

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 26, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROLANDO MAR-LOPEZ,

Defendant - Appellant.

No. 20-1261
(D.C. No. 1:19-CR-00217-RM-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **PHILLIPS, McHUGH**, and **MORITZ**, Circuit Judges.

Defendant-Appellant Rolando Mar-Lopez challenges his sentence as procedurally unreasonable based on the district court’s purported use of an impermissible factor at sentencing. Exercising jurisdiction under 28 U.S.C. § 1291, we reject Mar-Lopez’s argument and affirm his sentence.

BACKGROUND

Mar-Lopez is a citizen of Mexico without lawful immigration status in the United States. Since 2016, he has been removed from the country three times, but he has illegally reentered after each deportation.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

In August 2018, he pleaded guilty to child abuse and attempted child sexual assault in Colorado state court. He was sentenced to eight years' imprisonment.¹ A few months after that conviction, federal officials indicted Mar-Lopez for illegally reentering the country under 8 U.S.C. § 1326(a).

Mar-Lopez pleaded guilty to that charge through a Rule 11(c)(1)(C) plea agreement. This type of agreement binds a district court to a specific sentence or range if the district court accepts the agreement. Fed. R. Crim. P. 11(c)(1)(C). Under the proposed plea agreement, the parties agreed that Mar-Lopez's sentence for illegal reentry would be served consecutively to his state sentence and would not exceed six months. The district court accepted Mar-Lopez's guilty plea but deferred its decision on whether to accept the Rule 11(c)(1)(C) agreement.

At Mar-Lopez's sentencing hearing, the district court noted that Mar-Lopez's advisory guidelines range was 21 to 24 months. But it focused on whether the sentence imposed would run concurrently or consecutively to his state-prison sentence. The district court then gave the parties the chance to argue why it should accept the Rule 11(c)(1)(C) agreement.

Ultimately, the district court rejected the Rule 11(c)(1)(C) agreement, not wanting to restrict itself to a range of zero to six months of additional consecutive

¹ The victim, Mar-Lopez's stepdaughter, accused Mar-Lopez of digitally penetrating her when she was in first grade and fondling her breasts when she was in second grade. Mar-Lopez was also originally charged with child sexual assault by a person in a position of trust and sexual assault of a child under fifteen. But these charges were dismissed as part of his plea deal.

prison time. Though the district court gave Mar-Lopez the chance to withdraw his guilty plea under Fed. R. Crim. P. 11(c)(5), Mar-Lopez declined to do so and proceeded to sentencing that same day.

Given the conduct underlying his Colorado state conviction, the district court remained “concerned about the danger” Mar-Lopez would pose if he returned to the United States. R. vol. 4 at 109. But it noted that a 21- or 24-month sentence for his first immigration conviction would be “ridiculous.” R. vol. 4 at 108–10. So it gave him an “eight-month sentence, consecutive, and that’s it.” R. vol. 4 at 110.

The district court acknowledged that the sentence was only a two-month increase from the top end of the parties’ agreed imprisonment range in their proposed Rule 11(c)(1)(C) agreement. But the district court explained to Mar-Lopez:

I want it clear to you, that if you come back, you should not believe that you can have your lawyer work it out with the government lawyer, and that whatever gets worked out between the lawyers is going to be good enough. I want it to be clear to you that you are always at risk of a judge saying, “I don’t care what the lawyers think, I’m going to give him more time.” And I don’t need to send a consecutive 12-month sentence to send that message.

R. vol. 4 at 110–11. The district court emphasized to Mar-Lopez that “lawyers can’t save [him] from a Judge.” R. vol. 4 at 112.

The district court entered judgment. Mar-Lopez timely appealed.

DISCUSSION

I. Standard of Review

Because Mar-Lopez did not object to his sentence, we review for plain error. *United States v. Henson*, 9 F.4th 1258, 1289 (10th Cir. 2021).

Under plain-error review, we will reverse only when there is: “(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Malone*, 937 F.3d 1325, 1327 (10th Cir. 2019). The party seeking relief bears the burden of satisfying these elements. *United States v. Finnesy*, 953 F.3d 675, 684 (10th Cir. 2020).

II. Merits

“Section 3553(a) mandates consideration of its enumerated factors, and implicitly forbids consideration of factors outside its scope.” *United States v. Smart*, 518 F.3d 800, 803–04 (10th Cir. 2008). Thus, “[a] sentence is procedurally unreasonable if it is based on consideration of an impermissible factor.” *United States v. Story*, 635 F.3d 1241, 1244 (10th Cir. 2011).

Mar-Lopez argues that the district court impermissibly imposed an eight-month sentence—two months above the parties’ Rule 11(c)(1)(C) agreement—to convey that judges, not parties and their attorneys, decide the sentence. Mar-Lopez contends that the district court erred by relying on a factor outside those listed in 18 U.S.C. § 3553(a). And, as Mar-Lopez sees it, the district court’s sentence “punish[ed him] for the lawyers’ attempt to bind the district court into a particular sentence, through the use of a (c)(1)(C) plea agreement.” Opening Br. at 7.

The government counters that the district court was not punishing Mar-Lopez for reaching a plea agreement. Rather, it argues, the district court’s comments were simply meant to deter Mar-Lopez from illegally reentering the country again.

Our review of the record aligns with the government’s interpretation. The district court twice emphasized the need to dissuade Mar-Lopez from reentering because of the danger he posed to the public if he returned. R. vol. 4 at 109 (“I am concerned about the danger you pose to the public if you return”); R. vol. 4 at 113 (“I am giving an eight-month sentence[] due to the seriousness of the risk that is faced by the public, were he to return.”). The district court’s remarks demonstrate that its sentence focused on deterrence and protecting the public—designated § 3553(a) factors—not punishment for entering a Rule 11(c)(1)(C) plea agreement. 18 U.S.C. § 3553(a)(2)(B) and (C).

Even if the district court erred in its sentence, any error would not be plain. “An error is ‘plain’ if it is ‘clear or obvious’ under ‘current, well-settled law.’” *United States v. Thornburgh*, 645 F.3d 1197, 1208 (10th Cir. 2011) (quoting *United States v. Whitney*, 229 F.3d 1296, 1308–09 (10th Cir. 2000)). “In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue.” *United States v. Ruiz-Gea*, 340 F.3d 1181, 1187 (10th Cir. 2003).

Mar-Lopez cites no cases suggesting that the Supreme Court, this circuit, or any other circuit have tackled this issue. We recognize that the “the plain terms of a statute or regulation in certain instances can provide the basis for a plain-error finding.” *Finnesy*, 953 F.3d at 697. But taking the district court’s comments in context, we cannot conclude that § 3553(a)’s text so obviously prohibits the district court’s basis for sentencing that it would meet the second prong of plain-error

review. *Id.* In other words, Mar-Lopez has failed to carry his burden of establishing that the district court's error, assuming there was one, was plain.

Thus, we decline to reverse Mar-Lopez's sentence based on procedural unreasonableness.

CONCLUSION

For these reasons, we AFFIRM.

Entered for the Court

Gregory A. Phillips
Circuit Judge