

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 10, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHERNAR CLENON REDD, a/k/a Main,

Defendant - Appellant.

No. 22-1454
(D.C. No. 1:05-CR-00336-CMA-1)
(D. Colo.)

ORDER AND JUDGMENT*

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

Shernar Redd argues that the district court procedurally erred by running his 60-month revocation sentence consecutively to his state-court sentence of life in prison without the possibility of parole, contending that the district court fundamentally misunderstood his state-court sentence. Because the record, viewed in its entirety, demonstrates that the district court did not misunderstand Redd’s state-court sentence, we affirm.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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

Background

While on supervised release for federal crimes of armed bank robbery and brandishing a firearm, Redd committed Colorado felony murder. For that state offense, Redd received a sentence of life in prison without the possibility of parole. The U.S. Probation Office then successfully petitioned to revoke Redd's supervised release because he had violated the conditions of release by committing a new crime.

The district court imposed a revocation sentence of 60 months and, over Redd's objection, chose to run that sentence consecutively to his state sentence. *See* 18 U.S.C. § 3584(a) (providing discretion to impose consecutive or concurrent sentences). In so doing, the district court considered several of the 18 U.S.C. § 3553(a) sentencing factors and noted an advisory policy statement in the United States Sentencing Guidelines (U.S.S.G. or the Guidelines) that specifically recommends revocation sentences “be served *consecutively* to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation.” U.S.S.G. § 7B1.3(f) (emphasis added); *see also* § 3584(b) (directing sentencing court to consider § 3553(a) factors when deciding between consecutive or concurrent sentences). The district court further explained that it was Redd's “burden to come forward with a reason . . . to impose a concurrent sentence in spite of” this policy statement. R. vol. 3, 50; *see also United States v. Rodriguez-Quintanilla*, 442 F.3d 1254, 1256 (10th Cir. 2006).

Based on the violent conduct underlying Redd's criminal history and current violation, the district court determined that a lengthy sentence was necessary to deter criminal conduct and protect the public. *See* § 3553(a)(1), (2)(B)–(C). And in the district court's view, Redd's state-court life sentence did not account for this need because "a life sentence under state law does not always equate to a life sentence." R. vol. 3, 50. Defense counsel responded that because Redd's life sentence did not include the possibility of parole, there was no chance he would be released. Thus, according to defense counsel, a consecutive federal sentence and accompanying federal detainer would only serve to negatively impact Redd's conditions of confinement in state prison. Defense counsel also acknowledged "things may change," noting that Redd's state-court appeal was pending and that the Colorado legislature had recently shortened the sentence for Colorado felony murder from life without parole to a term of years, albeit in a prospective amendment that did not apply to Redd. *Id.* at 53; *see also* Act of Apr. 26, 2021, 2021 Colo. Sess. Laws 235; *People v. Sellers*, 521 P.3d 1066, 1077 (Colo. App. 2022) (describing these amendments), *cert. granted*, No. 22SC738, 2023 WL 3479427 (Colo. May 15, 2023) (unpublished). But ultimately, defense counsel maintained that Redd's state sentence of life without parole justified a concurrent sentence, rather than the policy statement's recommended consecutive sentence.

The government, for its part, agreed with the district court's deterrence and protection rationales and echoed the uncertainty of Redd's state sentence, stating that it did not "know what that state [sentence] is going to be." R. vol. 3, 55. And after

hearing from Redd, the district court imposed the 60-month sentence consecutively, effectively concluding that Redd failed to provide a reason for “exercis[ing] its discretion to impose a concurrent sentence.” *Id.* at 50; *see also* § 7B1.3(f).

Redd appeals.

Analysis

Redd argues that the district court procedurally erred when it decided to run his revocation sentence consecutively to his state sentence. Our overarching standard of review is abuse of discretion, but we review “the district court’s factual findings under the clear-error standard and engage in de novo review of legal determinations.” *United States v. Worku*, 800 F.3d 1195, 1202–03 (10th Cir. 2015).

“Review for procedural reasonableness focuses on whether the district court committed any error in calculating or explaining the sentence.” *United States v. Begay*, 974 F.3d 1172, 1174 (10th Cir. 2020) (quoting *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009)). Although procedural unreasonableness often involves the calculation of a defendant’s sentencing range under the Guidelines, a district court might also “commit[] procedural error when it misunderstands or misapplies the law.” *United States v. Farley*, 36 F.4th 1245, 1250 (10th Cir. 2022) (quoting *United States v. Gallegos-Garcia*, 618 F. App’x 402, 405 (10th Cir. 2015)).

Here, Redd contends that the district court based its sentencing decision on an incorrect understanding of his state sentence. In support, he points to the district court’s statement “that a life sentence *under state law* does not always equate to a life sentence.” R. vol. 3, 50 (emphasis added). According to Redd, this statement

demonstrates a misunderstanding of his state sentence as one that includes the possibility of parole, even though he was unquestionably sentenced to life *without* the possibility of parole. *See* Colo. Rev. Stat. § 18-3-102(1)(b), (3) (2020); *id.* § 18-1.3-401(1)(a)(V.5)(A); *Sellers*, 521 P.3d at 1077 (noting that for felony murder committed prior to September 15, 2021, “minimum sentence was life in prison without the possibility of parole”). This is so, Redd argues, because state life sentences sometimes allow for the possibility of parole, whereas federal life sentences never do. So according to Redd, the district court’s reference to “under state law” necessarily incorporates an erroneous understanding of his state sentence.

But as the government responds, the record elsewhere shows that the district court knew and understood the nature of Redd’s state sentence. In particular, the district court mentioned near the outset of the sentencing hearing that Redd’s prehearing memorandum described the state sentence as “life without parole.”¹ R. vol. 3, 46. And later, defense counsel described Redd’s sentence as “life without parole” and said Redd “ha[d] been sentenced . . . to die in custody.” *Id.* at 51, 54. The district court’s statement that “a life sentence under state law does not always equate

¹ Redd contends that the district court’s reference to his prehearing memorandum does not establish knowledge of the correct state sentence because the district court simultaneously faulted defense counsel for failing to provide “authority in support.” R. vol. 3, 46. According to Redd, the reference to an absence of authority shows that the district court did not believe defense counsel’s description of Redd’s sentence. But in context, the district court’s comment about the absence of authority was not aimed at the absence of factual support for the nature of Redd’s sentence—instead, it was aimed at the absence of legal authority for defense counsel’s position that a life sentence without the possibility of parole was a valid reason to forgo the consecutive sentence recommended by § 7B1.3(f).

to a life sentence” came between these two accurate descriptions of Redd’s state sentence. *Id.* at 50. Thus, the record—when viewed in its entirety—demonstrates that the district court was not confused about the nature of Redd’s sentence. *See United States v. Trujillo*, No. 21-1323, 2022 WL 17661046, at *4 (10th Cir. Dec. 14, 2022) (unpublished) (interpreting district court’s silence after defense counsel corrected prosecutor’s incorrectly stated legal test as acceptance and application of correct test).² We therefore reject Redd’s argument that the district court procedurally erred by “refus[ing] to accept the reality that [his] state sentence is one of life without parole.”³ Rep. Br. 8.

Instead, it appears that the district court determined Redd’s state sentence of life without parole was an insufficient reason to exercise its discretion to impose a concurrent sentence rather than the recommended consecutive sentence—likely due to the possibility, however remote, that Redd would be released from his state sentence through some avenue other than parole (whether that be success on appeal, further changes in state law, or executive clemency). *See* § 3584(a). Redd does not contend that such reasoning, if based on an accurate understanding of his state sentence, was an abuse of discretion. We accordingly affirm.

² We cite this unpublished case for its persuasive value. *See* 10th Cir. R. 32.1(A).

³ We need not resolve the parties’ dispute about whether the district court’s understanding of Redd’s state sentence was a legal conclusion, as Redd contends, or a factual finding, as the government would have it. Under either standard of review, there was no error. And because there was no error, we need not reach the government’s harmlessness argument.

Conclusion

Because the district court did not decide to run Redd's revocation sentence consecutively to the state court sentence based on a misunderstanding about Redd's state sentence, we find no procedural error and affirm.

Entered for the Court

Nancy L. Moritz
Circuit Judge