FILED
United States Court of Appeals
Tenth Circuit

August 9, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN JOEL DEAN,

Defendant - Appellant.

No. 21-6029
(D.C. No. 5:20-CR-00061-JD-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

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

Defendant pled guilty to two counts of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). On February 24, 2021, Defendant appeared for sentencing. There, the district court calculated a base offense level of 17, with a criminal history category of III, resulting in a guideline range of 30 to 37 months' imprisonment. While Defendant advocated for a downward departure or variance based on "the full circumstances of [Defendant's] crimes, persistent and

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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.

deteriorating medical conditions, and family obligations," the district court declined Defendant's invitation and sentenced him to a low-end guideline sentence of 30 months' imprisonment, to be followed by 3 years of supervised release.

Defendant timely appealed. He argues his sentence is substantively unreasonable considering the totality of the circumstances, "most especially [Defendant's] myriad complicated and ongoing medical maladies." We exercise jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Though we are sympathetic to Defendant's medical conditions, the governing law requires us to affirm on the facts presented.

I.

We review the substantive reasonableness of a sentence for an abuse of discretion and will reverse only if the sentence imposed is "arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. DeRusse*, 859 F.3d 1232, 1236 (10th Cir. 2017) (quoting *United States v. Gantt*, 679 F.3d 1240, 1249 (10th Cir. 2012)). When a sentence is within the properly calculated guideline range, we presume that it is reasonable, but a defendant may rebut this presumption by showing that the sentence is "unreasonable when viewed against the other factors delineated in [18 U.S.C.] § 3553(a)." *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006). "[I]n 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 these rationally

available choices." *DeRusse*, 859 F.3d at 1236 (quoting *United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007)).

Here, Defendant does not contest that the district court sentenced him at the low-end of the properly calculated guideline range. He nonetheless attempts to rebut the presumption of reasonableness we afford the district court's judgment by pointing to his "panoply of medical conditions." It is undisputed that Defendant has significant medical issues, as evidenced by his 39 doctor appointments in the 10 months preceding his sentencing. But Defendant's medical conditions alone do not make a low-end guideline sentence unreasonable.

The district court carefully addressed the § 3553(a) factors, including Defendant's need for medical care, before pronouncing a guideline sentence. The court began by recognizing factors in Defendant's case that suggest "a significant sentence of imprisonment would be warranted," including the fact that Defendant's "criminal history has not been a thing of the long-ago past, and it has continued." The court emphasized that Defendant had several drug- and firearm-related convictions in the past four years but served no prison time. "[D]espite this string of events," the court explained "nothing has deterred [Defendant], and [he has] continued to violate the law." The court concluded that "the two felon-in-possession counts here, combined with [Defendant's] criminal history, indicate that the sentence imposed needs to account for the nature and circumstances of the offense, [] promote respect for the law, provide just punishment for the offenses, and [] protect the public from further crimes."

Thereafter, the court "balance[d] the needs of this case against other factors that [Defendant and his counsel] . . . put before [the court]." Specifically, the court explained that Defendant's "history and characteristics," his "role in [his family]," and his "need for medical care . . . indicate that a sentence on the bottom end of the advisory guideline range is warranted." But the court ultimately concluded that the mitigating circumstances did not deserve "excessive weight that would warrant a downward variance or a departure outside the advisory guidelines to a term of probation."

This balancing of the § 3553(a) factors was well within the district court's discretion. Essentially, Defendant asks us to "look with more favor on the facts surrounding his medical condition than the district court did," but as the reviewing court, this is not our role. *McComb*, 519 F.3d 1049. Despite Defendant's urging, we cannot reweigh the sentencing factors. *See United States v. Miller*, 978 F.3d 746, 755 (10th Cir. 2020). Ultimately, the district court's sentence was not "arbitrary, capricious, whimsical, or manifestly unreasonable." *DeRusse*, 859 F.3d at 1236 (quoting *Gantt*, 679 F.3d at 1249). "Indeed, the record in this case demonstrates that the district court's sentence was not only not arbitrary or capricious, it was meticulously and thoroughly reasoned." *Miller*, 978 F.3d at 756.

II.

For the reasons provided herein, we affirm Defendant's guideline sentence.

Entered for the Court

Bobby R. Baldock
Circuit Judge