FILED
United States Court of Appeals
Tenth Circuit

November 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD JOHNS,

Defendant - Appellant.

No. 22-2008
(D.C. No. 1:19-CR-00936-KWR-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MORITZ**, **SEYMOUR**, and **EID**, Circuit Judges.

After Richard Johns pleaded guilty to bank robbery, the district court sentenced him to 180 months' imprisonment and 3 years' supervised release. The court also set special conditions on Johns's supervised release in lieu of fines, ordering him to reside in a residential reentry center for up to 180 days and to complete 60 hours of community service. Johns appeals his sentence, arguing that the district court plainly erred by basing his sentence on rehabilitative concerns and imposing special conditions on his supervised release for retributive purposes. Because the court did neither, we find no plain error and affirm.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

In February 2019, Richard Johns asked his niece for a ride to the library. When they arrived, Johns said he would be back in five minutes. He left. He returned. And when Johns entered the car, his niece noticed that he had "different clothes" on, was "out of breath," and seemed "weird." R. Vol. II at 19. Johns said nothing and "immediately reclined his seat." *Id.*

As it turns out, Johns did not visit the library. He robbed a nearby bank instead. A grand jury issued a one-count indictment charging Johns with bank robbery in violation of 18 U.S.C. § 2113(a). And Johns pleaded guilty without a plea agreement and proceeded to sentencing.

Johns's bank robbery added yet another offense to his long list of criminal history. Since the age of 18, Johns had only "spent perhaps 18 months out of custody." R. Vol. III at 26. A Presentence Investigation Report ("PSR") detailed that from 1991 to 2018 he accrued 22 convictions for, among other things: breaking and entering; robbery; battery upon a peace officer; possessing a firearm as a felon; aggravated battery; aggravated driving while intoxicated and obstructing an officer; battery against a household member; sexual conduct with a minor; failing to register as a sex offender; concealing identity; and committing a drug offense.

Given Johns's extensive criminal history, the PSR recommended that he receive a career-offender enhancement and that the Guidelines range for his bank robbery conviction be 151 to 188 months. Johns did not object to the PSR. He did, however, submit a sentencing memorandum and request that the district court vary

his sentence downward to 63 months' imprisonment—about 7 years below the Guidelines minimum.

Johns's memorandum specified that what he "need[ed] more than anything [was] 'comprehensive, long-term substance and abuse and mental health treatment.'" R. Vol. I at 52. For support, he explained his difficult childhood, prior substance abuse, and lack of support from the state criminal system. He explained that he can "demonstrate success in his life when he has structure and routine." *Id.* at 49. And to obtain that "structure," Johns reasoned that a lower sentence and the "much needed vocational training" available in federal prison would allow for his "successful reentry into society" and reduce the risk of his "future crimes." *Id.* at 51.

At sentencing, the district court heard arguments from each side and fully considered the 18 U.S.C. § 3553(a) factors. The court acknowledged Johns's struggles, "mental health issues," loss of his sister, and "very hard time" in custody. R. Vol. III at 25–26. But it noted that even with "all of the struggles," Johns did not "attempt . . . to make different decisions." *Id.* at 26. The sentencing judge noted that Johns had the "longest" criminal history that the judge had ever seen. *Id.* Indeed, Johns "continued to commit offense after offense after offense." *Id.* at 27. And because his most recent bank robbery (his "23rd conviction") involved the abuse of trust of his "younger family member," the court had "great concern about what choices [he] might make in the future." *Id*. at 26, 28.

With the § 3553(a) factors in mind, the district court "fashion[ed] a sentence." *Id.* at 25, 27. In doing so, the court reasoned that the "appropriate" sentence for

Johns would "support the goals of justice" by "reflect[ing] the seriousness of the offense," "afford[ing] adequate deterrence to future criminal conduct," and "protect[ing] the public from further crimes." *Id*. at 27.

Immediately following these "goals," the district court stated that Johns's sentence would also "provide [him] with the education and training and support" he needed and requested. *Id.*; *see* R. Vol. I at 51–52. The court recognized that Johns had an open choice to participate in federal "education and training and support" programs during his sentence. R. Vol. III at 27. Noting that Johns had previously exercised his "right" to "decline[] to take advantage of" the services offered to him while in custody, the court "encourage[d] [Johns] to take advantage" of federal resources. *Id.* ("Only you can make that decision . . . . [O]nly you can take advantage of them."). In the end, the district court sentenced Johns to 180 months' imprisonment and 3 years' supervised release.

Johns lacked the financial resources to pay "a fine or a portion of a fine," so the district court went another route. As part of Johns's supervised release, the court imposed two special conditions. First, "in lieu of a fine," the court required Johns to spend up to 180 days in a residential reentry center because he had "no solid release plan." *Id.* at 30. Second, also "in lieu of a fine," the court required Johns to complete 60 hours of community service during his supervised release so he could have "the opportunity to positively contribute to [his] community." *Id.* at 31–32. The court "conclude[d] that the total combined sanction, with these special conditions, [was] sufficiently punitive." *Id.* at 34.

Johns did not object to his sentence. He timely appealed.

II.

Johns raises two issues on appeal, each of which he did not object to below. Because Johns failed to object to the alleged errors below, we review them for plain error. *United States v. Mendiola*, 696 F.3d 1033, 1036 (10th Cir. 2012). Under this standard, Johns must show: an "(1) error (2) that is plain, (3) that prejudices his substantial rights, and (4) that 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (citation omitted).

Relying on *Tapia v. United States*, Johns argues that the district court plainly erred by (A) imposing his sentence based on rehabilitation and (B) imposing two special conditions on his supervised release based on retribution. *See* 564 U.S. 319, 326, 335 (2011). Either, if shown by the record, can warrant resentencing. *Id.*

Tapia clarified what a court cannot do in imposing a sentence or supervised release. In *Tapia*, the Supreme Court interpreted the Sentencing Reform Act and held that "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id.* at 335; *see* 18 U.S.C. § 3582(a) ("[I]mprisonment is not an appropriate means of promoting correction and rehabilitation."). Next, for "imposing a term of supervised release," *Tapia* held that "a court may *not* take account of retribution (the first purpose listed in § 3553(a)(2))." 564 U.S. at 326; *see United States v. Benvie*, 18 F.4th 665, 671 (10th Cir. 2021).

Since *Tapia*, this Circuit has identified when *Tapia* errors can occur. To find an error at sentencing, we look to the record to see if a district court "grounded [the] sentence, at least in part, on a desire to promote [a defendant's] rehabilitation." *United States v. Thornton*, 846 F.3d 1110, 1115 (10th Cir. 2017). To determine whether a sentence is "grounded" by rehabilitation, we apply the "unequivocal rule" announced in *Tapia*: "a court may not impose or lengthen a prison sentence . . . to promote rehabilitation." *Id.* at 1114 (quoting *Tapia*, 564 U.S. at 335). As such, we will remand a case for resentencing if a district court's statements "suggest that the court may have calculated the length of [the] sentence to *ensure* that [the defendant] receive certain rehabilitative services." *Tapia*, 564 U.S. at 334–35 (emphasis added); *see United States v. Valencia*, 776 F.3d 1173, 1175 (10th Cir. 2015).

But simply because a court cannot use rehabilitation as a basis for a sentence does not mean the court cannot talk about rehabilitation. A court can, and in some cases, it should. *See Tapia*, 564 U.S. at 334.

Tapia and subsequent Tenth Circuit precedent have determined three ways that a court can comment about rehabilitation at sentencing. First, courts can rightfully comment on rehabilitation while "recommending treatment in prison." *United States v. Naramor*, 726 F.3d 1160, 1170 (10th Cir. 2013); *see id.* at 1171 ("[W]e are not looking for stray remarks and technical errors to set aside sentencing decisions that were certainly *Tapia* compliant."). Indeed, *Tapia* explicitly noted that "[a] court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs." 564 U.S. at 334. "To the

contrary, a court properly may address a person who is about to begin a prison term about these important matters." *Id.*

Second, "it is proper for courts to 'pursue the goal of rehabilitation in sentencing, for example, in setting the terms of supervised release.'" *Naramor*, 726 F.3d at 1170 (citation omitted). And third, we have held that no error occurs when a district court speaks about rehabilitation in response to a defendant's motion for a downward variance if the district court "clearly rel[ies] on factors other than the need for prison rehabilitation programs." *Id.* at 1169.

With that framework in mind, we know what does and does not constitute a *Tapia* error. But even if one did occur, however, our job is not done. That is because on plain error review, we must also determine whether a defendant can "prove [that] the district court's error was plain or obvious" by looking at "whether the Supreme Court or the Tenth Circuit has addressed the issue." *Thornton*, 846 F.3d at 1118. If neither court has "addressed the issue," in general, the error is not plain. *United States v. Wolfname*, 835 F.3d 1214, 1221 (10th Cir. 2016) (citation omitted).

A.

Johns first argues that the district court committed a *Tapia* error by considering rehabilitation when imposing his sentence. He notes that the court expressly considered the need to provide him with "education and training and support." R. Vol. III at 27. And he reasons that the court's emphasis on how federal programming could meet his rehabilitative needs clearly contributed to the longer length of his sentence. Not so.

Looking at the record below, the district court did not "ground[] [Johns's] sentence, at least in part, on a desire to promote his rehabilitation." *Thornton*, 846 F.3d at 1115. Instead, the court merely encouraged Johns to take advantage of the rehabilitative services he could receive in federal prison.

To begin, the district court justified the imposition of Johns's sentence while considering the proper § 3553(a) factors:

> You've continued to commit offense after offense after offense. And those are things that I also have to consider in fashioning a sentence that is appropriate for your particular situation and is sufficient but not greater than necessary to support the goals of justice, including to reflect the seriousness of the offense, to afford adequate deterrence to future criminal conduct, and also to protect the public from further crimes by you.

R. Vol. III at 27. Immediately following this discussion, the district court stated that Johns's sentence would "provide" him with additional "opportunities" for rehabilitation that he should exercise his "right" to "take advantage of":

> But also to provide you with the education and training and support that you need when you get out to make better decisions. *Only you can make that decision*. The federal system will provide you with more opportunities to educat[e] yourself and to build a foundation that you can rely upon when you get out, sir, and *I encourage you to take advantage of those*.

Id. (emphases added). Thus, the district court clarified that rehabilitation was not a *basis* for Johns's sentence; rather, it was just an *option* that Johns had the "right" to accept or reject.[1] *Id.* Throughout the 27 years Johns was in custody, the court noted

[1] Johns characterizes the district court as stating that it *had* to impose his sentence because of the improper purpose of rehabilitation. The record does not support such a reading. Instead, as we explain, the district court merely encouraged

that Johns had exercised his "right" to "decline[] to take advantage of" the state services offered to him. *Id.* With that in mind, the court "encourage[d] [Johns] to take advantage" of federal resources, stating, "Only [he] can make that decision . . . . [O]nly [he] can take advantage of them." *Id.*

And that encouragement did not necessarily indicate that the court "may have calculated the length of [the] sentence to *ensure* that [he] receive certain rehabilitative services." *Tapia*, 564 U.S. at 334–35. In fact, the Supreme Court and this Court have made clear: a sentencing court does not err when "discussing the opportunities for rehabilitation within prison." *Id.* at 334; *see Naramor*, 726 F.3d at 1170 (explaining that district courts can "proper[ly]" comment on rehabilitation while "recommending treatment in prison").

That the district court spoke about rehabilitation following its discussion of the proper § 3553(a) factors does not automatically constitute error. Especially where, as here, the court clarified that it wanted to encourage a defendant to take advantage of rehabilitative "opportunities" in federal prison. R. Vol. III at 27. The district court's *full* dialogue indicates that the court discussed rehabilitation in the context of providing an additional benefit to Johns rather than being "part" of the reason for imposing or lengthening Johns's sentence. *Thornton*, 846 F.3d at 1115.

On that note, not only could the district court make statements "recommending treatment in prison," but it could also respond to Johns's motion for a downward

---

Johns to exercise his right in participating in rehabilitation. The sentence did not come about through rehabilitation. It was the other way around. The court clarified that rehabilitation could come about as a result of the sentence.

variance that was based on his need for rehabilitation. *Naramor*, 726 F.3d at 1170. Recall that Johns filed a memorandum to the district court arguing that what he "need[ed] more than anything [was] comprehensive, long-term substance and abuse and mental health treatment." R. Vol. I at 52. He wanted "structure." *Id.* at 51. And to get that structure, Johns requested "much needed vocational training" available in federal prison. *Id.*

He got the opportunity he asked for. At sentencing, Johns, the government, and the district court spoke in depth about Johns's request for rehabilitation. *See* R. Vol. III. at 10 ("[Johns is] deserving a punishment, without question, but he's also deserving of compassion and treatment and stability and structure."); *id.* at 21 ("[H]e just wants the Court to knock seven years off the guideline for reasons that are not supported by the record here."); *id.* at 26 ("I disagree also that you have shown that you can do well with structure."). As a result, the district court had to respond to and comment on Johns's request for rehabilitation.

And in fashioning a sentence, the district court "clearly rel[ied] on factors other than the need for prison rehabilitation programs." *Naramor*, 726 F.3d at 1169; *see* R. Vol. III at 25 ("Certainly, the [c]ourt considers that and considers the mental health issues that have been raised and there was a very thorough evaluation done of you. Those are a few of the many factors in your particular case with your particular facts and history that the [c]ourt considers and are required to consider under 18 USC 3553(a)(1) through (7)."); *see id.* at 28 ("I have considered the Sentencing Guideline

applications and the factors set forth in 18 USC 3553(a)(1) through (7), including the finding that you are a career offender under Sentencing Guideline Section 4b1.1.").

In sum, the district court did not impose or lengthen Johns's sentence based on rehabilitation. Instead, it encouraged Johns to take advantage of rehabilitation in prison, partly as a response to Johns's motion for a downward variance. No *Tapia* error occurred because the district court could "properly [] address" Johns "about these important matters." 564 U.S. at 334. Thus, no error, let alone a plain error, occurred.

In response, Johns makes several arguments attempting to mischaracterize the record. He starts by strictly construing the district court's statements, reasoning that the court imposed or lengthened his sentence for the purpose of rehabilitation. In relevant part, the district court stated:

> [T]hose are things that I also have to consider in fashioning a sentence that is appropriate for your particular situation and is sufficient but not greater than necessary to support the goals of justice . . . . *But also to* provide you with the education and training and support that you need when you get out to make better decisions.

R. Vol. III at 27 (emphasis added). Johns argues that the court's placement of its "[b]ut also to" language follows the factors the court considered in fashioning a sentence. *Id.* And so, the logic goes, the language "[b]ut also to" refers to fashioning a sentence based on rehabilitation, thereby creating a *Tapia* error.

But as explained above, context clarifies that the district court did not use rehabilitation as a "ground[]" for Johns's sentence. *Thornton*, 846 F.3d at 1115. Indeed, the court's discussion clarified that in terms of rehabilitation, Johns had the

"right" to take it or leave it. R. Vol. III at 27. And the court encouraged Johns to "take advantage of" it. *Id.* ("Only you can make that decision . . . . The federal system will provide you with more opportunities to educat[e] yourself and to build a foundation that you can rely upon when you get out, sir, and I encourage you to take advantage of those."). Not to mention, Johns, the government, and the district court each spoke at length about Johns's motion for a downward variance based on rehabilitation. *See, e.g.*, R. Vol. III at 10, 21, 26. Taken together, the record indicates that rehabilitation was not a basis or "part" of creating Johns's sentence; rather, it was an additional benefit that the court encouraged Johns to take advantage of in response to Johns's recidivism and variance motion. *Thornton*, 846 F.3d at 1115.

Next, Johns replies that the record provides no indication that the district court's discussion about rehabilitation was made in response to Johns's motion for a downward variance—a motion that was based on his need for rehabilitation. But the district court did not need to signpost exactly where its response to Johns's motion and its § 3553(a) analysis each started and ended. After all, we do not "demand that the district court 'recite any magic words' to show us that it fulfilled its responsibility to be mindful of the [§ 3553(a)] factors that Congress has instructed it to consider." *United States v. Kelley*, 359 F.3d 1302, 1305 (10th Cir. 2004) (citation omitted).

That said, however, the context leading up to the court's § 3553(a) analysis—namely, Johns's motion and the extensive discussion at sentencing about that motion—indicates that the court considered rehabilitation partially as a response to

Johns's motion. And the court's clarifications that Johns had the encouraged option of rehabilitation and that the court "considered the Sentencing Guideline applications and the factors set forth in 18 USC 3553(a)(1) through (7)" clearly show that no *Tapia* error occurred. As this Court has recognized before, "there is no *Tapia* error when a district court addresses rehabilitation merely to refute an offender's argument that in-prison treatment justifies a lesser sentence." *Thornton*, 846 F.3d at 1113. The district court did just that here.

It is true that a *Tapia* error can occur even when the district court provides other permissible purposes to fashion a sentence. But here, the context surrounding Johns's motion and the district court's clarifications indicate that the court did *not* "go[] further and ground[] [Johns's] sentence, in part, on the perceived benefit to the offender of providing prison-based rehabilitation." *Id.* The mention of rehabilitation does not in itself make it become "part" of a sentence, *id.* at 1115, where, as here, the sentence was based on nothing more than the § 3553(a) factors and the court encourages a defendant to take advantage of the rehabilitative services partially in response to a motion for a downward variance, *see Tapia*, 564 U.S. at 334.

Lastly, Johns points to another portion of the sentencing transcript where the district court summed up its reasons for imposing his sentence:

> And I have spent a lot of time thinking about *all of these factors* and the Court does feel that a sentence within the guideline range is appropriate in this case based on *all of the factors that the Court has considered* and all of the information and argument that have been presented to the Court.

R. Vol. III at 28 (emphases added). Because these statements follow the district court's discussion about rehabilitation, Johns reasons that the district court's reference to "all of these factors" and "all of the factors that the [c]ourt has considered" show that the court imposed a longer term of imprisonment due to the "factor[]" of rehabilitation. *Id.* Not so.

Again, the court only spoke about rehabilitation as an additional benefit of Johns's sentence, not as a factor of his sentence. With that in mind, we read the district court's general statements to refer to the other considerations that supported Johns's high-end Guidelines sentence. In particular, the court relied on Johns's extensive criminal history and his abuse of trust of a younger family member. Regardless, as with the district court's other statements, the phrases "all of these factors" and "all of the factors that the [c]ourt has considered" are ambiguous at best. *Id.* The court did not identify whether "these factors" include rehabilitation. *Id.* Therefore, no error occurred. And even if one did, the ambiguity here would not make it plain. *See United States v. Robertson*, 946 F.3d 1168, 1173 (10th Cir. 2020).

B.

Johns next argues that the district court plainly erred by imposing special conditions on his supervised release because they were based in part on retribution. Retribution, "the first purpose listed in § 3553(a)(2)," *Tapia*, 564 U.S. at 326, includes three considerations: "seriousness of the offense," "respect for the law," and "just punishment for the offense," 18 U.S.C. § 3553(a)(2)(A). Those "[r]etributive considerations may not be reasons for a special condition of supervised

release." *Benvie*, 18 F.4th at 671. Recognizing this, Johns asserts that the district court committed plain error by relying on retribution to impose two special conditions.

We hold that the district court did not err by relying on retribution in imposing the two special conditions on his supervised release. To understand why, we walk through the district court's step-by-step process.

To start, 18 U.S.C. § 3571 allows a district court to impose a fine as part of a criminal sentence. For guidance, 18 U.S.C. § 3572(a) establishes factors that help a court decide "whether to impose a fine," and if so, "set the amount." *United States v. Basurto*, 834 F.3d 1109, 1114 (10th Cir. 2016). Given Johns's lack of "financial resources," 18 U.S.C. § 3572(a)(1), the court determined he could not pay "a fine or a portion of a fine." R. Vol. III at 34.

Because Johns could not pay a fine, the sentencing statutes directed the district court to look to the Sentencing Guidelines for guidance. *See* 18 U.S.C. §§ 3553(a), 3572(a). The Guidelines required the district court to "consider alternative sanctions in lieu of . . . the fine," while keeping in mind that the court "must still impose a total combined sanction that is punitive." U.S.S.G. § 5E1.2(e). At that point, the district court could impose "any additional sanction not proscribed by the guidelines." *Id.* The court chose "community service," which "is the generally preferable alternative in such instances." *Id.* And it chose to make Johns reside in a residential reentry center for up to 180 days, which the guidelines do not proscribe. *See id.* The court

then "conclude[d] that the total combined sanction, with these special conditions, [was] sufficiently punitive." R. Vol. III at 34; *see* U.S.S.G. § 5E1.2(e).

Thus, the court complied in every respect with the sentencing statutes and Guidelines. No error occurred. Johns identifies no Supreme Court or Tenth Circuit authority that shows that compliance with U.S.S.G. § 5E1.2(e) constitutes a *Tapia* error or is otherwise unlawful. Neither *Tapia* nor our precedent reach the question of whether a sentencing court can impose community service or time in a residential reentry center in lieu of a fine. Because the district court did not err in imposing Johns's supervised release, we need not determine whether Johns can prove that the alleged error was plain. *Mendiola*, 696 F.3d at 1036.

Irrespective of the court's compliance, Johns argues that the imposition of fines is retributive, and that any special condition imposed "in lieu of" a fine must necessarily be retributive as well. But Johns's logic can only go so far. That is because we have the district court's explanation for why it imposed the special conditions. *Cf. Benvie*, 18 F.4th at 670–71 (finding plain error when a district court imposed special conditions of supervised release "without adequate explanation at sentencing"). And the court's explanation did not include retribution.

Rather, the district court relied on rehabilitation in imposing supervised release, which again, "is proper." *Naramor*, 726 F.3d at 1170. Specifically, the court imposed the "residential reentry center" condition because Johns had "no solid release plan." R. Vol. III at 30. Next, it imposed the "community service" condition to afford him "the opportunity to positively contribute to [his] community." *Id.* at

31–32. Both conditions concern Johns's "correctional needs." *United States v. Mike*, 632 F.3d 686, 692 (10th Cir. 2011) (requiring district courts to make any imposed special conditions "reasonably relate[] to at least one" of the § 3553 factors besides retribution, such as "correctional needs"); *see* 18 U.S.C. § 3583(d)(1). The conditions did not relate to the "seriousness of the offense," "respect for the law," or "just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).[2]

Lastly, Johns points to the district court's conclusion that "the total combined sanction, with these special conditions, [was] sufficiently punitive." R. Vol. III at 34. He argues that if the sanction and the special conditions are "punitive," then his sentence must also be for "retributive purposes." But the logic does not pass muster for at least two reasons.

First, the terms "punitive" and "retributive" are not synonymous. "Punitive" is broader. It means "[i]nvolving or inflicting punishment." *Punitive*, Black's Law Dictionary 1270 (8th ed. 2004). And "[p]unishment serves several purposes[.]" *United States v. Brown*, 381 U.S. 437, 458 (1965). Not only can punishment be "retributive" in nature; it can also be "rehabilitative, deterrent—and preventive." *Id.* It then "would be archaic to limit the definition of 'punishment' to 'retribution.'" *Id.* Accordingly, just because a court imposes a "punitive" sanction does not mean that the sanction serves "retributive" purposes.

---

[2] Relatedly, Johns argues that, besides improper retributive goals, the district court provided no other individualized explanation as to why community service or time in a residential reentry center might be specifically important in Johns's case. As stated, that is simply not true.

Second, the district court complied with U.S.S.G. § 5E1.2(e), which requires courts to "impose a total combined sanction that is punitive." U.S.S.G. § 5E1.2(e). Because a court does not err by following Guidelines that remain good law in the absence of a Supreme Court or Tenth Circuit opinion saying otherwise, no error occurred here.

III.

For these reasons, we AFFIRM.

Entered for the Court

Allison H. Eid
Circuit Judge