

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JHON ALEXANDER MALLA-CALLE,

Defendant - Appellant.

No. 22-2074
(D.C. No. 2:21-CR-01491-MIS-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **MORITZ**, and **EID**, Circuit Judges.

Jhon Malla-Calle contends that his 48-month sentence for unlawful reentry is substantively unreasonable. Although this sentence is three times higher than the top end of Malla-Calle’s sentencing range under the United States Sentencing Guidelines (U.S.S.G. or the Guidelines), the district court justified its decision to vary upward based on several facts stemming from Malla-Calle’s prior state-court conviction for first-degree sexual abuse, including his lenient custodial sentence for that crime and that he had violated the terms of his probation for that crime. Finding no abuse of

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

discretion in the district court's balancing of the 18 U.S.C. § 3553(a) sentencing factors to arrive at the 48-month sentence, we affirm.

Background

Border-patrol agents apprehended Malla-Calle, an Ecuadorian citizen, at the Mexican border in July 2021. A few months later, Malla-Calle pleaded guilty to unlawful reentry without a plea agreement. *See* 8 U.S.C. § 1326(a). His presentence investigation report (PSR) listed one prior offense: New York first-degree sexual abuse based on a December 2014 incident in which Malla-Calle, after drinking alcohol and smoking marijuana, touched his four-year-old half-sister's vagina with his fingers and penetrated her vagina with his penis. The PSR noted that at the time of the incident, Malla-Calle reported not thinking clearly and not knowing that what he was doing was wrong. For this offense, Malla-Calle served just under one year in prison and was sentenced to a ten-year term of probation. As relevant here, the conditions of Malla-Calle's probation required him to commit no further crimes, seek sex-offender treatment, and refrain from unsupervised contact with children. However, adequate supervision could be provided by an adult who knew about Malla-Calle's conviction.

Nevertheless, Malla-Calle's probation was not actively supervised because he was promptly deported to Ecuador after being released from state prison. While in Ecuador, Malla-Calle married and had several children. He reported unlawfully returning to the United States in 2021 to financially support his growing family, to

escape crime in Ecuador, and to meet his father and be with family.

The PSR set Malla-Calle's offense level at 10: a base offense level of 8, plus 4 levels because he had been convicted of a prior felony, and a 2-level reduction for accepting responsibility. *See* U.S.S.G. §§ 2L1.2(a), 2L1.2(b)(2)(D), 3E1.1(a). The PSR then assigned Malla-Calle four criminal-history points because he not only served more than 60 days in prison for his prior felony, but also committed his current offense while on probation. *See id.* § 4A1.1(b), (d). That resulted in a criminal-history category of III, which combined with his base offense level of 10 to produce a Guidelines range of 10 to 16 months in prison. *See id.* ch.5, pt. A. The parties did not object to the PSR.

Prior to Malla-Calle's sentencing hearing, the district court informed the parties that it was considering an upward departure. Malla-Calle argued against a departure and asked the district court to impose a sentence within his Guidelines range. The government proposed a 21-month sentence under application note six to § 2L1.2(b)(2), arguing that the length of his sentence for his prior felony did "not reflect the seriousness" of that offense. However, at Malla-Calle's first sentencing hearing, the government sought a continuance so it could instead argue for an upward variance. The district court then clarified that it had been considering an upward variance, and not a departure, all along.¹ So over Malla-Calle's objection, the district

¹ "A departure is a deviation from the calculated [G]uidelines range based on the enumerated departure provisions in the Guidelines," whereas "a variance occurs when the district court deviates from the [G]uidelines range based on the sentencing

court continued the hearing and allowed both parties to brief the upward-variance issue.

The government ultimately moved for an upward variance to 48 months, arguing that such a sentence was proper in light of Malla-Calle's prior felony and the § 3553(a) factors. Malla-Calle, on the other hand, argued that a sentence within his Guidelines range, or at least a sentence of the government's originally requested 21 months, would be sufficient and not greater than necessary to effectuate the § 3553(a) factors.² The district court agreed with the government and imposed a 48-month sentence, plus three years of supervised release.

Malla-Calle appeals.

Analysis

Malla-Calle argues that his sentence is substantively unreasonable. When faced with such a challenge, “we review the length of the sentence for an abuse of discretion.” *United States v. McCrary*, 43 F.4th 1239, 1249 (10th Cir. 2022). Under this standard, we ask “whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in [§ 3553(a)].” *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1215 (10th Cir. 2008) (quoting *United States v. Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007)). Although a within-the-

factors in [§ 3553(a)].” *United States v. Kaspereit*, 994 F.3d 1202, 1214 (10th Cir. 2021).

² Malla-Calle also renewed his objection that the first sentencing hearing should not have been continued to allow the government to move for an upward variance. The district court rejected this argument at Malla-Calle's second sentencing hearing, and Malla-Calle does not challenge that ruling on appeal.

Guidelines sentence creates a presumption of reasonableness on appeal, no such presumption applies when, as here, the district court imposed a sentence above the Guidelines range. *See id.* at 1216. That said, we must nevertheless “give due deference to the district court’s decision that the § 3553(a) factors, on [the] whole, justify the extent of the variance.”³ *Id.* (quoting *United States v. Munoz-Nava*, 524 F.3d 1137, 1146 (10th Cir. 2008)).

Here, the district court began by noting Malla-Calle’s evidence in support of a lower sentence, including his assertions that he took medications and attended therapy for depression and anxiety. The district court further considered Malla-Calle’s statement—not supported by official documentation—that he “went to programs and talks about sex abuse” while in Ecuador. R. vol. 4, 51. It also reviewed a letter from Malla-Calle’s wife; according to the district court, though the letter stated that Malla-Calle had never abused their two daughters, it did not affirmatively profess specific awareness of Malla-Calle’s prior felony. And rejecting Malla-Calle’s argument that there was no relationship between his unlawful reentry and his prior felony, the district court found a “meaningful relationship” between the two because Malla-Calle’s prior felony involved “a young family member” and he returned to the

³ Malla-Calle asserts, without support, that “there is nothing in this case to suggest that the sentencing court . . . was in a better position to assess [his] history” than we are. Aplt. Br. 14. But as the government points out, “the deference afforded to the district court’s sentence does not wax or wane based on the nature and extent” of the sentencing proceedings. Aplee. Br. 7. Indeed, “[t]he uniqueness of the individual case . . . does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.” *Gall v. United States*, 552 U.S. 38, 52 (2007). We adhere to that deferential abuse-of-discretion standard here.

United States while on probation for that crime, in part, “to be with his family.” *Id.* at 52.

The district court then specifically addressed the § 3553(a) factors. As to Malla-Calle’s history and characteristics, *see* § 3553(a)(1), it emphasized his prior felony conviction for sexually abusing his four-year-old half-sister while under the influence of drugs and alcohol, as well as his contemporaneous statement that he did not know what he was doing was wrong. The district court also explained that by unlawfully reentering the United States, Malla-Calle had violated the conditions of his probation for that crime. It further observed that Malla-Calle had likely violated his probation by failing to complete sex-offender treatment and having unsupervised contact with children.

The district court then considered the need for a sentence that would adequately deter criminal conduct, protect the public, and provide just punishment for the offense. *See* § 3553(a)(2)(A)–(C). It expressed concern that a lenient sentence would not adequately deter criminal conduct because Malla-Calle’s prior lenient sentence for sexually abusing his four-year-old half-sister had not deterred him from unlawfully returning to the United States or from violating his probation. It further found a need to protect the public, and children in particular, because Malla-Calle had harmed a child and reported not knowing that what he had done was wrong. And the district court stated that a sentence above the Guidelines range provided just punishment for the offense because Malla-Calle unlawfully reentered the United States “after having committed a very serious crime” here. R. vol. 4, 54.

Next, the district court looked at the kinds of sentences available and Malla-Calle's Guidelines range. *See* § 3553(a)(3)–(4). Although Malla-Calle's Guidelines range was 10 to 16 months, the district court concluded that a sentence within this range was “far too low given the serious nature of [Malla-Calle's] history and his conduct after conviction.” R. vol. 4, 55. The district court also determined that a higher sentence would not create unwarranted sentencing disparities, *see* § 3553(a)(6), explaining that Malla-Calle was not an “average or median reentry defendant” because he was “a child sex offender who has . . . stated that he did not understand sex with a young relative was wrong and violated his sex[-]offender probation by coming back in[to] the United States, in part, to be with his family,” R. vol. 4, 55. The district court further reasoned that many defendants with similar criminal histories have served longer sentences for those prior offenses. And it found “that any disparity” was, in any event, “warranted by the particular[s]” of this case. *Id.* Based on all these considerations, the district court sentenced Malla-Calle to 48 months in prison.

Challenging this analysis on appeal, Malla-Calle first contests the district court's factual findings that he likely violated his probation by failing to complete sex-offender treatment and having unsupervised contact with children. But we discern no clear error. *See United States v. Gordon*, 710 F.3d 1124, 1138 n.17 (10th Cir. 2013) (noting that clear-error review of factual findings requires “defendant to show that the findings are more than possibly or even probably wrong but pellucidly so” (quoting *United States v. Ludwig*, 641 F.3d 1243, 1247 (10th Cir. 2011))).

Although Malla-Calle reported attending programs about sex abuse, he provided no documentation confirming as much. So we cannot say that the district court clearly erred in finding that Malla-Calle likely violated his probation by failing to complete sex-offender treatment.

Nor can we say that the district court clearly erred in finding that Malla-Calle likely violated his probation by having unsupervised contact with children. Critically, Malla-Calle himself told the district court at his second sentencing hearing that he lived with his wife and children and that he was generally around children in the process of raising his own. On appeal, Malla-Calle implicitly suggests that his wife could have been supervising his contact with children, pointing to her letter professing awareness that he had made mistakes in the past. But the district court interpreted the letter's general reference to past mistakes as insufficient to show specific awareness of Malla-Calle's prior felony. And given the ambiguity of the word "mistakes," we cannot say the district court's interpretation was clearly erroneous. *See Gordon*, 710 F.3d at 1138 n.17. So because Malla-Calle's wife was unaware of his prior felony, she could not supervise his contact with children under the terms of his probation, and the district court did not clearly err in finding that Malla-Calle likely violated his probation by having unsupervised contact with children.

Turning to legal arguments, Malla-Calle next contends that his sentence is substantively unreasonable because it is three times longer than the top of his Guidelines range and also longer than what his Guidelines range would have been

had he received the maximum seven-year sentence for his prior felony. But as the government responds, to assess whether a sentence is substantively reasonable, we do not apply “a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.” *Gall*, 552 U.S. at 47. Instead, we apply the abuse-of-discretion standard, which requires us to consider “the extent of any variance from the Guidelines range” as merely one factor among “the totality of the circumstances.” *Id.* at 51. For example, we have affirmed a 22-year sentence as substantively reasonable even though the top of the defendant’s Guidelines range was three years, explaining that “a district court can vary from the [G]uidelines so long as it does not do so arbitrarily and capriciously.” *See United States v. Worku*, 800 F.3d 1195, 1198, 1207–08 (10th Cir. 2015).

Thus, that Malla-Calle’s sentence is three times longer than the top of his Guidelines range is not determinative. This remains true even though Malla-Calle correctly explains that his 48-month sentence exceeds the Guidelines range of 27 to 33 months that would have applied if he had received the maximum seven-year sentence for his prior conviction.⁴ *See id.* at 1208 (affirming 22-year sentence without regard for “whether the variance was 14 levels above the range under the

⁴ The maximum sentence for the sex offense was seven years. *See* N.Y. Penal Law § 130.65 (providing that sexual contact with person under 11 years old is class D felony); *id.* § 70.80(4)(a)(iii) (providing maximum sentence of seven years for class D felony). A prior sentence of that length would have increased the base offense level from 10 to 16 (with Malla-Calle’s criminal-history category remaining the same). *See* U.S.S.G. § 2L1.2(a), (b)(2)(A); § 3E1.1(a).

2012 guidelines or 31 levels above the range under the 2010 guidelines”). The question at hand is not whether the sentence is too high when compared to an actual or hypothetical Guidelines range; instead, the “keystone of our analysis” is “the adequacy of the [district] court’s consideration and explanation of the § 3553(a) factors.”⁵ *United States v. Barnes*, 890 F.3d 910, 916 (10th Cir. 2018).

Appearing to recognize as much, Malla-Calle next argues that the district court’s sentence created an unwarranted sentencing disparity. *See* § 3553(a)(6). In support, he asserts that the Guidelines exist to eliminate disparities and reiterates that “[a]ny other individual, having received the maximum state penalty for the same underlying offense, would fall in a [G]uideline[s] range” lower than his 48-month sentence. Aplt. Br. 18. But as the government responds, this is “just another spin on his argument that the Guidelines should be used to measure the reasonableness of a variance.” Aplee. Br. 15. And we have already rejected that argument. Malla-Calle further asserts that the district court created a disparity by focusing on his prior felony—he argues that “[t]he determination of similarly situated defendants should not be based upon similar prior convictions.” Rep. Br. 11. But this argument is also

⁵ The question at hand is likewise unaffected by the New York court’s rationale in sentencing Malla-Calle. We thus disregard Malla-Calle’s suggestion that the New York court, after weighing “the nature and circumstances of the crime” and his “history and character,” must have concluded that the typical sentence of two to seven years “would be unduly harsh.” Aplt. Br. 17–18 (quoting N.Y. Penal Law § 70.80(4)(c)). Even assuming the New York court was “intimately familiar with the facts” underlying Malla-Calle’s prior felony, the district court here was free to conduct its own § 3553(a) assessment when sentencing Malla-Calle for the instant offense. *Id.* at 18.

unavailing. This sentencing factor, after all, specifically directs the district court to avoid disparities “among defendants *with similar records who have been found guilty of similar conduct.*” § 3553(a)(6) (emphasis added). So the district court did not err by including Malla-Calle’s prior felony in its disparity analysis.

Malla-Calle alternatively contends that a disparity exists even if the district court properly considered his prior felony. To support this argument, Malla-Calle lists nine recent New Mexico reentry cases involving defendants with prior sex offenses, each of whom received a shorter sentence than he did. These statistics and comparisons, however, do not assist Malla-Calle because we know little to nothing about the conduct underlying those defendants’ prior convictions or the sentences they served for those prior convictions. Moreover, Malla-Calle overlooks the district court’s additional finding that any disparity here was “warranted by the particular[s]” of this case. R. vol. 4, 55. And Malla-Calle’s list of supposedly similarly situated defendants does not undermine the district court’s conclusion that any disparity here was warranted given the conduct underlying his prior felony, the lenient sentence he received for that felony, and his probation violations. In short, the district court did not abuse its discretion when assessing the disparity sentencing factor.

Malla-Calle next asserts that the district court abused its discretion in determining that a 48-month sentence was necessary to deter future criminal conduct and to protect the public. But on deterrence, the district court clearly explained that “another lenient sentence” would not adequately deter criminal conduct because Malla-Calle had likely violated the conditions of his probation while in Ecuador and

then committed a new crime by unlawfully reentering the United States. Malla-Calle's only counter to the district court's reasoning is reference to a certificate of criminal history that shows an absence of criminal charges and convictions in Ecuador during the six years he lived there after being deported. Yet the absence of formal criminal charges or convictions does not render the district court's rationale arbitrary or capricious. *See Worku*, 800 F.3d at 1207. As for protecting the public, the district court emphasized Malla-Calle's statement to law enforcement that at the time of the incident, he did not understand what he was doing was wrong. Malla-Calle faults the district court for ignoring his later acceptance of full responsibility. But the district court was not obligated to allow Malla-Calle's later acceptance to overcome its concern about his initial statement. So we see no abuse of discretion in the district court's assessment of the deterrence and protection factors.

Last, Malla-Calle asserts that the district court abused its discretion by focusing too much on his prior conviction and ignoring other aspects of the § 3553(a) factors that could have supported a lesser sentence. It is true that the district court focused heavily on Malla-Calle's prior conviction. But it properly tied its concerns to the § 3553(a) factors and explained its reasoning in detail; indeed, it expressly found a "meaningful relationship" between Malla-Calle's instant and prior convictions because the prior felony involved "a young family member" and Malla-Calle returned to the United States while on probation for that crime, in part, "to be with his family." R. vol. 4, 52. The district court also plainly stated that although it was accounting for Malla-Calle's "past behavior in imposing a sentenc[e] that will deter

[criminal conduct] and protect the public,” it was “sentencing [him] only for th[e] crime” of unlawful reentry. *Id.* Moreover, there is nothing improper about placing great weight on a defendant’s criminal history: The § 3553(a) factors specifically contemplate the consideration of criminal history in the holistic sentencing process. *See United States v. Gross*, 44 F.4th 1298, 1305 (10th Cir. 2022). And “[w]e have consistently observed that reentry of an ex-felon is a serious offense,” such that the details underlying that felon status are especially relevant. *United States v. Martinez-Barragan*, 545 F.3d 894, 905 (10th Cir. 2008). To the extent that Malla-Calle believes the district court “placed too much weight on some of the § 3553(a) factors and too little on others,” Aplt. Br. 20, he reaches beyond the scope of our review: “[W]e will ‘not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them’ anew,” *Gross*, 44 F.4th at 1305 (quoting *United States v. Smart*, 518 F.3d 800, 808 (10th Cir. 2008)).

In sum, although we “might reasonably have concluded that a different sentence was appropriate[, that] is insufficient to justify revers[ing] . . . the district court.” *Gall*, 552 U.S. at 51. Because “the balance struck by the district court among the factors set out in § 3553(a) is not arbitrary, capricious, or manifestly unreasonable, we must defer to that decision even if we would not have struck the same balance in the first instance.” *United States v. Sells*, 541 F.3d 1227, 1239 (10th Cir. 2008).

Conclusion

Finding no abuse of discretion in the length of Malla-Calle's sentence, we affirm.

Entered for the Court

Nancy L. Moritz
Circuit Judge