

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 17, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARVIS DEAN ARNETT, JR.,

Defendant - Appellant.

No. 23-6018
(D.C. No. 5:21-CR-00333-F-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON, BRISCOE, and EID**, Circuit Judges.

Defendant Darvis Dean Arnett, Jr., pleaded guilty to three counts of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and was sentenced to a total term of imprisonment of 216 months, to be followed by a three-year period of supervised release. Arnett now appeals his sentence, arguing that it is substantively unreasonable. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

The March 13–14, 2021 incident

On March 13, 2021, officers from the Edmond (Oklahoma) Police Department (EPD) were dispatched to the Kelly Park neighborhood of Edmond in response to a report of a gun being fired. Witnesses reported seeing a passenger in a tan sport utility vehicle firing rounds into the air. The officers located approximately thirty-six 9mm casings in the roadway.

The following morning, EPD officers were dispatched to the same neighborhood in response to a second report of gunfire. At the scene, officers spoke with a resident who had a video of the incident. The video showed two suspects, one male and one female, firing rounds. After viewing the video, the officers went to a residence at 1018 Gemini Road and discovered approximately nine spent casings in the roadway. The officers then made contact with the occupants of the residence, Arnett and his girlfriend, Braquel Willis. Willis spoke with the officers and acknowledged she had fired three rounds and that Arnett had fired the remainder of the rounds. The officers arrested Arnett and then obtained a search warrant for the residence. During the search of the residence, officers seized two firearms, two loaded magazines, two empty magazines, multiple handgun rounds, a green pill (later confirmed to be methamphetamine), a green leafy substance, and 26.05 grams of cocaine. After the search, officers interviewed Arnett and he admitted that one of the firearms, a Glock 17 Generation 5 firearm, was his.

Investigators ultimately recovered sixty-eight spent shell casings fired on March 13 and 14, 2021. The shell casings and firearms were submitted to the Oklahoma State Bureau of Investigation (OSBI) for examination. The OSBI determined that both of the firearms recovered from the residence were operational, and that the sixty-eight rounds investigators recovered were all fired from the Glock 17 firearm.

Investigators reviewed the in-car audio recording from the patrol vehicle that Arnett was placed in following his arrest. That recording captured Arnett speaking by cell phone with his brother. At one point during that conversation, Arnett said to his brother, “Tell Braquel if they find the weapon . . . take the charge.” ROA, Vol. II at 60.

The May 3, 2021 incident

On May 3, 2021, officers from the Oklahoma City Police Department (OCPD) responded to a report of an assault with a deadly weapon. The dispatcher advised the officers that a shooting occurred at a Hampton Inn near Southeast 44th Street and Shields Boulevard in Oklahoma City. Officers located and performed a felony stop on the suspect vehicle. Willis was driving the vehicle, a woman named Shay Garcia was in the front passenger seat, and Willis’s four-year-old daughter and Arnett were in the vehicle’s back seat. Willis told the officers she had been involved in a fight near the Hampton Inn but did not know who discharged the firearm. Officers searched the vehicle and discovered a .40 caliber Springfield Armory firearm in a purse in the trunk of the vehicle. The firearm, which was confirmed to be stolen, was

loaded with six rounds in the magazine. The officers also discovered twenty-nine Xanax pills and two small baggies of marijuana in the trunk of the vehicle.

The officers interviewed Garcia. She stated that Willis got into a fight with another woman and that there was gunfire after the fight. Garcia stated that she did not know who fired the firearm. Garcia told the officers that the firearm and drugs found in the trunk belonged to her.

The officers also spoke with witnesses who observed the incident. The witnesses reported that two women began arguing outside the Hampton Inn and that three men intervened and tried to break up the fight. The witnesses reported that two of the men then began fighting with each other. One of those men, later identified as Arnett, ran back to a vehicle (later identified as the same vehicle that Arnett was found riding in) and grabbed a black handgun. According to the witnesses, Arnett fired one round in the air and then fired two rounds towards the man he had been fighting with. Arnett and the two women then fled the area in the vehicle.

Officers arrested Arnett. While in custody, Arnett told officers that “one of the females” had used the firearm. *Id.*

The November 11, 2021 incident

On November 11, 2021, OCPD officers responded to a report of a burglary at 2502 Northwest 35th Street in Oklahoma City. The caller, later identified as Lauren Lane, initially told the dispatcher that her ex-boyfriend, who she identified as Arnett, had previously broken into her apartment and returned to attempt to break in again. The caller then told the dispatcher that Arnett was discharging a firearm outside her

apartment. An OCPD officer, who was in the area, heard three gunshots. When officers arrived, Arnett was gone. The officers discovered three 9mm shell casings at the scene.

Lane told the officers that earlier that day she had returned from the grocery store to find her apartment door had been kicked in and could not be locked. Lane stated that she called 911 and then called her friend, Shyann Taulbee, who arrived shortly thereafter. According to Lane, when Taulbee was about to leave, Taulbee noticed Arnett outside the apartment door. Lane and Taulbee tried to close the apartment door, but Arnett placed his foot between the frame and the door. Arnett removed his foot and eventually walked away from the apartment door. As Arnett was walking away, Lane and Taulbee noticed that he was holding a handgun. Lane and Taulbee then heard gunshots coming from the parking lot of the apartment building.

Officers subsequently located Arnett at his father's residence in Edmond, Oklahoma. Arnett's father handed the officers a black Taurus 9mm firearm that Arnett had purportedly hidden in the attic. Arnett agreed to speak with the officers and denied being at Lane's apartment or possessing a firearm.

On November 16, 2021, an investigator spoke again with Lane and Taulbee. Both women said Arnett had been calling repeatedly and telling Lane to drop the charges against him that arose out of the November 11, 2021 incident. Lane told the investigator that she had a child with Arnett and that Arnett was using drugs.

An investigator spoke with Arnett later on November 16, 2021. Arnett stated that he had a Xanax addiction and that most of his bad decisions were made when he was using Xanax. Arnett stated that he had been in a relationship with Lane for approximately two years. Arnett admitted that he went to Lane's apartment on November 11, 2021, but he stated that the front door had already been kicked in when he arrived. Arnett stated that Lane and Taulbee saw him and held the front door shut. Arnett stated that he left the apartment, fired three shots into the air, and then left the area.

On November 17, 2021, an investigator listened to two phone calls that Arnett placed to Lane while in custody. During the first call, which was made on November 15, 2021, Arnett told Lane that he needed her to drop the burglary charge against him. During the second call, Arnett told Lane he would go to the prison if Lane testified against him.

II

On November 19, 2021, a criminal complaint was filed in the United States District Court for the Western District of Oklahoma, charging Arnett with one count of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). That offense was alleged to have occurred on November 11, 2021. On December 14, 2021, a federal grand jury returned an indictment charging Arnett with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). That offense was also alleged to have occurred on November 11, 2021.

On February 15, 2022, a federal grand jury returned a superseding indictment charging Arnett with three counts of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). Count 1 was alleged to have occurred on March 14, 2021. Count 2 was alleged to have occurred on May 3, 2021. Count 3 was alleged to have occurred on November 11, 2021.

On April 8, 2022, Arnett filed a petition to enter a plea of guilty to all three charges alleged in the superseding indictment. Arnett did so without benefit of a plea agreement with the government. The district court held a plea hearing that same day and accepted Arnett's guilty plea.

On October 20, 2022, the probation department prepared and submitted to the district court and the parties a presentence investigation report (PSR). The PSR grouped all three counts of conviction for guideline calculation purposes. The PSR imposed a base offense level of 26 pursuant to U.S.S.G. § 2K2.1(a)(1)(A)(i) and (B). The PSR then imposed four increases to the base offense level: (1) a two-level increase pursuant to U.S.S.G. § 2K2.1(b)(1)(A) because the offenses involved four firearms; (2) a one-level increase pursuant to U.S.S.G. § 2K2.1(b)(4)(A) because one of the firearms was stolen; (3) a four-level increase pursuant to U.S.S.G. § 2K2.1(b)(6)(B) because Arnett used or possessed the firearms in connection with other felony offenses, i.e., drug trafficking, burglary, and assault and battery with a deadly weapon; and (4) a two-level increase pursuant to U.S.S.G. § 3C1.1 because Arnett willfully attempted to obstruct or impede the investigation of the offenses of conviction. The PSR also deducted three levels pursuant to U.S.S.G. § 3E1.1(a) and

(b) because Arnett accepted responsibility for the offenses and because he assisted authorities in the prosecution of the offenses by timely entering a guilty plea. Those calculations resulted in a total offense level of 32. The PSR in turn calculated Arnett’s criminal history score to be 12 and his criminal history category to be V. The majority of the criminal history points were based on multiple Oklahoma state felony offenses, including two separate armed robberies that Arnett committed in 2015 when he was seventeen; the remaining two points were added due to the fact that Arnett committed the federal offenses of conviction while under a suspended sentence for his state felony criminal convictions. The PSR also classified Arnett as an armed career criminal, which—if applicable—would require the district court to impose a mandatory minimum sentence of fifteen years on each of the three counts. Together, the total offense level of 32 and the criminal history category of VI resulted in an advisory Guidelines sentencing range of 210 to 262 months.

On January 10, 2023, Arnett filed a sentencing memorandum arguing, in relevant part, that the district court should vary downward from the advisory Guidelines sentencing range due to two factors: (a) his history and personal characteristics, and (b) the nature and circumstances of the offenses at issue. With respect to the first factor, Arnett noted that he “was 17 years old when he was first incarcerated” and he “was, at that time, severely addicted to Xanax” and also “hanging out with the wrong crowd.” ROA, Vol. I at 37. Arnett further noted that while he was incarcerated in the custody of the Oklahoma Department of Corrections, “he was not given the opportunity to acquire any vocational skills or

work experience” and was not afforded the opportunity “for drug rehabilitation.” *Id.* Arnett asserted that he was first released from custody in early 2020, “shortly before the COVID-19 pandemic.” *Id.* Although he initially began working at the same restaurant as his father, he lost that employment after the pandemic began “and all the structure and support systems he needed to successfully re-integrate into society eroded away.” *Id.* at 38. Arnett stated that “[b]oredom and freedom . . . created a void,” and he filled that void with “the exact same drugs and negative personal associations . . . that caused [him] problems just five years prior.” *Id.* Arnett stated, “[b]efore long, he was taking at least 3 Xanax pills a day, and was hanging around people who were negative influences.” *Id.* Arnett conceded that he “made several immature and ill-advised decisions in the year he was out of state prison.” *Id.* He argued, however, that those decisions “were made by a very young man whose brain, even at age 22 and 23, [was] still was not fully developed and capable of understanding the consequences of his actions.” *Id.* For reference, Arnett was 23 years old at the time of the three incidents underlying his conviction.

The district court held a sentencing hearing on January 30, 2023. At the outset of the hearing, the district court stated that it did not “intend to apply the Armed Career Criminal Act . . . in this case” because “[t]he government [did] not advocate for [its] application.” *Id.*, Vol. III at 24. That reduced Arnett’s criminal history category to V and in turn reduced his advisory Guidelines sentencing range to 188 to 235 months’ imprisonment. The district court in turn rejected Arnett’s objection to two of the offense-level enhancements set forth in the PSR. The district court then

discussed the § 3553(a) factors and began by noting “that one” of the factors “that tug[ged] at [it] the most, and certainly in a way that [wa]s not favorable to . . . Arnett, [wa]s the need for incapacitation.” *Id.* at 50. The district court in turn discussed “Arnett’s Xanax addiction,” noting that it did not “doubt that he was addicted to Xanax or at least was . . . a very persistent abuser of that drug,” but also stating that it was “a little troubled by the suggestion that that [wa]s somehow mitigating.” *Id.*

The district court also stated that its “preliminary impression” was

to say that addiction to Xanax or any other drug should be mitigating where the individual involved is a very persistent user is more or less like saying that, well, he only fires his gun on Tuesdays and Thursdays and that that should be mitigating. Well, if you’re addicted to Xanax, every day is a Tuesday or a Thursday. And so I’m a little—I’m a little skeptical of using or hanging my hat on his addiction as a mitigating circumstance.

Id. at 50–51.

The district court then “invite[d] the government to make any comment” it might “have with respect to sentencing.” *Id.* at 51. The government noted in response that, with respect to the first count of conviction, Arnett “discharge[ed] approximately 68 rounds over the course of two days in the middle of a neighborhood in Edmond” and that it was “kind of surprising” “[t]hat he did not hit anyone or hurt anyone.” *Id.* at 52. The government further noted that, with respect to the second count of conviction, Arnett “[wa]s the one who cho[se] to escalate the fight by introducing a firearm to it and then using it to some effect to intimidate the person he’s arguing with.” *Id.* The government also noted that Arnett, while “being transported to the Oklahoma County Jail after that, . . . trie[d] to lay blame on the

females who were with him.” *Id.* With respect to the third count of conviction, the government noted that Arnett went to Lane’s “apartment not just armed with words and fists,” but “armed with a gun,” which he “produce[d] . . . and fire[d].” *Id.* at 53. Ultimately, the government argued that Arnett’s conduct underlying the offenses of conviction, when considered in light of his criminal history, which included “the menacing use of firearms,” “more than wash[ed] away any mitigation that would be had by his substance abuse addiction because he has demonstrated himself a dangerous person.” *Id.* The government thus urged the district court to impose “a sentence at or near the top of the guideline range.” *Id.* at 54.

In announcing its sentence, the district court noted at the outset that it would “recommend the Residential Drug Abuse Program” for Arnett. *Id.* at 62. The district court in turn noted that this case was “toward the more egregious end of the gamut of cases that [it] could have on a felon in possession instant offense.” *Id.* at 71. The district court further noted that “[t]he history and characteristics of the defendant [wa]s one aspect of the case that [wa]s both sobering and heartbreaking.” *Id.* The district court stated that “the addiction [wa]s in the mix, but in the final analysis, we all have to ultimately bear the consequences of our own choices,” and the case involved a “young man who . . . sadly ha[d] thrown his life away.” *Id.* The district court stated that it was “not sure what sentence [it] could impose that would promote respect for the law,” and that “the need to impose just punishment [wa]s really subsumed in the other sentencing factors.” *Id.* at 71–72. As for “[t]he need to afford adequate deterrence,” the district court stated that it “could probably be served by a

shorter sentence than the one [it was] about to impose,” but that it was “not sure what it would take to deter . . . Arnett from further criminal activity.” *Id.* at 72. The district court stated that it was “mindful of and certainly respect[ed] the arguments that ha[d] been made on behalf of . . . Arnett as to the effects of his addiction.” *Id.* The district court stated that, nevertheless, “the need for incapacitation [wa]s by far the most prominent sentencing factor [it was] required to take into account” and that factor “cut[] rather strongly against . . . Arnett.” *Id.* Ultimately, the district court “conclude[d] that a sentence that [wa]s sufficient but not greater than necessary to achieve the statutory objectives of sentencing [wa]s a sentence of 216 months of incarceration,” which included “120 months on Count 1, 92 months on Count 2, 96 months on Count 3 with the Count 2 and 3 sentences to run concurrent with each other and consecutive to the Count 1 sentence.” *Id.* at 73. The district court also imposed a three-year term of supervised release.

Final judgment was entered in the case on January 30, 2023. Arnett thereafter filed a timely notice of appeal.

III

Arnett argues in his appeal that the sentence imposed by the district court “is substantively unreasonable because the district court gave insufficient weight to his youth and drug addiction.” *Aplt. Br.* at 9. For the reasons that follow, we reject Arnett’s arguments and affirm the sentence imposed by the district court.

“As a general matter, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular

sentence.” *Concepcion v. United States*, 142 S. Ct. 2389, 2404 (2022) (quoting *Solem v. Helm*, 463 U.S. 277, 290 n. 16 (1983)) (internal quotation marks omitted). “The Supreme Court has therefore instructed that ‘courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.’” *United States v. Budder*, 76 F.4th 1007, 1016 (10th Cir. 2023) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). “When reviewing the substantive reasonableness of a sentence, we ‘give substantial deference to the district court and will only overturn a sentence that is arbitrary, capricious, whimsical, or manifestly unreasonable.’” *Id.* (quoting *United States v. Lawless*, 979 F.3d 849, 855 (10th Cir. 2020)). “[W]e presume a sentence is reasonable if it is within the properly calculated guideline range.” *United States v. Chavez*, 723 F.3d 1226, 1233 (10th Cir. 2013).

Here, Arnett does not challenge the district court’s calculation of the advisory Guidelines sentencing range (188 to 235 months’ imprisonment), and it is undisputed that the sentence imposed by the district court—216 months’ imprisonment—was within that range. As a result, we must presume that the sentence imposed by the district court is substantively reasonable.

Arnett attempts to overcome this presumption of reasonableness by arguing that the district court gave “insufficient weight to two factors that supported leniency: [his] youth and his addiction to Xanax.” *Aplt. Br.* at 10. A review of the sentencing hearing transcript, however, refutes this argument. The district court specifically discussed both of these factors. With respect to Arnett’s age, the district court

expressly noted that Arnett was “a young man who ha[d] thrown his life away.” ROA, Vol. III at 71. Relatedly, the district court opined that “[t]he history and characteristics of [Arnett] [wa]s one aspect of the case that [wa]s both sobering and heartbreaking.” *Id.* The district court nevertheless stressed that Arnett had made a series of choices that caused these circumstances: “the emphasis there, in my view, is on the fact that he threw his life away.” *Id.* As for Arnett’s addiction to Xanax, the district court stated it was “mindful of and certainly respect[ed] the arguments that ha[d] been made on behalf of . . . Arnett as to the effects of his addiction.” *Id.* at 72. And, notably, the district court stated that it would “recommend the Residential Drug Abuse Program” for Arnett. *Id.* at 62. But the district court rejected Arnett’s argument that the Xanax addiction was “somehow mitigating.” *Id.* at 50. To be sure, the district court acknowledged that “the addiction [wa]s in the mix,” but it stated that “in the final analysis, we all have to ultimately bear the consequences of our own choices.” *Id.* at 71. And ultimately, the district court emphasized that “the need for incapacitation [wa]s by far the most prominent sentencing factor” in the case and “it cut[] strongly against . . . Arnett.” *Id.* at 72. This emphasis was reasonable given that Arnett was being sentenced on three separate firearm offenses—each involving not just the illegal possession of a firearm, but rather the reckless *discharge* of the illegally possessed firearm.

In sum, nothing in the record persuades us that the within-Guidelines sentence imposed by the district court was arbitrary, capricious, whimsical, or manifestly unreasonable.

IV

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge