FILED
United States Court of Appeals
Tenth Circuit

August 23, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER PIPPEN,

Defendant - Appellant.

No. 22-2084
(D.C. No. 2:21-CR-01673-MIS-2)
(D. N.M.)

ORDER AND JUDGMENT*

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

Christopher Pippen appeals his 30-month sentence, arguing the district court plainly erred in its sentencing procedure. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Mr. Pippen was charged with one count of conspiracy to transport illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I), and two counts of transporting

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

an illegal alien, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(A)(v)(II). Mr. Pippen's co-conspirator, Raven Leigh Hall, pleaded guilty, but Mr. Pippen went to trial. Ms. Hall testified against Mr. Pippen at trial, explaining that she had suggested Mr. Pippen accompany her to smuggle undocumented immigrants back to Dallas, and that he would earn around $7,000 for doing so. He agreed, and they drove to El Paso together and picked up ten undocumented immigrants at various locations. They attempted to conceal the immigrants in the back of the car beneath a sheet. The immigrants were not wearing seat belts and their weight exceeded the rated capacity for the car. At a border checkpoint, an agent noticed the people hiding under the sheet, and then arrested Ms. Hall and Mr. Pippen. Although Mr. Pippen asserted as his defense at trial that he was just along for the ride and Ms. Hall was not a credible witness, the jury found Mr. Pippen guilty on all counts.

The Probation Office prepared a Presentence Investigation Report (PSR), which detailed the facts presented to the jury at trial and calculated Mr. Pippen's advisory Sentencing Guidelines range to be 24 to 30 months' imprisonment. Mr. Pippen filed a sentencing memorandum and a motion for a downward variance, arguing he should be sentenced to time served. The government opposed the request for a variance, asserting instead that Mr. Pippen should be sentenced to 30 months in prison.

At the sentencing hearing, the district court first stated that it had reviewed the PSR, the sentencing memorandum and request for downward variance, and the government's response to the variance request. The court then asked defense counsel

if there was anything else it needed to review, and counsel said no. The court next asked counsel if he and his client had read and discussed the PSR. Counsel responded, "Yes, Your Honor. We have no corrections or objections." R., vol. III at 336. The court then stated: "Having reviewed the materials, I'm considering a 30-month sentence. I'm concerned about some of the defendant's criminal history and his involvement with the Securities and Exchange Commission [(SEC)], but I'll hear from the parties first." *Id.* at 336-37.

The government spoke first and reiterated its request that Mr. Pippen be sentenced to a "Guideline sentence, a 30-month sentence." *Id.* at 337. Defense counsel then asked the court to "reconsider" its "inclination" to sentence Mr. Pippen to 30 months in prison. *Id.* at 338. Counsel discussed the facts of the case and argued again that Mr. Pippen was just "'along for the ride.'" *Id.* at 339. Counsel also suggested there was a sentencing disparity between Mr. Pippen and Ms. Hall, which was unfair because she was the organizer. Counsel next discussed Mr. Pippen's involvement with the SEC, his criminal history, his health issues, and his monetary issues.

After defense counsel's argument, the court invited Mr. Pippen "to make a statement now before sentencing." *Id.* at 345. Mr. Pippen spoke at length, discussing the SEC investigation, his criminal history, his health issues, his financial difficulties, his desire to spend time with his son, his plan to get back to work—to "make jobs" and "put people to work," if he was sentenced to time served, *id.* at 356, and his version of the facts of his case. At one point, the court asked Mr. Pippen a

question about the accounting practices at his former business—which had been the subject of the SEC investigation—and defense counsel asked a follow up question.

The court then stated it was adopting the PSR's factual findings, and it had considered the factors in 18 U.S.C. § 3553(a). It explained the base offense level was 15, the criminal history category was IV,[1] and so the Sentencing Guidelines range was 24 to 30 months. The court noted that Mr. Pippen "conspired with another to transport ten undocumented people within the United States for financial gain and created a substantial risk of serious bodily injury by overloading the vehicle over the weighted capacity." *Id.* at 363. The court sentenced Mr. Pippen to 30 months in prison for each count, to run concurrently.

Mr. Pippen now appeals.

II. Discussion

Mr. Pippen argues that "[t]he district court plainly erred by announcing its proposed sentence before making findings of facts, calculating the guidelines sentence, and deciding whether a variance [was] warranted." Aplt. Opening Br. at 4 (boldface omitted). Because Mr. Pippen did not object to the court's sentencing procedure at the sentencing hearing, he concedes our review is for plain error. *See id.* at 3. "Under plain-error review, a defendant must show: (1) error, (2) that is plain, (3) which affects the party's substantial rights, and (4) which seriously affects

[1] The district court misspoke and said the criminal history category was IV, when it was actually III, as the PSR correctly indicated. But the court's misstatement was harmless because the Guidelines range the court announced was correct based on a base offense level of 15 and criminal history category of III.

the fairness, integrity, or public reputation of judicial proceedings." *United States v. Moore*, 30 F.4th 1021, 1025 (10th Cir. 2022) (internal quotation marks omitted).

"An error is plain if it is clear or obvious under current, well-settled law." *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012) (internal quotation marks omitted). We conclude Mr. Pippen has failed to show error, let alone plain error, in the district court's sentencing procedure.

"We have recognized that a district court will frequently approach sentencing with at least some idea of what sentence it intends to impose." *United States v. Slinkard*, 61 F.4th 1290, 1293 (10th Cir. 2023) (brackets and internal quotation marks omitted). "Indeed, it is not improper for the court to convey its tentative views on a proper sentence, a disclosure that may assist the defendant in framing a statement." *Id.*; *see also United States v. Dill*, 799 F.3d 821, 825 (7th Cir. 2015) ("If the judge communicates [its] preliminary thoughts about an appropriate sentence to counsel near the beginning of the hearing, it can often help counsel and the defendant know what the judge is most concerned about and address their arguments to those points."). But a district court is prohibited from making a "definitive" or "conclusive" announcement of a sentence prior to giving the defendant a chance to speak. *Slinkard*, 61 F.4th at 1295. Here, the district court did not act improperly by expressing its tentative view of the sentence it was considering at the beginning of the sentencing hearing; it did not make any definitive or conclusive statements about the sentence before giving the parties an opportunity to address the court.

Mr. Pippen argues, however, the district court committed an error here like those we found in *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014), and *Moore*. He contends that—like the sentencing courts in those cases—the court here failed to follow the correct order of operations in its sentencing procedure. We disagree.

In *Sabillon-Umana*, the district court stated early in the sentencing hearing that the defendant "was but a bit player in a larger drug operation." 772 F.3d at 1330. And "[i]n that light, the judge stated that he thought a guidelines base offense level of 32 sounded about right and he asked the probation officer to offer some justification for that number." *Id.* The probation officer then told the court that if it found the defendant responsible for certain quantities of cocaine and heroin, it would "yield the court's desired base offense level." *Id.* At the end of the hearing, the district court "adopted those findings as its own and imposed a sentence based on them." *Id.* We held this procedure was error because the district court failed to follow the correct order of operations. *See id.* at 1331. We explained that "in our legal order[,] properly found facts drive sentencing decisions, not the other way around." *Id.* And "[b]efore settling on a guidelines offense level or some other sentencing conclusion, a district court must take account of the facts—whether conceded by the defendant, found by a jury, or (perhaps) found by the court." *Id.*

Mr. Pippen attempts to characterize what the district court did here as the same as what the court did in *Sabillon-Umana*, arguing the district court here started with a sentencing conclusion and then backed into factual findings to support its conclusion.

We are not persuaded by his argument because the circumstances in *Sabillon-Umana* are distinguishable from this case.

In *Sabillon-Umana*, the district court "sought to justify a base offense level of 32" and asked the Probation Office to provide facts to justify that sentencing conclusion. *Id.* Here, to the contrary, the district court did not "settl[e] on a guidelines offense level or some other sentencing conclusion," *id.*, and then ask for factual support to justify that conclusion. The court here reviewed the PSR, defendant's motion for a variance, and the government's response and then simply expressed its tentative view on a sentence it was considering. It then heard at length from defense counsel and Mr. Pippen. After hearing Mr. Pippen's statement, it adopted the PSR's factual findings, which were based on facts found at Mr. Pippen's jury trial. It next calculated the Guidelines range and imposed a sentence at the high end of that range. Contrary to Mr. Pippen's argument, the district court did not act out of order—its initial statement that it was tentatively considering a sentence of 30 months' imprisonment is not the same as reaching a conclusion about a specific base offense level and then trying to back into factual findings to justify that conclusion as the court did in *Sabillon-Umana*.

Mr. Pippen also relies on our decision in *Moore* to support his claim of plain error, but that case involves an even more unique set of facts from those in *Sabillon-Umana* and is readily distinguishable from the circumstances here. In *Moore*, at the defendant's initial sentencing, the district court offered the defendant a choice—he "could take (1) an immediate 51-month sentence of imprisonment; or

(2) a 48-month sentence of probation, subject to *at least* 84 months' imprisonment for any future probation violation." 30 F.4th at 1022. The defendant took the second option, but he later violated some of the conditions of his probation, so, "the district court made good on its promise and sentenced him to 84 months' imprisonment." *Id.* We held the district court's "sentencing bargain was procedurally unreasonable," *id.*, characterizing the district court as employing a "sentence-in-advance system," *id.* at 1025. At the revocation hearing, the district court was supposed to undertake a two-step analysis to determine the defendant's sentence. *See id.* at 1027. And although the parties referenced the 5-to-11-month Guidelines range for the probation violations, "the district court simply latched onto its promised 84-month sentence." *Id.* We explained that the district court committed plain error by "preordaining a minimum future sentence and bypassing the required analysis that is available only after probation has been revoked." *Id.* at 1025.

While Mr. Pippen attempts to characterize what the district court did here as a "sentence-in-advance procedure," Aplt. Opening Br. at 12, it bears no resemblance to what the district court did in *Moore*. The district court here announced a tentative sentence it was considering, then heard from counsel and the defendant, adopted the factual findings from the PSR, calculated the Guidelines range, and imposed a sentence within that range. It did not preordain a minimum future sentence at the initial sentencing hearing and impose that sentence without any analysis at the probation revocation hearing as the district court did in *Moore*.

III. Conclusion

Mr. Pippen has failed to demonstrate that the district court committed plain error in its sentencing procedure. Accordingly, we affirm the district court's judgment.

Entered for the Court

Bobby R. Baldock
Circuit Judge