would have applied to a sentence for resisting arrest.

We may assume for the sake of argument that the district court plainly erred in including a criminal-history point for resisting an officer. With this assumption, we'd consider whether the error affected a substantial right. *See* Part III(A), above; *see also United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012) ("Because all four requirements [of

the plain error test] must be met, the failure of any one will foreclose relief and the others need not be addressed.").

C. Any error didn't affect a substantial right.

Even if the court had plainly erred, we'd need to affirm because the extra criminal-history point doesn't undermine confidence in the outcome.

1. We consider the probability of a different outcome.

"An error seriously affects the defendant's substantial rights . . . when the defendant demonstrates 'that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.'" *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (quoting *United States v. Mendoza*, 698 F.3d 1303, 1310 (10th Cir. 2012)). A probability is reasonable when it undermines confidence in the outcome. *Id.*

2. Any error wouldn't have affected the criminal-history category.

Criminal-history points are used to put defendants in categories. Four to six criminal-history points would put a defendant in Category III. *See* p. 3, above. The court put Mr. Vannortwick in Category III because he had five criminal-history points. With one fewer criminal-history point, he

would have remained in Category III. So the extra criminal-history point wouldn't ordinarily affect the sentence.[3]

3. Mr. Vannortwick theorizes the possibility of a downward departure and variance with one fewer criminal-history point.

Mr. Vannortwick admits that defendants with four points would ordinarily fall within Category III. Despite this admission, Mr. Vannortwick theorizes that the district court would likely have granted

- a downward departure to a guideline range of 262 to 327 months and

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[3] *See United States v. Torres*, 182 F.3d 1156, 1164 (10th Cir. 1999) (declining to address an issue when "the resulting one-point deduction from [the defendant's] criminal history would do nothing to change his criminal history category III status"); *United States v. Ewing*, 465 F. App'x 761, 763 (10th Cir. 2012) (unpublished) (regarding any error in adding a criminal-history point as "harmless because it did not affect the appropriate guideline range"); *United States v. Fisher*, 796 F. App'x 504, 513 (10th Cir. 2019) (unpublished) (regarding any challenge to the calculation of criminal-history points as frivolous because the error hadn't affected the criminal-history category); *accord United States v. LeFlore*, 927 F.3d 472, 475 (7th Cir. 2019) (finding the erroneous addition of criminal-history points harmless because the defendant "would remain in the same criminal history category of VI . . . , and thus the same Guidelines range would apply"); *United States v. Isaac*, 655 F.3d 148, 158 (3d Cir. 2011) (finding the error "completely harmless because even with the one point reduction, [the defendant] would remain in criminal history category IV and the same Guideline range would have applied"); *United States v. Jackson*, 22 F.3d 583, 585 (5th Cir. 1994) (finding an error harmless because any error "would leave [the defendant] in the same criminal history category and would not affect his sentence"); *United States v. Defeo*, 36 F.3d 272, 277 (2d Cir. 1994) (finding no need to resolve the error because "even without the two points in question [the defendant's] criminal history points would have totaled 14, [so] her criminal history category would have remained VI").

- a subsequent variance below the 216-month sentence that had been imposed.

Mr. Vannortwick's first theory stems from the existence of a lower guideline range (262–327 months) for a criminal-history category of II. He theorizes that he could likely have persuaded the district court to depart downward to that range with one fewer criminal-history point.

Second, Mr. Vannortwick points out that with a downward departure, the district court would have considered a variance from a starting point of 262 months rather than 292 months. From this starting point, he theorizes that the court would likely have granted a downward variance below 216 months (the actual sentence).

Mr. Vannortwick bases these theories on the district court's discretion to depart downward when "the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S Sent'g Guidelines Manual § 4A1.3(b)(1) (U.S. Sent'g Comm'n 2021). Though Mr. Vannortwick never moved for a downward departure, he argues that with four criminal-history points, his trial counsel could have made a compelling argument for a downward departure.

For this argument, Mr. Vannortwick points out that he would have missed Category II by only one criminal-history point. Because he would have been so close to Category II, he contends that his trial counsel could

likely have obtained a downward departure by arguing that it was "highly unusual" for someone to get (1) two points for a single, minor incident resulting only in misdemeanors and (2) two points for committing murder while serving a sentence for those misdemeanors. But Mr. Vannortwick presents no evidence about whether these circumstances were unusual.

Even if we were to assume that it's unusual for one incident (like Mr. Vannortwick's drug offenses) to trigger four criminal-history points, he doesn't explain how this fact would support a downward departure. Regardless of the frequency or infrequency of these circumstances, each pair of points would still have stemmed from different conduct. *See United States v. Tisdale*, 248 F.3d 964, 983 (10th Cir. 2001) ("The assigning of points for prior convictions and for violating the terms of one's probation involve two distinct considerations."). Mr. Vannortwick obtained

- one pair of points for his sentence for the drug offenses (resulting in two points under U.S Sentencing Guidelines Manual § 4A1.1(b)) and
- another pair of points because he committed murder while he was serving another sentence (resulting in two points under U.S. Sentencing Guidelines Manual § 4A1.1(d)).

Mr. Vannortwick also argues that his trial counsel could have argued that

- one point had sprung from "chance procedural decisions of a local prosecutor and trial judge," Appellant's Opening Br. at 26–27, and

- the extra point was arbitrary and overstated his risk of recidivism.

These arguments lack support.

Mr. Vannortwick obtained a deferred sentence for his drug offenses. But with the new murder charge, the state court accelerated the deferred sentence and sentenced Mr. Vannortwick to one year in jail. Because the sentence was at least sixty days, he obtained two criminal-history points for his drug offenses (rather than one). *See* U.S. Sent'g Guidelines Manual § 4A1.1(b) (U.S. Sent'g Comm'n 2021) ("Add 2 points for each prior sentence of imprisonment of at least sixty days."); *see also* pp. 2–3, above.

On appeal, Mr. Vannortwick focuses on the two criminal-history points for his drug offenses, characterizing the second of these points as the product of unusual decisions by the state prosecutor and the state trial judge. But the record doesn't say anything about the practices of Oklahoma prosecutors or trial judges when considering revocation based on new criminal charges.

Mr. Vannortwick claims that most local prosecutors wouldn't have pursued revocation of probation when (1) the violation also triggered another charge and (2) the defendant was already in custody. But we have no way of knowing what other Oklahoma prosecutors and judges would have done.

For the sake of argument, we may assume that

- most Oklahoma prosecutors and judges wouldn't have pursued revocation or
- trial counsel would have argued that the extra point had been arbitrary or had overstated the risk of recidivism.

With either assumption, however, the possibility of a downward departure would rest on speculation. After all, Mr. Vannortwick would have needed to justify a departure, which is rarely given. *See United States v. Sierra-Castillo*, 405 F.3d 932, 938 (10th Cir. 2005) (burden); *United States v. Jackson*, 921 F.2d 985, 989 (10th Cir. 1990) (en banc) (rare). And when criminal-history points are reduced from five to four, other courts have found the error harmless. *See United States v. Martin*, 378 F.3d 353, 359 (4th Cir. 2004) ("[T]his error was harmless; offenders with four or five criminal history points are both classified as Category III offenders . . . leaving the applicable guideline range unchanged."); *United States v. Gutierrez*, No. 99-1594, 2000 WL 1370326, at *2 (2d Cir. Sept. 20, 2000) (unpublished) (concluding that an error was harmless because the defendant would have remained in Category III even after the reduction in criminal-history points); *see also United States v. Broomfield*, No. 96-50050, 1997 WL 14364, at *2 (9th Cir. Jan. 13, 1997) (unpublished) (declining to remand because a reduction of criminal-history points from five to four would have left the defendant in the same category (III)); *United States v. Lamar*, 88 F. App'x 487, 491 (3d Cir. 2004) (unpublished)

(declining to address a challenge to one criminal-history point because the four other points would still have triggered Category III).

The government ordinarily bears the burden to show harmlessness. *See, e.g.*, *United States v. Martinez*, 418 F.3d 1130, 1135–36 (10th Cir. 2005). Here, though, Mr. Vannortwick bears the burden of persuasion because he's urging plain error. *United States v. Benally*, 19 F.4th 1250, 1256 (10th Cir. 2021). Because an error that doesn't change a defendant's criminal-history category is ordinarily considered harmless, the erroneous assessment of a fifth criminal-history point wouldn't generally lessen our confidence in Mr. Vannortwick's sentence.

4. The possibility of a bigger downward variance is speculative.

Mr. Vannortwick argues that even if he had stayed in Category III, the district court would likely have varied further downward with one fewer criminal-history point. This argument rests on speculation.

We explained the inherent speculation when rejecting a similar argument in *United States v. Serrato*, 742 F.3d 461 (10th Cir. 2014). There the defendant claimed the district court had erred in increasing his offense level. *Id.* at 469. Even though the guideline range would remain the same with or without any error, the defendant argued that "the district court might have made an even greater downward variance" if his offense level hadn't been increased. *Id.* We rejected the argument as speculative,

explaining that "[t]he factors on which the variance was based remain the same regardless [of] whether the" offense level had been higher. *Id.* So any error was harmless. *Id.* at 469–70; *see also United States v. Sanchez*, 979 F.3d 1256, 1264 (10th Cir. 2020) (rejecting as pure speculation the defendant's argument that the district court may have varied further downward when the variance factors and the guideline range would remain the same regardless of the error).

Serrato is particularly instructive here because the burden fell on Mr. Vannortwick to prove an effect on his substantial rights. *See United States v. Benally*, 19 F.4th 1250, 1256 (10th Cir. 2021); *see also* p. 12, above. As in *Serrato*, the potential for a greater downward variance (without the alleged error) rests on pure speculation.

Mr. Vannortwick points to his argument in district court, where he urged a downward variance because "[h]is criminal convictions consisted of only misdemeanors." R. vol. 1, at 279. On appeal, Mr. Vannortwick suggests that this argument could have been "strengthened" without a criminal-history point for resisting an officer. Appellant's Opening Br. at 32.

But the exclusion of one criminal-history point wouldn't change this factor. With or without the disputed criminal-history point, all of the past convictions involved misdemeanors. And the district court didn't say anything to suggest that it had given any particular weight to the criminal-

history point for resisting an officer. We thus reject Mr. Vannortwick's argument as speculative.[4]

IV. Conclusion

Without any effect on Mr. Vannortwick's substantial rights, we affirm the sentence.

[4] After determining the sentence, the district court remarked that "based upon all presently known legal and factual factors, this is the same sentence the Court would impose if given the broadest possible discretion, and the same sentence the Court would impose notwithstanding any judicial fact-finding occurring by adoption of the presentence report or at this hearing." R. vol. 3, at 467–68. Mr. Vannortwick argues that the district court's remarks don't diminish the effect of the alleged error. But we haven't relied on the district court's remarks. So we need not address Mr. Vannortwick's argument.