

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 30, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENDALL BRENT SMITH,

Defendant - Appellant.

No. 20-7071
(D.C. No. 6:19-CR-00073-RAW-13)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ, PHILLIPS**, and **EID**, Circuit Judges.

In this appeal, we conclude Kendall Smith’s sentence at the bottom of the advisory Sentencing Guidelines range is substantively reasonable, and we affirm the sentence.

I

Oklahoma Highway Patrol troopers found more than two kilograms of methamphetamine in a truck Mr. Smith was driving. He pleaded guilty to possessing

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

with the intent to distribute at least 500 grams of a mixture or substance containing methamphetamine. The advisory Sentencing Guidelines range was 168 to 210 months.

Mr. Smith asked for a shorter term, 120 months. He described enduring a tragic childhood—for example, members of his family suffered from alcoholism, physically abused him, and taught him “to steal from a very early age.” R. vol. 3 at 18. And citing his age (fifty-one years old at sentencing) and health, he feared even a sentence at “the low end” would be, “in effect, a life sentence.” *Id.* at 19.

The district court considered Mr. Smith’s “history and characteristics, to include his upbringing,” *id.* at 26, and his criminal history, noting his multiple prior convictions for offenses such as escape, attempted burglary, assault and battery on a police officer, aggravated eluding, and embezzlement. The court also acknowledged that Mr. Smith had been released from an eighteen-year prison sentence less than two years before he committed the offense underlying this case, an offense involving more than two kilograms of methamphetamine of 96% purity. Although the court recognized its authority to vary from the Guidelines range, it found that the 18 U.S.C. § 3553(a) factors did not warrant a variance. It ultimately imposed a prison term at the bottom of the range, 168 months.

II

Mr. Smith argues that three circumstances combine to make his sentence unreasonably long—the Sentencing Guidelines’ harsh treatment of methamphetamine offenses, his traumatic childhood, and his age. He devotes much of his brief to the

first circumstance, challenging the policies behind the Guidelines' treatment of methamphetamine-trafficking offenses.

He failed to challenge these policies in the district court, however, and the parties disagree about how that failure should affect our review. Mr. Smith argues that he preserved his ultimate claim that his sentence is substantively unreasonable by urging the court to impose a shorter sentence, so we should review his sentence for an abuse of discretion. True enough, a defendant preserves a claim that a sentence is unreasonably long by advocating for a shorter sentence than the district court ultimately imposes. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 767 (2020). But *Holguin-Hernandez* did not answer the question arising from Mr. Smith's new policy arguments: When has a party "properly preserved the right to make particular arguments supporting its claim that a sentence is unreasonably long"? *Id.* In the government's view, Mr. Smith's failure to raise his policy arguments until now requires us to review them only for plain error.

We need not decide whether Mr. Smith preserved the right to make his policy arguments on appeal, because he has not shown reversal is warranted even under the abuse-of-discretion standard. *See United States v. Vasquez-Alcaarez*, 647 F.3d 973, 976–77 (10th Cir. 2011) (declining to decide if the defendant preserved a particular argument, as his sentence could "be affirmed under either plain error or abuse of discretion review").

Because Mr. Smith's sentence falls within the Guidelines range, we presume it is reasonable. *See United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007).

To overcome this presumption, Mr. Smith must show the district court abused its sentencing discretion under § 3553. *See id.* Our role is not to reweigh from scratch the sentencing factors in § 3553(a); so long as the district court did not balance those factors in a way that is “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). In other words, there is “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.” *McComb*, 519 F.3d at 1053. With these standards in hand, we turn to Mr. Smith’s arguments.

Mr. Smith sees at least two problems with how the Guidelines treat methamphetamine offenses. First, they treat offenses involving high-purity methamphetamine more harshly than offenses involving the same amount of methamphetamine of lower or unknown purity. *See* U.S. Sent’g Guidelines Manual § 2D1.1(c) (U.S. Sent’g Comm’n 2018). Mr. Smith argues that, these days, “essentially all methamphetamine at every level of the chain of distribution is of high purity.” Aplt. Opening Br. at 12. As a result, he concludes, “differences among methamphetamine defendants’ sentences often reflect little more than whether the government has decided to test the drugs recovered for purity.” *Id.*

Second, on average, defendants convicted of trafficking methamphetamine receive longer sentences than those convicted of trafficking other drugs. In a recent

year, for example, the average sentence for a methamphetamine-trafficking offender (ninety-five months) exceeded the average sentence for traffickers of other drugs (seventy-eight months for crack-cocaine traffickers, seventy months for both heroin traffickers and powder-cocaine traffickers). *See* 2019 Sourcebook of Federal Sentencing Statistics 124, Figure D-3 (U.S. Sent’g Comm’n). And yet, Mr. Smith tells us, “the available evidence indicates that methamphetamine is *less* harmful than many other drugs.” Aplt. Opening Br. at 14.

Some district judges have been persuaded by similar policy arguments. *See, e.g., United States v. Nawanna*, 321 F. Supp. 3d 943, 949–55 (N.D. Iowa 2018). Others have rejected them. *See, e.g., United States v. Velazquez-Aguilera*, 842 F. App’x 286, 288 (10th Cir. 2021) (describing the district court’s ruling rejecting similar arguments). Because Mr. Smith failed to present his policy arguments to the district court, we cannot know what it would have thought of them. But even if it had agreed with his arguments, it would not have been required to vary from the Guidelines range on that ground alone. *See United States v. Heim*, 941 F.3d 338, 340 (8th Cir. 2019); *United States v. Bostock*, 910 F.3d 348, 350 (7th Cir. 2018).

Still, Mr. Smith contends that the problems he sees with the Guidelines undermine the district court’s balancing of the § 3553(a) factors. That the Guidelines range accounted for the purity of his methamphetamine, he says, disconnects his sentence from “the nature and circumstances of the offense” and “the seriousness of the offense.” *See* §§ 3553(a)(1), (a)(2)(A). On top of that, in his view, the Guidelines create “unwarranted sentence disparities” between defendants like him

and defendants convicted of crimes involving different drugs or methamphetamine of lower or unknown purity. *See* § 3553(a)(6). And relying on statistics showing that, in a recent year, of those convicted of methamphetamine-trafficking offenses, 27.7% received a Guidelines-range sentence, 32.2% received a variance, and 40% received a downward departure, *see* 2019 Sourcebook of Federal Sentencing Statistics at 123, Table D-14, Mr. Smith contends that an unwarranted disparity exists between his sentence and the sentences of methamphetamine offenders who received a departure or variance.

Mr. Smith has not shown that the court's adherence to the Guidelines range made his sentence unreasonably long. Granted, if nearly all methamphetamine is of high purity, then purity reveals little about an individual's position in the distribution chain. Even so, Mr. Smith's offense is no doubt a serious one. And we think he oversells the rarity of sentences like his: the statistics he cites show that roughly one in every four defendants convicted of trafficking methamphetamine receives a sentence in the Guidelines range. Besides, these "national statistics do not reveal what percentage of those defendants have a similar criminal background to" Mr. Smith, *United States v. Garcia*, 946 F.3d 1191, 1215 (10th Cir. 2020), depriving us of context we would need to assess whether the statistics reflect sentences imposed on defendants similarly situated to him. And, in the end, sentencing disparities and any perceived policy flaws in the Guidelines are but some among many factors a sentencing court must balance. Mr. Smith has not shown that these

factors, balanced against the others considered by the district court, require a shorter sentence.

That remains true even when we add in the other circumstances that Mr. Smith relies on, his age and his traumatic childhood. As Mr. Smith highlights, older people are less likely than younger people to commit new crimes after they get out of prison. But these statistics lose force once we remember that Mr. Smith committed the offense in this case at age fifty. Mr. Smith is surely correct to characterize his upbringing as tragic. But the district court expressly considered his upbringing along with other factors weighing against a variance, such as Mr. Smith's criminal history and recent release from prison. The court's balancing of the relevant factors produced a sentence that fits comfortably within the range of rational choices. *See McComb*, 519 F.3d at 1053.

III

The sentence is affirmed.

Entered for the Court

Gregory A. Phillips
Circuit Judge