

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 8, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERNESTO PEREZ-ASUNCION,

Defendant - Appellant.

No. 23-2061
(D.C. No. 2:23-CR-00062-MIS-1)
(D.N.M.)

ORDER AND JUDGMENT*

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

This appeal involves the reasonableness of an 18-month sentence for illegally reentering the United States. Though the guideline range was 0–6 months, the district court sentenced Mr. Perez-Asuncion to prison for 18 months. Is the 18-month prison term reasonable? We answer *yes*.

* Mr. Ernesto Perez-Asuncion moved to waive oral argument, and we grant his motion. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

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

In sentencing a defendant, the district court has broad discretion. *United States v. Balbin-Mesa*, 643 F.3d 783, 788 (10th Cir. 2011). The court must consider (1) the sentencing guidelines, (2) the nature and circumstances of the offense, (3) the characteristics of the defendant, (4) the defendant’s past behavior and characteristics, (5) the sentencing goals of punishment, promotion of respect for the law, deterrence, and protection of the public, (6) the need to avoid unwarranted sentencing disparities, and (7) the need for restitution. 18 U.S.C. § 3553(a).

At Mr. Perez-Asuncion’s sentencing, the court applied these factors and decided on an 18-month term. In reviewing that decision, we apply the abuse-of-discretion standard. *United States v. Sells*, 541 F.3d 1227, 1237 (10th Cir. 2008). That standard requires “substantial deference” to the district court. *United States v. Sayad*, 589 F.3d 1110, 1116 (10th Cir. 2009) (quoting *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009)). This level of deference requires us to uphold a sentence unless it is “arbitrary, capricious, whimsical, or manifestly unreasonable.” *Id* (quoting *Friedman*, 554 F.3d at 1307).

The district court acted within its broad realm of discretion. The court acknowledged that the guideline range was 0–6 months’ imprisonment. But the court also considered Mr. Perez-Asuncion’s conduct after the government had ordered his removal. That conduct included Mr.

Perez-Asuncion's return to the United States within roughly 4 months of his removal.

Mr. Perez-Asuncion argues that he reentered the United States only to get his work materials. But the district court didn't have to accept this explanation. After Mr. Perez-Asuncion was caught, he made arrangements for someone else to get his work materials. In light of those arrangements, the district court could reasonably infer that Mr. Perez-Asuncion had chosen to return rather than to get someone else to retrieve his work materials.

The district court also expressed concern about the potential danger to Mr. Perez-Asuncion's ex-wife. This concern stemmed from a finding that Mr. Perez-Asuncion had threatened to chop off his ex-wife's head and give it to their children. After making the threat, Mr. Perez-Asuncion was spotted outside of his ex-wife's house. Inside the car was a hatchet.

Mr. Perez-Asuncion downplays the danger, stating that (1) he was far away from his ex-wife when he later reentered the United States, (2) he had the hatchet only to use in his work, and (3) the existing charge in state court involved only a misdemeanor. We reject these arguments.

Mr. Perez-Asuncion points out that he was stopped over 1000 miles away from his ex-wife's residence when he reentered the United States. But when he was stopped, Mr. Perez-Asuncion explained that he was returning to gather his truck and work tools. Given this explanation, the

court could reasonably infer that Mr. Perez-Asuncion had planned to retrieve his truck and tools from the vicinity of his ex-wife's residence.

Mr. Perez-Asuncion defends his possession of a hatchet, saying that he needed it for work. Perhaps he did. But the district court found that Mr. Perez-Asuncion had threatened to chop off his ex-wife's head. This threat could appear credible to the sentencing court when Mr. Perez-Asuncion was found with a hatchet inside his car.

Finally, the district court could consider the conduct to be serious. Mr. Perez-Asuncion downplays the conduct, pointing out that the state prosecutor decided to bring a charge for a misdemeanor (third-degree domestic assault). But a federal district court need not consider the ways that state prosecutors exercise their discretion. *United States v. Craine*, 995 F.3d 1139, 1159–60 (10th Cir. 2021). So the state prosecutor's decision to charge only a misdemeanor didn't prevent the federal district court from varying upward based on the seriousness of Mr. Perez-Asuncion's threat to his ex-wife. *See, e.g., United States v. Mateo*, 471 F.3d 1162, 1166–68 (10th Cir. 2006) (relying on facts underlying prior arrests even though these arrests hadn't led to convictions).

Mr. Perez-Asuncion also points out that the median sentence for someone with his guideline range would have been 3 months and the average sentence would have been only 2 months. These statistics could reasonably support a sentence within the guideline range, for federal law

requires consideration of unwarranted sentencing disparities. 18 U.S.C. § 3553(a)(6). But the district court could reasonably conclude that a sentence of only 2–3 months would jeopardize the safety of his ex-wife.

* * *

We thus affirm, concluding that the district court acted within its discretion when sentencing Mr. Perez-Asuncion to 18 months for illegal reentry.

Entered for the Court

Robert E. Bacharach
Circuit Judge