FILED
United States Court of Appeals
Tenth Circuit

October 24, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY LAMONT MASON, II,

Defendant - Appellant.

No. 22-5083

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:21-CR-00270-SJM-1)

O. Dean Sanderford, Assistant Federal Public Defender, (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant - Appellant.

Leena Alam, (Clinton J. Johnson, United States Attorney, and George Jiang, Assistant United States Attorney, on the brief), Tulsa, Oklahoma, for Plaintiff - Appellee.

Before **HARTZ**, **KELLY**, and **MATHESON**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Anthony Lamont Mason appeals from the district court's sentence of 84 months. He was convicted by a jury of assault of an intimate or dating partner by strangulation, 18 U.S.C. §§ 1153(a), 113(a)(8), as well as Oklahoma first-

degree burglary, 18 U.S.C. § 1153(b); Okla. Stat. tit. 21, §§ 1431, 1436. I R. 208, 283–84. Our jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) and we affirm.

Background

Mr. Mason was tried and sentenced in federal court under the Indian Major Crimes Act (IMCA), which "assimilates" the minimum and maximum sentences under state law for crimes that are "not defined and punished by Federal law." 18 U.S.C. § 1153(b). A state's statutorily required minimum sentence that exceeds the high end of the Sentencing Guideline range becomes the guideline sentence. U.S.S.G. § 5G1.1(b). A minimum sentence supersedes the guideline range only if it is a "mandatory minimum." Koons v. United States, 138 S. Ct. 1783, 1787 (2018).

The Presentence Report (PSR) initially calculated an offense level of 22 and a criminal history category of III, resulting in an advisory guideline range of 51 to 63 months' imprisonment. III R. 38. But when a statutorily required minimum sentence is greater than the maximum of the guideline range, as was the case here, the statutorily required minimum is the guideline sentence. U.S.S.G. § 5G1.1(b). For convictions of first-degree burglary, Oklahoma state law imposes a sentence "not less than seven (7) years." Okla. Stat. tit. 21, § 1436. Accordingly, the PSR recommended a sentence of 84 months' imprisonment, 21 months more than the initial advisory guideline range. III R. 38.

Mr. Mason objected to the PSR, arguing that his eligibility for a suspended or deferred sentence under the Oklahoma sentencing scheme meant that it did not

impose a "true mandatory minimum." See Okla. Stat. tit. 22, §§ 991a(A)(1), (C) (2020) (amended 2022), 991c(A), (H)–(I); I R. 215; II R. 544. Considering itself bound by United States v. Jones, 921 F.3d 932 (10th Cir. 2019), and United States v. Wood, 386 F.3d 961 (10th Cir. 2004), the district court overruled Mr. Mason's objection and sentenced him to 84 months. II R. 544–46, 578. Regardless, were it not for the 84-month sentence, the district court indicated that it would have varied upward beyond 63 months but not beyond 84 months. Id. at 575–77.

In Jones, we held that a New Mexico "basic sentence" was not a mandatory minimum because the sentencing scheme provided several avenues for state courts to alter the sentence. 921 F.3d at 939. We distinguished the "basic sentence" from the Oklahoma sentencing statute's imposition of a term of imprisonment "not less than (2) years," which we concluded imposed a mandatory minimum. Id. at 941–42 (discussing Wood, 386 F.3d at 962–63).

On appeal, Mr. Mason reiterates that the sentencing statute imposes no mandatory minimum and that our distinction between the two sentencing schemes in Jones was plainly dicta. Aplt. Br. at 9–17. The government responds that if Mr. Mason prevails, it would require us to "overrule" our previous decision in Wood, Aplt. Br. at 14, but of course, one panel cannot overrule another "absent en banc consideration." Arostegui-Maldonado v. Garland, 75 F.4th 1132, 1142 (10th Cir. 2023).

Discussion

We review legal questions under the guidelines de novo. United States v. Martinez, 1 F.4th 788, 789 (10th Cir. 2021). Under the IMCA, Mr. Mason's assimilated state offense "becomes a federal offense punishable under federal law." Id. at 790. Federal sentencing law applies, including the guidelines. 18 U.S.C. § 3551(a). Our "[i]ncorporation of state law is limited to the maximum and minimum penalties for the offense and does not extend to 'state sentencing schemes.'" Martinez, 1 F.4th at 790 (quoting Jones, 921 F.3d at 937–38).

For example, in Wood we declined to incorporate a portion of the Oklahoma sentencing scheme that provided for the suspension of judgments and sentences. 386 F.3d at 963. But we affirmed the district court's incorporation of the Oklahoma mandatory minimum for second-degree burglary requiring a term of imprisonment "not less than two (2) years."[1] Id. at 962–63. We reasoned: "Under § 1436(2), Defendant's offense was punishable by imprisonment between two and seven years. Because the maximum of Defendant's guideline range fell below the minimum of her statutory range, the district court properly sentenced Defendant to the two year minimum." Wood, 386 F.3d at 963. We performed no further analysis to determine whether the sentencing scheme imposed a "true mandatory minimum," or expressly

[1] After Wood, Oklahoma updated the statute at issue to remove the "not less than" language. Compare Okla. Stat. tit. 21, § 1436(2) (effective Nov. 1, 2018), with id. (effective July 1, 1999).

prohibited suspension or deferment. The statute's mandatory language was sufficient.

After our decision in Wood, we rejected the idea that a district court could grant a conditional discharge, Martinez, 1 F.4th at 790–91, or apply a broader, state safety-valve provision, United States v. Polk, 61 F.4th 1277, 1280–81 (10th Cir. 2023). In our view, each of these state sentencing options conflicted with federal sentencing policy, which provides for probation, a fine, or imprisonment. Polk, 61 F.4th at 1280–81; Martinez, 1 F.4th at 791; Wood, 386 F.3d at 963.

Unlike the cases above, our decision in Jones did not concern the application of a state sentencing procedure. Rather, it focused on whether the New Mexico sentencing scheme imposed a mandatory minimum sentence — in which case it would apply to the defendant — or a non-mandatory, discretionary sentence. Jones, 921 F.3d at 939–42. We concluded that the scheme — which imposed a "basic sentence" — did not require the court to incorporate a mandatory minimum in sentencing the defendant for his assimilated conviction. Id. at 939, 942.

First, distinguishing the New Mexico statute from the Oklahoma statute in Wood — which provided an "express minimum mandatory sentence" — we reasoned that the New Mexico statute contained no language requiring a criminal defendant to serve "not less than" a specified term of imprisonment. Id. at 938, 941. Second, the New Mexico sentencing scheme authorized the sentencing court to reduce, suspend, or defer the sentence, and in some instances, the defendant might avoid incarceration entirely. Id. at 939–41. Third, we found that the New Mexico Supreme Court did not

interpret state law to impose a mandatory minimum "in every instance," but only where the sentencing scheme expressed that the sentence "could not be suspended, deferred or taken under advisement." Id. at 941 (discussing State v. Martinez, 966 P.2d 747 (N.M. 1998)). That language was absent from the sentencing statute, providing further support for us to find no mandatory minimum. Id. at 941–42.

Mr. Mason urges us to perform the same depth of analysis here to find that the Oklahoma sentencing statute does not impose what he calls a "true mandatory minimum." Aplt. Br. at 9–14. First, relying upon Jones, Mr. Mason argues that the presence of state sentencing procedures allowing the court to suspend or defer the sentence, and the absence of statutory language prohibiting suspension or deferment, makes the sentence non-mandatory. Id. at 7, 10–11. To Mr. Mason, only the legislature's express prohibition of suspension or deferment constitutes a "true mandatory minimum." Id. at 10–11.

But here the sentencing statute already reflects Oklahoma's desire to impose a mandatory minimum. We performed an in-depth analysis in Jones precisely because the statutory language traditionally associated with a mandatory minimum — "not less than" — was absent from the New Mexico sentencing statute. In contrast, the presence of that exact language here renders the state court's ability to suspend or defer the sentence irrelevant.[2] Okla. Stat. tit. 21, § 1436(1).

[2] Because we find the Oklahoma state court's ability to suspend or defer irrelevant, we will not speculate as to whether Mr. Mason would have qualified for either procedure in state court. See Aplt. Br. at 12–14.

Similarly, Mr. Mason cannot rely upon the absence of express language prohibiting a suspension or deferment. We relied upon its absence in Jones only because the basic sentence at issue provided insufficient guidance. 921 F.3d at 941. Accordingly, we looked further to state-court interpretation. In New Mexico, a state sentence imposes a mandatory minimum only when suspension or deferment is expressly prohibited. Id. Mr. Mason attempts to turn our discrete analysis of New Mexico law into a categorical rule. Because we have no need to consult the Oklahoma courts' interpretation of its sentencing scheme, we refuse to incorporate that analysis here.

Second, Mr. Mason urges us to disregard as dicta our distinction in Jones between the Oklahoma sentencing statute and New Mexico sentencing scheme.[3] Aplt. Br. at 14–17. He argues that our failure to undertake a full analysis of Oklahoma law proves it was unessential to the decision. Id. at 16. "[D]icta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at

[3] Mr. Mason also argues that Oklahoma law does not require imposition of the statutory minimum because an Oklahoma state court previously deferred his sentence for a conviction under a sentencing statute using the same language as the one in this case ("not less than"). See Okla. Stat. tit. 21, § 1436(2) (2012); Aplt. Br. at 11–12. Mr. Mason failed to raise this argument at the district court. "[A]rguments raised for the first time on appeal are waived." Little v. Budd Co., Inc., 955 F.3d 816, 821 (10th Cir. 2020). While this theory supports the same broad argument we address in this appeal (as opposed to an entirely new argument), waiver is equally applicable to "a new theory on appeal that falls under the same general category" as an argument pursued in the trial court. Id. at 821.

hand." United States v. Titties, 852 F.3d 1257, 1273 (10th Cir. 2017) (quoting In re Tuttle, 291 F.3d 1238, 1242 (10th Cir. 2002)).

While Mr. Mason is correct that we are not bound by a prior panel's dicta, id., our distinction in Jones was essential. It was "because of the differences between the New Mexico and Oklahoma sentencing schemes" that we held there was "no mandatory minimum for a federal sentencing court to incorporate." Jones, 921 F.3d at 939 (emphasis added). And our brief examination of Oklahoma law was the very reason it was necessary to our holding. We had no need to perform an in-depth examination of the Oklahoma sentencing statute because it already imposed a "traditional mandatory minimum" of "not less than (2) years." Id. at 942. Even assuming our discussion of the Oklahoma sentencing statute was dicta, our decision in Wood provides us with ample support to conclude that a mandatory minimum applies given the statute's "not less than" language.

Because the statute's "not less than" language unambiguously states a mandatory minimum, we hold that the district court properly assimilated the 84-month mandatory minimum for first-degree burglary.

AFFIRMED.