FILED
United States Court of Appeals
Tenth Circuit

September 29, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CAMERON TAEVON JONES,

Defendant - Appellant.

No. 20-6159
(D.C. No. 5:20-CR-00011-F-1)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Defendant-appellant Cameron Taevon Jones pleaded guilty to one charge of being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and the district court sentenced him to the statutory maximum of 120 months in prison. He now appeals the advisory sentence calculation under the United States Sentencing Commission Guidelines. Specifically, he argues the district court improperly considered a prior state controlled-substances conviction to calculate his

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

base offense level under United States Sentencing Commission, *Guidelines Manual*, §2K2.1(a) (Nov. 2018). If this was an error as Mr. Jones suggests, it was harmless. Therefore, we affirm his sentence.

I. BACKGROUND

Mr. Jones has a long criminal history spanning approximately thirty years. As relevant here, Mr. Jones has been convicted of (1) possession of cocaine with the intent to distribute in the United States District Court for the Western District of Oklahoma and (2) possession of controlled dangerous substance marijuana with intent to distribute in Oklahoma state court. Due to these and other convictions, Mr. Jones has spent most of his adult life in prison.

On August 18, 2019, while Mr. Jones was on supervised release from his federal conviction for possessing cocaine with the intent to distribute, the police conducted a traffic stop of a vehicle he was driving. The police arrested Mr. Jones after he admitted he did not have a valid driver's license. Then, Mr. Jones allowed the police to search his car and informed them there was a gun inside. The officers found a stolen 5.56mm AR-style rifle that did not have ammunition in it, as well as an AK-style magazine loaded with 30 rounds of 7.62mm x 39mm ammunition.

Based on this conduct, the district court revoked Mr. Jones's term of supervised release. Mr. Jones was also charged in a one-count indictment with being a felon in possession of a firearm and ammunition under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Mr. Jones pleaded guilty to the offense without a plea agreement.

Before the sentencing hearing, the Probation Office prepared a presentence investigation report ("PSR")[1] that included an advisory sentence calculation under the Guidelines. The PSR reflected a base offense level of twenty-four pursuant to USSG §2K2.1(a)(2) because Mr. Jones had two prior felony convictions for controlled substance offenses: one in federal court and one in state court. Mr. Jones objected to this base offense level calculation. He argued the definition of a controlled substance offense in USSG §4B1.2, which is the definition that applies to §2K2.1(a), includes only state offenses that control federally controlled substances. Under this interpretation, a state offense would not qualify as a "controlled substance offense" for federal sentencing purposes unless all the substances controlled by the state statute are also controlled by federal law. Mr. Jones argued it was improper to include the Oklahoma state conviction in the base offense calculation because the Oklahoma law controlled more than federally controlled substances. With only one prior *federal* controlled substance offense, Mr. Jones argued his base offense level would be twenty under the Guidelines, not twenty-four.

At the sentencing hearing, the district court rejected Mr. Jones's argument and accepted the calculation reflected in the PSR. This left Mr. Jones with a base level of twenty-four and a total offense level of twenty-three after applicable adjustments. With a criminal history category of IV, the district court adopted a Guidelines range of 70–87 months. Then, the district court considered the 18 U.S.C. § 3553(a) factors

[1] There was an initial PSR dated August 18, 2020, and a revised PSR dated September 9, 2020. We refer to the revised PSR throughout this order.

as required and ultimately sentenced Mr. Jones to an above-Guidelines, maximum sentence of 120 months based on Mr. Jones's history and characteristics, the need to incapacitate him, and the need to impose just punishment. The district court noted that due to these considerations, it would have imposed the same sentence "regardless of the outcome on the issue of the application of [G]uideline[s] section 2K2.1(a)(2)." ROA Vol. 3 at 23.[2]

On appeal, Mr. Jones challenges the district court's interpretation of the definition of a "controlled substance offense" in USSG §2K2.1(a) and argues his state conviction should not be included. Thus, according to Mr. Jones, his base offense level should be twenty and his total offense level should be nineteen, resulting in a Guidelines range of 46–57 months instead of the 70–87 months the district court calculated. He also argues the calculation error was not harmless.

II. DISCUSSION

When reviewing a district court's sentence, we "review the procedural reasonableness of [the] defendant's sentence using the familiar abuse-of-discretion standard of review, under which we review de novo the district court's legal conclusions regarding the Guidelines and review its factual findings for clear error." *United States v. Sanchez-Leon*, 764 F.3d 1248, 1262 (10th Cir. 2014) (internal quotation marks omitted) "If we find a procedural error, resentencing is required only if the error was not harmless." *United States v. Porter*, 928 F.3d 947, 963 (10th Cir.

[2] The first page of ROA Vol. 3 is marked as page 7. This citation is to the page number as marked and not the actual page number.

2019) (internal quotation marks omitted). "Procedural error is harmless if the record viewed as a whole clearly indicates the district court would have imposed the same sentence had it not relied on the procedural miscue(s)." *Sanchez-Leon*, 764 F.3d at 1262 (internal quotation marks omitted). For example, "a highly detailed explanation for the sentence imposed by a district court 'could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines.'" *United States v. Gieswein*, 887 F.3d 1054, 1061 (10th Cir. 2018) (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016)). In contrast, "[a]n error is not harmless if it requires us to speculate on whether the court would have reached [the same] determination absent the error." *Sanchez-Leon*, 764 F.3d at 1262 (internal quotation marks omitted). The Government bears the burden of demonstrating harmlessness by a preponderance of the evidence. *Id.*

There is a circuit split among our sibling courts about whether a state offense is a "controlled substance offense" under USSG §§2K2.1(a) and 4B1.2(b) when the state law controlled substances that were not controlled under federal law. Specifically, the Second, Fifth, and Ninth Circuits have held that for a state offense to qualify as "a controlled substance offense" for purposes of USSG §2K2.1(a), the state offense can only regulate substances controlled under federal law. *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793–94 (5th Cir. 2015); *see also United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012) (considering USSG §2L1.2 and concluding the term "controlled substance" in the Guidelines refers to a substance listed in the Controlled

Substances Act). In contrast, the Fourth, Seventh, and Eighth Circuits have concluded a state conviction may qualify as a "controlled substance offense" for federal sentencing purposes even when the state statute of conviction controls substances not also controlled under federal law. *United States v. Henderson*, --- F.4th ---, 2021 WL 3817853, at *4 (8th Cir. Aug 27, 2021); *United States v. Ward*, 972 F.3d 364, 372–74 (4th Cir. 2020); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020).[3] This court has not directly addressed the issue.[4] We need not reach the question now, however, because even if the district court improperly considered Mr. Jones's state conviction when calculating the base offense level, any presumed error was harmless.

The Guidelines are not mandatory but are to be considered as a factor for determining a sentence in addition to the factors listed in 18 U.S.C. § 3553(a). *See Kimbrough v. United States*, 552 U.S. 85, 90 (2007) (citing U*nited States v. Booker*, 543 U.S. 220, 244 (2005)). Accordingly, an error in calculating the Guidelines range is harmless when the district court thoroughly explains the sentence is based on

[3] The Sixth and Eleventh Circuits have also analyzed the issue similarly in unpublished orders. *United States v. Howard*, 767 F. App'x 779, 784 n.5 (11th Cir. 2019) (unpublished); *United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017) (unpublished).

[4] Although we have not addressed this issue head-on, we have considered the meaning of "counterfeit substance" in USSG §4B1.2(b), holding it did not reference the federal statutory definition of counterfeit substance. *United States v. Thomas*, 939 F.3d 1121, 1125–28 (10th Cir. 2019). We have also addressed the definition of a "serious drug offense" in the Armed Career Criminal Act, 18 U.S.C. § 924, and determined it only includes offenses against state laws if they solely control federally controlled substances. *See United States v. Cantu*, 964 F.3d 924, 927 (10th Cir. 2020).

"'factors independent of the Guidelines.'" *Gieswein*, 887 F.3d at 1063 (quoting *Molina-Martinez*, 136 S. Ct. at 1347). That is the case here.

The district court set forth in detail the reasons for the above-Guidelines, maximum sentence of 120 months. In particular, the district court noted Mr. Jones's prior gang affiliation and his commission of serious crimes during his brief stints outside of prison. The district court also reminded the parties that at a revocation hearing four years earlier, it had found by a preponderance of the evidence that Mr. Jones had killed someone.[5] Based on this history, the district court determined, "[t]he sentencing factors that weigh most heavily are quite simply the need to impose just punishment and the need for incapacitation." ROA Vol. 3 at 19. And, because of Mr. Jones's extensive, prior criminal history, including the killing of another person, the court concluded "incapacitation is far and away the most salient sentencing factor." *Id.* Although the district court acknowledged that other factors like the seriousness of the felon-in-possession offense and the need for specific and general deterrence did not necessarily support the long sentence it imposed, it concluded Mr. Jones's violent criminal history did. Finally, the district court explained it would impose the same sentence "regardless of the outcome on the issue of the application of [G]uideline[s] section 2K2.1(a)(2)." *Id.* at 23.

[5] Mr. Jones takes issue with the district court's "focus" on its prior finding that Mr. Jones had killed someone because "there was no finding in this record" that he had done so. Aplt. Opening Br. at 10. However, as Mr. Jones notes, the district court heard evidence and made this finding at a prior revocation hearing. The district judge simply cited his prior finding when considering the history and characteristics of Mr. Jones. This was not an abuse of discretion.

In sum, the factors that drove the sentence imposed were the history and characteristics of Mr. Jones, the need for incapacitation, and the statutory maximum sentence—not the Guidelines range. To be sure, the district court's statement that the result would not change regardless of the outcome of the Guidelines calculation objection is not sufficient standing alone to show the error was harmless. *Gieswein*, 887 F.3d at 1062–63 ("Our court has rejected the notion that district courts can insulate sentencing decisions from review by making such statements."). But our examination of the record as a whole leaves no doubt that the district court did not consider the Guidelines determinative in light of its assessment of the § 3553(a) factors.

Thus, it is clear the district court imposed the maximum sentence because of "factors independent of the Guidelines."[6] *Id.* at 1063. "Under these circumstances, a remand would needlessly burden the district court and counsel with another sentencing proceeding, which . . . would produce the same result." *Id.* (internal quotation marks omitted). Therefore, any potential error in calculating the Guidelines range is harmless.

[6] Mr. Jones also argues that he did not get any benefit from pleading guilty. Instead, he received the maximum sentence possible despite accepting responsibility for the crime. But the district court properly applied the level-reduction for taking responsibility for the crime in the Guidelines calculation. Nothing about Mr. Jones's guilty plea, made in the absence of a plea agreement, bound the district court to sentence him within the advisory Guidelines. *See Booker*, 543 U.S. at 244.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the sentence.

Entered for the Court

Carolyn B. McHugh
Circuit Judge