Not For Publication in West's Federal Reporter

United States Court of Appeals
For the First Circuit

Nos. 20-1318
20-1398

UNITED STATES,

Appellee,

v.

BYRON CARDOZO,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Allison Burroughs, U.S. District Judge]

Before

Thompson, Selya, and Hawkins,*

Circuit Judges.

Marie Theriault for appellant.

Karen Eisenstadt, Assistant United States Attorney, with whom Nathaniel R. Mendell, Acting United States Attorney, was on brief, for appellee.

August 25, 2021

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* Of the Court of Appeals for the Ninth Circuit, sitting by designation.

PER CURIAM. Appellant Byron Cardozo ("Cardozo") pled guilty to cyberstalking and making interstate threats in violation of 18 U.S.C. § 2261A(2)(B) and 18 U.S.C. § 875(c). In these sentencing appeals, Cardozo contends that the district court imposed a sentence that was procedurally and substantively unreasonable, and that the court also erred by ordering restitution for legal fees and expenses incurred by one of his victims. We affirm the sentence; the restitution appeal is premature, and we therefore dismiss it without expressing an opinion on the merits. The parties are familiar with the facts, and we do not repeat them here.

We review Cardozo's sentence to ensure the district court did not commit any procedural errors such as "failing to consider the section 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." United States v. Gierbolini-Rivera, 900 F.3d 7, 12 (1st Cir. 2018). Cardozo's claim of procedural sentencing error is without merit. In making its individualized sentencing determination, the district court clearly stated that it considered the section 3553(a) factors, and even specifically listed several of these factors, including the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence to reflect the seriousness of the offense and provide adequate deterrence. Such

statements are entitled to "significant weight," especially where, as here, "the record . . . offers no reason to doubt the judge's word." United States v. Santiago-Rivera, 744 F.3d 229, 233 (1st Cir. 2014). "That the district court did not explicitly mention [mitigating factors argued by the defendant] during the sentencing hearing suggests they were unconvincing, not ignored." United States v. Lozada-Aponte, 689 F.3d 791, 793 (1st Cir. 2012).

Nor is the court's explanation inadequate. The Supreme Court held in Chavez-Meza v. United States that an explanation is adequate if it "satisf[ies] the appellate court that [the court] has considered the parties' arguments and has a reasoned basis for exercising his own legal decision-making authority." 138 S. Ct. 1959, 1963-64 (2018). In an ordinary case with a straightforward application of the Guidelines, this standard is not "onerous" and the court's "reasoning can often be inferred by comparing what was argued by the parties or contained in the pre-sentence report with what the judge did." United States v. Robles-Alvarez, 874 F.3d 46, 52 (1st Cir. 2017).

It is apparent from the record that the court here heard and considered the various pros and cons of the sentencing and mitigating factors but ultimately weighed them more heavily in favor of the government. Although Cardozo attempted to distinguish himself from a typical offender on several grounds, the government offered equally compelling reasons to reject these

arguments. With respect to Cardozo's argument that his sentence exceeded the nationwide average for cyberstalking, he presented no evidence that those defendants were similarly situated to him. United States v. Rodriguez-Adorno, 852 F.3d 168, 177 (1st Cir. 2017). Moreover, the sentencing court has no duty to "address every argument that a defendant advances in support of his preferred sentence," particularly arguments that are not even "potentially forceful." United States v. Rivera-Morales, 961 F.3d 1, 19, 20 (1st Cir. 2020).

Cardozo also argues that the sentence is substantively unreasonable, partially based on his arguments of "overstated criminal history category and the overall circumstances of [his] background" but also due to the "unforeseen and unprecedented global pandemic." His first argument is subsumed within the procedural argument discussed above, as this was a factor the court considered in connection with section 3553(a).[1] The second refers to the court recommending the residential drug abuse program ("RDAP"), in which the court notes "if he accepts and completes the RDAP program, he will be considered for the Bureau of Prisons

[1] To the extent Cardozo alludes to other arguments about his criminal history that he did not raise below, we agree with the government that they are waived for a lack of adequate development. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

alternative community placement program." Due to Covid-19, Cardozo has not yet been able to participate in the RDAP program.

Nothing in the record indicates that the recommendation to RDAP factored into the length of the sentence imposed, and post-sentencing developments are rarely appropriate for our consideration on direct appeal. United States v. Mateo, 271 F.3d 11, 15 (1st Cir. 2001). This is especially the case where restrictions caused by the pandemic are constantly changing and the current status of the RDAP program is not in the record.

In sum, Cardozo's mid-range Guidelines sentence does not lie "outside the expansive boundaries that surround the universe of reasonable sentences." United States v. Fuentes-Moreno, 954 F.3d 383, 396 (1st Cir. 2020). We find the sentence to be substantively reasonable.

Cardozo's restitution appeal is premature. At the time of sentencing, the district court did not set the amount of restitution, and the final judgment indicates restitution is "to be determined." Although the court later entered an order on restitution, the judgment was not amended nor was a further notice of appeal filed pertaining to the restitution order. "[A] defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order"; a notice of appeal filed after the initial judgment is insufficient and does not "spring forward" to cover the later

restitution award. Manrique v. United States, 137 S. Ct. 1266, 1272, 1274 (2017).

Because the final judgment was never amended in this case, there is no final restitution order from which the defendant may appeal. 18 U.S.C. § 3664(o)(1)(B) ("sentence that imposes an order of restitution is a final judgment"). We dismiss this portion of the appeal as premature and direct the district court to file an amended judgment incorporating the restitution award, at which point Cardozo may file a notice of appeal from the amended judgment if he so choses.

AFFIRMED in part, DISMISSED in part.