FILED
United States Court of Appeals
Tenth Circuit

October 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BERLIN ULICES CARDONA-ZUNIGA,

Defendant - Appellant.

No. 23-4008
(D.C. No. 2:22-CR-00051-HCN-1)
(D. Utah)

ORDER AND JUDGMENT*

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

Defendant-Appellant Berlin Ulices Cardona-Zuniga pled guilty to possession with intent to distribute 100 grams or more of heroin, 21 U.S.C. § 841(a)(1), (b)(1)(B), and was sentenced to 63 months' imprisonment. 1 R. 20–26, 47–48; 2 R. 17–28. Mr. Cardona-Zuniga's appellate counsel has filed an Anders brief and seeks to withdraw due to lack of reasonable grounds for appeal. Aplt. Br. at 6–7; see Anders v. California, 386 U.S. 738 (1967). Our jurisdiction arises under 28 U.S.C.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

** 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.

§ 1291 and 18 U.S.C. § 3742(a),[1] and we grant counsel's motion to withdraw and dismiss the appeal.

According to plea counsel, Mr. Cardona-Zuniga chose not to pursue a Fed. R. Crim. P. 11(c)(1)(C) plea offer of 29 months fixed so he could urge the court to impose a sentence of 13 or 15 months. 2 R. 40–43, 45.[2] The district court treated Mr. Cardona-Zuniga's offense level as 25 (after applying the safety-valve provision under 18 U.S.C. § 3553(f)) with a criminal history category of II. 2 R. 36–38. After considering the 18 U.S.C. § 3553(a) factors, the district court sentenced him to 63 months' imprisonment. 2 R. 39–44.

Mr. Cardona-Zuniga was notified that his counsel filed an Anders brief and was provided a translated copy. See 10th Cir. R. 46.4(B). He contends that he did not knowingly and voluntarily enter his plea agreement and that his sentence was unreasonable. Aplt. Br. at 1; Translated Resp. to Anders Letter (Aug. 25, 2023). He maintains that counsel failed to advise him he ran the risk of 63 months' imprisonment, and that the record does not capture the acrimonious relationship between him and his counsel. Translated Resp. to Anders Letter (Aug. 25, 2023).

Upon receiving an Anders brief, we "conduct a full examination of the record to determine whether defendant's claims are wholly frivolous." United States v.

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[1] Upon consent of the parties, the district court referred the change of plea hearing to a magistrate judge who accepted the plea. 28 U.S.C. § 636(b)(3); 2 R. 17–18, 26–27. The district court then conducted the sentencing and entered judgment. 2 R. 32–50.

[2] The government indicated Mr. Cardona-Zuniga did not comply with certain conditions of the agreement and it was off the table. 2 R. 42–43.

Calderon, 428 F.3d 928, 930 (10th Cir. 2005). If we agree with counsel, we will grant the request to withdraw and dismiss the appeal. Anders, 386 U.S. at 744.

Discussion

We review de novo whether a defendant's guilty plea was knowing and voluntary. United States v. Jim, 786 F.3d 802, 810 (10th Cir. 2015). "We review the district court's sentencing decision under an abuse of discretion standard." United States v. Lente, 647 F.3d 1021, 1030 (10th Cir. 2011) (citing Gall v. United States, 552 U.S. 38, 51 (2007)). First, we ensure that "the district court's decision is procedurally sound." Id. (citation and internal quotation marks omitted). Then, we "consider the substantive reasonableness of the sentence imposed." Id. (citation omitted).

1. Defendant's Guilty Plea

For a guilty plea to be knowing and voluntary, the court and counsel must make the defendant "fully aware of the consequences of the plea." United States v. McIntosh, 29 F.4th 648, 655 (10th Cir. 2022) (citation and internal quotation marks omitted). In this context, Fed. R. Crim. P. 11(b) informs the task of the district court. Id.

At the change of plea hearing, the magistrate judge informed Mr. Cardona-Zuniga of his rights under Rule 11 and ensured that he understood. 2 R. 18–26. While Mr. Cardona-Zuniga claims he was dissatisfied with his lawyer, he expressed satisfaction with his lawyer in his plea agreement and at the change of plea hearing.

1 R. 25; 2 R. 19–20. The magistrate judge discussed the nature of Mr. Cardona-Zuniga's sentence, including the maximum penalty (up to 40 years), the applicable mandatory minimum, the discretion exercised by the sentencing judge, and the possibility of deportation. 2 R. 20–22. The magistrate judge specifically told Mr. Cardona-Zuniga that he would not be able to withdraw his plea should the district court not sentence him in accordance with any estimate by counsel or recommendation by the government. 2 R. 23; see also 1 R. 21 (same advice in plea agreement). Mr. Cardona-Zuniga said he understood. 2 R. 23. The record confirms that he pled guilty based on his own free will. 2 R. 21–22.

2. Defendant's Sentence

"Procedural reasonableness addresses whether the district court incorrectly calculated . . . the Guidelines sentence, treated the Guidelines as mandatory, failed to consider the § 3553(a) factors, relied on clearly erroneous facts, or failed to adequately explain the sentence." United States v. McCrary, 43 F.4th 1239, 1244 (10th Cir. 2022) (citation omitted). Here, the sentence was below the correctly-calculated guideline range of 78–97 months (offense level of 27, criminal history category of II), after applying the safety-valve provision and a downward variance[3] resulting in a sentence of 63 months. 2 R. 36, 44. The district court explained that it had considered the § 3553(a) factors. 2 R. 44. In particular, it mentioned the severity of the federal drug laws and rejected a further variance based upon Mr.

[3] The district court's sentence was based on a varied offense level of 25 and a criminal history category of II resulting in a range of 63–78 months. 2 R. 44.

Cardona-Zuniga's subjective belief that the guidelines resulted in too long a sentence. 2 R. 44–45.

Substantive reasonableness "addresses whether the length of the sentence is reasonable given all the circumstances of the case" and the § 3553(a) factors. McCrary, 43 F.4th at 1244 (citation omitted). The district court applied the safety-valve provision to Mr. Cardona-Zuniga's sentence and sentenced him to the very bottom of the guideline range it applied. 2 R. 44. The record provides nothing to suggest that the sentence was "arbitrary, capricious, whimsical, or manifestly unreasonable." United States v. Durham, 902 F.3d 1180, 1236 (10th Cir. 2018) (citation omitted).

We have fully examined the record to determine whether there are any other claims arguable on their merits and find none.

We DISMISS the appeal and GRANT counsel's motion for leave to withdraw.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge