FILED
United States Court of Appeals
Tenth Circuit

April 7, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EVAN AUBREY ARMSTRONG,

Defendant - Appellant.

No. 21-8075
(D.C. No. 0:21-CR-00047-NDF-1)
(D. Wyo.)

ORDER AND JUDGMENT[*]

Before **MATHESON**, **KELLY**, and **ROSSMAN**, Circuit Judges.

Evan Aubrey Armstrong pled guilty to one count of conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(B), and one count of carrying a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). Mr. Armstrong's guidelines range was 100-125 months of imprisonment on the conspiracy count and a consecutive 60-month prison sentence on the § 924(c) count. The district court imposed consecutive sentences of 86 months and 60

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[*] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

months, respectively. On appeal, Mr. Armstrong argues his sentence is substantively unreasonable. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

On December 22, 2020, Mr. Armstrong was involved in a car accident and transported to a hospital. During an inventory search of his car, a Wyoming Highway Patrol trooper found a stolen firearm, suspected methamphetamine, two digital scales, and other drug paraphernalia. The trooper attempted to contact Mr. Armstrong at the hospital, but Mr. Armstrong had already left.

About one month later, on January 20, 2021, an agent with the Wyoming Division of Criminal Investigation (DCI) was surveilling Mr. Armstrong's residence when the agent saw Mr. Armstrong leave in a pickup truck. The agent called for local police to initiate a traffic stop. During the stop, officers arrested Mr. Armstrong, searched him, and found approximately 17 grams of methamphetamine and $1,700 in cash. In the truck, the officers located a handgun, a scale, and packaging material consistent with distribution.

That same day, DCI agents executed a search warrant for Mr. Armstrong's residence. There, they encountered two additional suspects and discovered about 150 grams of methamphetamine.

The government charged Mr. Armstrong with three offenses:

- Count One charged conspiracy to distribute methamphetamine;
- Count Two charged possession with the intent to distribute methamphetamine on the date of the traffic stop; and
- Count Three charged carrying a firearm during and in relation to Count Two.

Mr. Armstrong pled guilty to the first and third counts. The government agreed to dismiss the second count. Count One carried a statutory sentencing range of 5-40 years of imprisonment, and Count Three carried a mandatory minimum 5-year consecutive sentence.

A presentence report (PSR) prepared by a probation officer calculated Mr. Armstrong's advisory guidelines range. With a total of 18 criminal history points, the PSR put Mr. Armstrong in criminal history category VI. With an offense level of 24 on the conspiracy count, Mr. Armstrong's guidelines range was 100-125 months, plus 60 months on the § 924(c) count.

Mr. Armstrong filed a sentencing memorandum requesting a downward variance from the guidelines range under 18 U.S.C. § 3553(a). As relevant here, Mr. Armstrong emphasized two mitigating factors in support of a variance: (1) overrepresented criminal history and (2) trauma from childhood sexual abuse.

First, Mr. Armstrong explained that two of his prior sentences were based on offenses committed nearly 20 years earlier, in 2002, when he was just 21 years old. Citing Supreme Court precedent and research from the National Institute of Health, Mr. Armstrong asserted the adolescent brain does not fully mature until approximately the age of 25. On that basis, Mr. Armstrong argued his 2002 offenses were akin to juvenile offenses, which generally would not qualify for criminal history points. He further contended sentences imposed nearly 20 years earlier typically fall outside the 15-year lookback period in U.S.S.G. § 4A1.2(e)(1) and, for that additional reason, would not count for criminal history points. Indeed, it was only because a suspended sentence

was continued multiple times before ultimately being revoked that Mr. Armstrong ended up serving any part of it within the previous 15 years. Without these two prior sentences in the mix, Mr. Armstrong would have only 12 criminal history points, not enough to qualify for category VI. Mr. Armstrong argued he should be sentenced as if he were in criminal history category V.

Next, Mr. Armstrong explained that he was a victim of sexual abuse as a child and contended this was a significant mitigating factor warranting a downward variance. When Mr. Armstrong was about five or six years old, an older teenage family member repeatedly sexually abused him. His abuser also introduced him to drugs. Throughout his life, Mr. Armstrong suppressed his history of abuse and relied on controlled substances to cope with his trauma, which ultimately led to an extensive juvenile and adult criminal history. Mr. Armstrong also stated that Eye Movement Desensitization and Reprocessing (EMDR) therapy had been the most effective treatment for addressing his trauma. Mr. Armstrong claimed the Bureau of Prisons (BOP) would be unable to provide him with this essential treatment. Accordingly, he requested a five-level downward variance based on the Sentencing Guidelines' failure to take into account these mitigating circumstances, *see* 18 U.S.C. § 3553(b)(1), and to allow him to receive the requisite treatment as soon as possible, *see* § 3553(a)(2)(D).

At the sentencing hearing, the district court initially calculated Mr. Armstrong's guidelines range to be 100-125 months of imprisonment based on an offense level of 24 and a criminal history category of VI, plus 60 months on the § 924(c) count. After

hearing argument from Mr. Armstrong and the government, the district court granted in part and denied in part the requested downward variance.

First, the district court denied Mr. Armstrong's request to treat him as if he were in criminal history category V. The court reasoned "with regards to the criminal history and the brain development, the argument applies to all" defendants with convictions from their early twenties. R. vol. III at 53. And while the district court found "some merit" to Mr. Armstrong's argument, the court ultimately determined it was appropriate to count Mr. Armstrong's 2002 sentences because the "reason those didn't fall off was because he continued to commit crimes in violation of his probation." *Id.* at 55.

The district court agreed Mr. Armstrong's trauma from childhood sexual abuse warranted a downward variance. "In terms of the abuse, I certainly see that and the youthful consumption, the mental health issues," the district court reasoned. *Id.* at 56. "I think that there is grounds for consideration there for a variance to address the mental health and the early onset substance abuse that I think certainly led to the poor choices." *Id.* The district court did not rely on the alleged lack of EMDR treatment within the BOP as a basis for a downward variance. However, the district court expressed its frustration with the BOP's lack of treatment options and was adamant it would try to get Mr. Armstrong into EMDR treatment during his incarceration. *Id.* ("I'll do everything I can. I'm not happy with the Bureau of Prisons. . . . I think that we are, in many ways, poorly investing our time and efforts into jail cells and not in programming.").

"In the end," the district court found, "a sentence of 86 months as to Count 1 [wa]s sufficient but not greater than necessary." *Id.* at 57. The district court explained the

downward variance was based in part on "some recognition for the mental health and the early onset substance abuse and the problems that existed as well as the sexual abuse." *Id.* The district court also imposed the mandatory minimum 60-month consecutive sentence on the § 924(c) count.

Mr. Armstrong timely appealed.

II. Discussion

Appellate review of the reasonableness of a sentence "includes both a procedural component, encompassing the method by which a sentence was calculated, as well as a substantive component, which relates to the length of the resulting sentence." *United States v. Henson*, 9 F.4th 1258, 1284 (10th Cir. 2021) (quoting *United States v. Smart*, 518 F.3d 800, 803 (10th Cir. 2008)).

Mr. Armstrong challenges only the substantive reasonableness of his sentence, arguing the district court's failure to properly weigh his mitigating circumstances resulted in an unreasonably long sentence.

"We review the substantive reasonableness of a sentence under a deferential abuse-of-discretion standard." *United States v. Richards*, 958 F.3d 961, 968 (10th Cir. 2020). "We find an abuse of discretion only if the district court was 'arbitrary, capricious, whimsical, or manifestly unreasonable' when it weighed 'the permissible § 3553(a) factors in light of the totality of the circumstances.'" *United States v. Sanchez-Leon*, 764 F.3d 1248, 1267 (10th Cir. 2014) (quoting *United States v. Sayad*, 589 F.3d 1110, 1116, 1118 (10th Cir. 2009)). "That is to say, we recognize that in many cases there will be a range of possible outcomes the facts and law at issue can

fairly support; rather than pick and choose among them ourselves, we will defer to the district court's judgment so long as it falls within the realm of . . . rationally available choices." *United States v. Durham*, 902 F.3d 1180, 1236 (10th Cir. 2018) (alteration in original) (quoting *United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007)). Moreover, we apply a "rebuttable presumption of reasonableness to a below-guideline sentence challenged by the defendant as unreasonably harsh." *Richards*, 958 F.3d at 968-69 (quoting *United States v. Balbin-Mesa*, 643 F.3d 783, 788 (10th Cir. 2011)).

Mr. Armstrong argues the district court gave insufficient weight at sentencing to two mitigating factors: (1) his overrepresented criminal history and (2) his trauma from childhood sexual abuse. However, we cannot conclude—particularly in light of the highly deferential standard of review—that the district court abused its discretion in varying only 14 months below the guidelines range.[1]

As for his criminal history, Mr. Armstrong argues "the fact that a meaningful portion of his criminal history was committed when he was only 21 years old should have

[1] A "variance occurs when the district court deviates from the guidelines range based on the sentencing factors in 18 U.S.C. § 3553(a)." *United States v. Kaspereit*, 994 F.3d 1202, 1214 (10th Cir. 2021). "A departure is a deviation from the calculated guidelines range based on the enumerated departure provisions in the Guidelines Manual." *Id.* While Mr. Armstrong occasionally references departure provisions, his sole argument on appeal is that the sentence was substantively unreasonable—not that the district court erred in failing to apply a departure, which would implicate the procedural reasonableness of the sentence. *See id.* ("While a case involving a departure (and thus a question of guidelines application) opens the door to a procedural reasonableness challenge, we review a variance for substantive reasonableness.").

been taken into consideration when considering the section 3553(a) factors." Opening Br. 12. However, the district court thoughtfully considered Mr. Armstrong's argument, recognized it had some merit, and gave a reasoned explanation for rejecting it. The district court observed that Mr. Armstrong's brain-development argument did not set him apart from any other defendant, and it was appropriate to count his 2002 convictions since he continued to commit multiple crimes while on probation. While the district court had discretion to grant Mr. Armstrong a downward variance based on an overrepresented criminal history, it did not abuse its discretion by refusing to do so. That is, the district court's decision fell within the realm of rationally available choices. *Durham*, 902 F.3d at 1236.

Next, Mr. Armstrong argues "the district court should have given more weight to the fact that the defendant was a victim of sexual abuse." Opening Br. 12. Our review confirms the district court gave significant weight to this mitigating circumstance. Indeed, the district court granted a downward variance because of the trauma Mr. Armstrong suffered as a child, finding it contributed to Mr. Armstrong's early-onset substance abuse and criminal history. Understandably, Mr. Armstrong would have liked the district court to have varied downward even further. However, we must presume the substantive reasonableness of a below-guideline sentence. *Richards*, 958 F.3d at 968-69. Mr. Armstrong has not rebutted that presumption nor demonstrated that the district court abused its discretion. *See id.*

Accordingly, the district court did not reversibly err by imposing a substantively unreasonable sentence.

III. Conclusion

The district court's judgment is affirmed.

Entered for the Court

Veronica S. Rossman
Circuit Judge