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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OCTAVIO MENDOZA, Jr., Defendant-Appellant.	No. 21-10367 D.C. No. 3:20-cr-00048-HDM-WGC-1 MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted November 18, 2022[**]
San Francisco, California

Before: LINN,[***] RAWLINSON, and HURWITZ, Circuit Judges.

Octavio Mendoza, Jr. (Mendoza) appeals his sentence and two supervised release conditions after pleading guilty to seven counts of distributing fentanyl, in

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and one count of possession with intent to distribute 40 grams or more of a mixture or substance containing a detectable amount of fentanyl in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(vi).

"We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. . . ." *United States v. Johnson*, 812 F.3d 757, 761 (9th Cir. 2016). We review de novo the district court's interpretation of the sentencing guidelines. *See id.* We review the district court's sentencing determination for an abuse of discretion. *See United States v. Brown*, 42 F.4th 1142, 1145 (9th Cir. 2022). If an asserted sentencing error would not affect the outcome, the error is harmless. *See United States v. Garcia-Guizar*, 234 F.3d 483, 491 (9th Cir. 2000), *as amended*.

1. The district court did not err in using the combined weight of the fentanyl and the added pain relievers to determine the appropriate sentence. *See Chapman v. United States*, 500 U.S. 453, 459 (1991) ("So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence.").

2. The district court did not impose a procedurally unreasonable sentence. "It would be procedural error for a district court to fail to calculate – or to calculate incorrectly – the Guidelines range; to treat the Guidelines as mandatory instead of advisory; to fail to consider the § 3553(a) factors; to choose a sentence based on

clearly erroneous facts; or to fail adequately to explain the sentence selected, including any deviation from the Guidelines range." *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Mendoza contends that the district court procedurally erred by considering the pending state charge to determine his sentence. Mendoza argues that the allegations from the state charge were not sufficiently reliable. To succeed, Mendoza must establish that any challenged information was "(1) false or unreliable, and (2) demonstrably made the basis for the sentence." *United States v. Vanderwerfhorst*, 576 F.3d 929, 935-36 (9th Cir. 2009) (explaining that reliance on unreliable information at sentencing may violate due process) (citation omitted). However, as Mendoza has now been convicted of the state charges, any error in relying on the allegations from the state charges has been rendered harmless. *See Garcia-Guizar*, 234 F.3d at 491.

Mendoza's *Kimbrough*[1] argument of procedural error is unpersuasive. Reversal under *Kimbrough* is warranted when the record reflects that the sentencing judge is unaware of his discretion to express and act upon a policy disagreement with the applicable guidelines. *See United States v. Henderson*, 649 F.3d 955, 958, 964 (9th Cir. 2011). There is no indication in this record that the sentencing judge disagreed with the applicable guideline range, or was unaware of

[1] *Kimbrough v. United States*, 552 U.S. 85 (2007).

his discretion to adjust Mendoza's sentence based on a policy disagreement with the applicable guideline.

3. The district court did not impose a substantively unreasonable sentence. We consider the totality of the circumstances when assessing substantive reasonableness. *See Carty*, 520 F.3d at 993. Normally, a sentence imposed within the recommended guidelines range will not be substantively unreasonable. *See United States v. Carter*, 560 F.3d 1107, 1120 (9th Cir. 2009). This is because a sentence within the recommended guidelines range is consistent with the Sentencing Commission's independent assessment of the appropriate sentence in the "mine run of cases." *United States v. Blinkinsop*, 606 F.3d 1110, 1116 (9th Cir. 2010) (citations omitted). The district court acted within its discretion in imposing the within-guidelines sentence in this case. *See id*.

4. We vacate the mental health supervised release condition (Special Condition 3) and remand to the district court for further consideration in light of our recent decision in *United States v. Nishida*, No. 21-10070, ____F.4th____, 2022 WL 16986253 at *5 (9th Cir. 2022).

5. The district court did not err in imposing the risk notification condition (Standard Condition 12). We have recently upheld this same condition. *See United States v. Gibson*, 998 F.3d 415, 423 (9th Cir. 2021).

AFFIRMED in part and VACATED and REMANDED in part.