

FILED
United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

Christopher M. Wolpert
Clerk of Court

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 21-6167

KENNETH LAMAR LEE,

Defendant - Appellant.

**Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:20-CR-00329-SLP-1)**

Submitted on the briefs:*

Laura K. Deskin, Research & Writing Specialist, Oklahoma City, Oklahoma (Jeffrey M. Byers, Federal Public Defender, with her on the brief) for Defendant-Appellant Kenneth Lamar Lee

Jessica L. Cardenas, Assistant United States Attorney, Oklahoma City, Oklahoma (Robert J. Troester, United States Attorney, with her on the brief) for Plaintiff-Appellee United States of America

Before **McHUGH**, **EID**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

The Supreme Court long ago axed the mandatory application of the United States Sentencing Guidelines (“U.S.S.G.”). But the resulting grant of sentencing discretion to the district courts did not give them license to bypass the Guidelines altogether. Indeed, the advisory Guideline range provides the starting point for our evaluation of a sentence’s reasonableness. So district courts must correctly calculate the Guideline imprisonment range—even if they ultimately choose to grant a variance.

Here, the district court sentenced Defendant Kenneth Lamar Lee, but failed to apply U.S.S.G. § 5G1.3(b)(1), which applies to Defendant and provides a downward sentencing adjustment if a defendant already served time for another offense that is relevant conduct to the offense at issue. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we vacate Defendant’s sentence and remand for resentencing.

I.

A female called law enforcement, stating that her ex-boyfriend, Defendant, held her hostage and shot at her. She said he was staying at a nearby hotel. Defendant supposedly came to her because he thought he was overdosing on drugs. When she allowed him in the room, he became aggressive, accusatory, and demanded money. Defendant hit her on the legs, back, and head with an open hand when she said she didn’t have any money. He pulled out a firearm, placed it against her head, rubbed it against her body, and demanded that she remove her clothing from the

waist down. Defendant told her he would rape her with the firearm. But he didn't penetrate her. The woman retreated to the bathroom several times and finally barricaded herself inside. One of the times she was in the bathroom, he fired the gun. Afterward, he picked up the spent casing and told her that he meant the bullet for her. Officers never located a visible bullet hole in the room or a shell casing. After the woman barricaded herself in the bathroom, Defendant left and she dialed 911.

An hour later, officers arrived at Defendant's nearby hotel and instructed him to leave the room. Ten minutes later, a female sex worker left the room. She told officers that Defendant had a gun. They arrested him. Defendant consented to a room search, but officers didn't recover a firearm.

During a follow-up interview, the ex-girlfriend told law enforcement that Defendant liked to hide things inside box springs. Officers re-searched the room and found a loaded gun inside the box spring. The officer also found a magazine with fifteen live rounds. The ex-girlfriend's description of the gun matched the firearm officers found in the box springs.

Authorities charged Defendant with feloniously pointing a firearm, kidnapping, sexual battery, and possession of a firearm after former conviction of a felony. Defendant pleaded guilty to being a felon in possession and the state court sentenced him to 84 months' imprisonment. It dismissed the other three counts. Then, a federal grand jury indicted Defendant with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) based on the same events. Defendant pleaded guilty again.

At Defendant’s federal sentencing, the presentence investigation report (“PSR”) recommended an initial base offense level of 26 because the firearm contained a high-capacity magazine and Defendant had two previous felony convictions—one for possession of a controlled dangerous substance with intent to distribute and one for robbery by force. It also recommended a four-level enhancement because Defendant used or possessed the firearm in connection with another felony offense (the dismissed state-law offenses). The PSR applied a cross-reference to U.S.S.G. § 2A4.1 (kidnapping) and used it to determine a higher base offense level of 32. It applied a two-level enhancement because Defendant used a dangerous weapon and a six-level enhancement because Defendant sexually exploited the victim. That gave him an adjusted offense level of 40. The PSR recommended a three-level reduction for acceptance of responsibility that resulted in a recommended total offense level of 37. Defendant’s criminal history resulted in a criminal history score of eleven and a criminal history category of V.

Thus, based on a total offense level of 37 and a criminal history category of V, the PSR initially calculated Defendant’s Guideline range to be 324 to 405 months’ imprisonment. The statutory maximum, however, was 120 months’ imprisonment. The PSR also provided that under U.S.S.G. § 5G1.3(b), if a term of imprisonment resulted from another offense that is relevant conduct to the instant offense, the court (1) shall adjust the federal sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court finds that the Bureau of Prisons (“BOP”) will not credit it to the federal sentence and (2) shall run the federal

sentence concurrently to the remainder of the undischarged term of imprisonment.

The PSR noted that Defendant pleaded guilty in the state court case and that case was relevant conduct to the instant offense. It specified that the state court sentenced him to seven years of imprisonment and that he had been in continuous primary state custody since August 30, 2020.

Defendant objected to the PSR. The district court overruled his objections at sentencing and found the advisory Guideline range to be 120 months' imprisonment. Defendant requested that the district court run its sentence concurrently to his state sentence under U.S.S.G. § 5G1.3(b)(2) because, as the PSR recognized, that offense involved "the same gun, the same conduct that is punished in that state sentence of imprisonment that he's held on now." Defendant also requested that the district court reduce his sentence by fifteen months under U.S.S.G. § 5G1.3(b)(1) because BOP would not award him any credit for the time he had spent on his state case.

The district court sentenced Defendant to 120 months' imprisonment to run concurrently to any state term of imprisonment. When asked if the parties had anything further, Defendant again asked if the district court would reduce his sentence by 15 months under U.S.S.G. § 5G1.3(b)(1). The probation officer, when asked, agreed with Defendant that his understanding was "that the Bureau of Prisons will not give him credit." The district court responded that it was not in a position to know that the BOP absolutely would not credit the 15 months. The court continued, "I certainly have no objection in the event that the Bureau of Prisons makes a determination that they do give credit, I certainly don't have any objection to that,

but in terms of whether or not I intend to vary downward and reduce the 120 months by 15 months, the Court does decline to do that at this time.” But after Defendant pushed for clarification, the district court said it was “not convinced that there’s sufficient evidence to trigger the ‘shall’” and said it wouldn’t reconsider it later, even if BOP would not credit him time served on his state sentence.

II.

United States Sentencing Guideline § 5G1.3(b) provides that if a term of imprisonment “resulted from another offense that is relevant conduct to the instant offense of conviction” under the relevant conduct provision of the Guidelines:

the sentence for the instant offense shall be imposed as follows: (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

On appeal, Defendant asks us to vacate the sentence and remand for resentencing because the district court procedurally erred in disregarding U.S.S.G. § 5G1.3(b)(1) when determining Defendant’s advisory Guideline sentence prior to exercising its discretion to vary from that sentence—a procedural reasonableness challenge. We review a party’s procedural reasonableness challenge for abuse of discretion, reviewing de novo the district court’s legal conclusions on the Guidelines and reviewing its factual findings for clear error. United States v. Gantt, 679 F.3d 1240, 1246 (10th Cir. 2012) (citing United States v. Mollner, 643 F.3d 713, 714 (10th Cir. 2011)). But a procedural error is harmless and not reversible “if the record viewed as

a whole clearly indicates the district court would have imposed the same sentence had it not relied on the procedural miscue(s).” United States v. Kieffer, 681 F.3d 1143, 1165 (10th Cir. 2012) (citing Williams v. United States, 503 U.S. 193, 203 (1992)). In other words, we necessarily remand if the district court imposed the sentence “*as a result* of an incorrect application of the Guidelines.” Id. (citing 18 U.S.C. § 3742(f)(1)) (internal quotation mark omitted)

The government first contends that in United States v. Booker, 543 U.S. 220 (2005), the Supreme Court made the Guidelines advisory. So, in its view, the district court exercised its discretion in refusing to apply U.S.S.G. § 5G1.3(b). The government argues that the district court heard arguments about U.S.S.G. § 5G1.3(b), considered it, and decided not to apply it. Thus, according to the government, because Booker made the Guidelines advisory, the Guidelines did not require the district court to reduce Defendant’s sentence.

Although the Guidelines are advisory and district courts have the discretion to vary from the Guideline imprisonment range, the district court still must properly calculate and consider the Guidelines’ advisory recommendation. See Kieffer, 681 F.3d at 1168 (concluding the district court committed procedural error when it disregarded U.S.S.G. § 5G1.3(b)(2)). Here, the Guidelines required the district court to consider U.S.S.G. § 5G1.3(b)(1) and adjust the Guidelines sentence downward for any period of imprisonment already served on the undischarged term of imprisonment. Then the district court could vary its sentence based on the § 3553(a) factors. Thus, the district court procedurally erred “when it purported to impose a

within-[G]uideline sentence on Defendant without accounting for [U.S.S.G.] § 5G1.3(b).” Id.

The government urges us to find this error harmless. We decline to do so. We cannot say that the error here did not affect Defendant’s sentence. At the sentencing hearing, the district court said that although it was not inclined to vary downward fifteen months, it had no objection to the BOP giving Defendant credit—hardly a firm declaration that the district court would have imposed the same sentence either way. Because we do not know whether the district court would have imposed a different sentence had it applied U.S.S.G. § 5G1.3(b)(1), we must vacate Defendant’s sentence and remand for resentencing. We express no opinion on what sentence the district court should impose on remand.

VACATED AND REMANDED.