FILED
United States Court of Appeals
Tenth Circuit

July 10, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRAVIS WAYNE LESTER,

Defendant - Appellant.

No. 22-6077
(D.C. No. 5:20-CR-00253-J-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

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

Mr. Travis Wayne Lester was sentenced to three, ten-year terms of imprisonment for being a felon in possession of firearms. The district court ordered that the terms run concurrent to each other but consecutive to two state sentences. For the first time on appeal, Mr. Lester challenges the court's decision to impose his federal sentence consecutive to his state sentences, arguing that the court failed both to consider relevant sentencing guidelines and to adequately explain its decision. We hold that the court did not plainly err in explaining its reasons for imposing the consecutive sentence. However,

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

because it appears the court did not have all the information necessary to comply with the relevant sentencing guidelines, the court committed plain procedural error in imposing the consecutive sentence. Accordingly, we vacate and remand for resentencing.

Background

Mr. Lester was charged with and pled guilty to three counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Probation filed an initial presentence report ("PSR") on March 7, 2022 and an amended PSR on March 31, 2022. The amended PSR provided a guideline range of 110 to 137 months. In his sentencing memorandum, Mr. Lester requested a downward variance of thirty-six months' imprisonment on each count, to run concurrently with each other and the two state sentences. On April 11, 2022, an Oklahoma state court sentenced Mr. Lester, revoking two suspended ten-year sentences in full and ordering them to be served concurrently.

At federal sentencing on May 5, 2022, the district court denied Mr. Lester's request for a downward variance. In doing so, the court considered Mr. Lester's lengthy, violent, and repetitive criminal history, which "clearly demonstrates that [he has] little to no respect for the law, that prior efforts to deter [him] from further engagement in criminal activity were unsuccessful and that [he] pose[s] great danger to the public in the absence of a robust sentence." Rec., vol. III at 60–61. This history and the "troubling" circumstances of this case caused the court to consider imposing an above-guidelines sentence, but the court found Mr. Lester's arguments about his mental health and substance abuse persuasive. *Id.* The court ultimately sentenced Mr. Lester to ten years' imprisonment on each count, to be served concurrent to each other and consecutive to his

state sentences. While the district court was aware that Mr. Lester had already been sentenced in state court, there is no evidence that the court was informed of what sentences were imposed.

Discussion

Mr. Lester argues that the district court procedurally erred in imposing his federal sentence consecutive to his state sentences because it failed both to consider relevant sentencing guidelines and to provide sufficient reasoning for its decision. Because he did not raise these arguments in district court, we review the court's decision to impose a consecutive sentence for plain error. *See United States v. Chavez*, 723 F.3d 1226, 1232 (10th Cir. 2013). "To satisfy the plain error standard, a defendant must show that (1) the district court erred; (2) the error was plain; (3) the error affects the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014).

"In general, a district court has broad discretion to sentence a defendant to a consecutive or concurrent sentence. This discretion is limited, however, by U.S.S.G. § 5G1.3 when the district court seeks to impose a consecutive or concurrent sentence upon a defendant subject to an undischarged term of imprisonment." *United States v. Tisdale*, 248 F.3d 964, 976 (10th Cir. 2001) (quoting *United States v. Contreras*, 210 F.3d 1151, 1152 (10th Cir. 2000)). Section 5G1.3 applies to courts sentencing defendants subject to undischarged prison sentences or anticipated state prison sentences. Relevant here is subsection (d), a policy statement that provides: "In any other case involving an

undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense."[1]

As we held in *United States v. Hurlich*, when subsection (d) applies the district court "*must* consider the directives set forth in [the subsection] and the relevant application notes." 293 F.3d 1223, 1229–30 (10th Cir. 2002) (emphasis added). This includes application note 4(A) which lists five factors courts should consider "to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity." The factor most relevant to this appeal is "[t]he type . . . and length of the prior undischarged sentence." § 5G1.3, cmt. n.4(A)(ii). Although a district court "must provide reasons for its decision" in imposing a concurrent or consecutive sentence, it "is not required to make specific findings for the factors listed in the application notes." *Hurlich*, 293 F.3d at 1230.

A. Consideration of § 5G1.3(d) and the Application Note Factors

Mr. Lester first argues that the district court plainly erred in failing to consider § 5G1.3(d) and accompanying application notes. "[A]bsent a contrary indication in the record," we assume that a sentencing court considered all necessary factors, "even where the district court does not explicitly so state at the sentencing hearing or in its order." *United States v. Rose*, 185 F.3d 1108, 1111 (10th Cir. 1999). Therefore, "[w]e will only step in and find error when the record gives us reason to think that our ordinary

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[1] Subsection (d) was previously designated as subsection (c), and some relevant cases therefore refer to subsection (c).

presumption that the district judge knew and applied the law is misplaced." *Chavez*, 723 F.3d at 1232 (quoting *United States v. Benally*, 541 F.3d 990, 996–97 (10th Cir. 2008)). The record in Mr. Lester's case indicates that the sentencing court did not consider § 5G1.3(d) and the application notes as required by *Hurlich* because the record is devoid of the information the court needed to fully consider the application note factors. Specifically, there is nothing in the record that indicates the type or length of state sentence imposed on Mr. Lester. The court also made no mention of § 5G1.3 or the application note factors,[2] and there is no evidence that the parties or probation alerted the court to the guideline.

The PSR did alert the court to the fact that Mr. Lester had pled guilty in state revocation proceedings. However, because the PSR was issued before the state sentencing, it did not alert the court to what Mr. Lester's ultimate state sentence was or how much time he was likely to serve. Although the court knew that the revoked sentences were suspended ten-year sentences, Oklahoma law allows state courts to revoke suspended sentences in whole or in part. *See* Okla. Stat. tit. 22, § 991b. Consequently, there is only evidence that the court had notice of the maximum potential state sentences, not the sentences ultimately imposed.

The government argues that district courts presumptively run federal sentences consecutively to state revocation sentences. Specifically, it notes that "[m]ultiple terms

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[2] We reiterate that a district court is not required to recite any magic words or make any specific findings about these factors. However, had the district court done so, there would be little room to doubt that it complied with our precedent.

of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a). The guidelines also "recommend[] that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation" when the undischarged sentence results from the revocation of probation, parole, or supervised release. § 5G1.3, cmt. n.4(C). To the extent, if any, that this authority establishes a presumption of consecutive sentences, such a presumption does not relieve sentencing courts of their obligations to consider § 5G1.3(d) and related application notes and to explain the reasoning for their decisions.

It is possible that the district court became aware of the details of Mr. Lester's state sentences through avenues that are not reflected in the record. Our review, however, is confined to the record before us, which indicates that the court lacked the information it needed to comply with our clearly established precedent. We decline to assume the court correctly applied the law on this record and conclude that the first and second prongs of the plain error test are met.

We also conclude that the third and fourth prongs of the plain error test are met. *See Sabillon-Umana*, 772 F.3d at 1333–34 (clear guidelines error will presumptively satisfy third and fourth prongs). To show that his substantial rights have been affected by the court's error, a defendant must "show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Benford*, 875 F.3d 1007, 1017 (10th Cir. 2017) (internal quotation marks and citation omitted). This is not a preponderance standard. *Id.* Rather, a defendant must show "a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v.*

Wolfname, 835 F.3d 1214, 1222 (10th Cir. 2016)). Although the district court expressed a desire to impose a robust sentence in Mr. Lester's case, we cannot say that it would have imposed the same, consecutive sentence had it considered § 5G1.3(d) and been aware of the details of Mr. Lester's state sentences. Under subsection (d), the district court has discretion to impose concurrent, partially concurrent, or consecutive sentences. In light of the relatively long length of the federal and state sentences imposed, we conclude that there is a reasonable probability the court would have imposed a different sentence. For this reason, we also conclude that the error affected the fairness and integrity of the judicial process. *See Sabillon-Umana*, 772 F.3d at 1335.

In sum, the district court did not have the information necessary to faithfully apply § 5G1.3(d) and comply with our precedent. Because it nonetheless imposed a consecutive sentence, it committed plain procedural error.

B. Adequacy of the District Court's Reasoning

Mr. Lester next argues that the district court plainly erred by failing to provide any reasoning for its decision to impose a consecutive sentence. To the contrary, the court explained that its sentence was designed to provide a sufficient punishment for a defendant who had a lengthy and violent criminal record, including recidivism for the crime of conviction, and that a serious sentence was necessary for deterrence. The court highlighted that Mr. Lester's convictions stemmed from three separate and troubling events and described him as a danger to himself and the public. The court also considered Mr. Lester's personal circumstances, including mental health and substance abuse issues. Immediately after offering this explanation, the court denied the request for

a downward variance, imposed the sentence, and clarified that the terms for each count ran concurrently to each other but consecutive to the state sentences.

We considered similar reasoning in *Hurlich*. There, the sentencing court considered the defendant's extensive criminal history, the seriousness of the offenses, the need for deterrence, and the need to protect the public in deciding to depart upward from the guidelines. *Hurlich*, 293 F.3d at 1227–28. In concluding that a consecutive sentence was appropriate, the district court relied on "the reasons already cited in granting the motion for upward departure." *Id.* at 1230. Although we held that these reasons were insufficient to justify the degree to which the court upwardly departed, they were sufficient to justify the court's decision to impose a consecutive sentence. *Id.* In Mr. Lester's case, the district court provided similar and more extensive reasoning, which was sufficient to support its decision to impose a consecutive sentence.

Mr. Lester argues that the court's proffered reasons only supported the length of the sentence it imposed, not its decision to impose the federal sentence consecutively to the state sentences. However, we are persuaded that the reasons offered by the court supported its sentence more generally. The record suggests that the court and Mr. Lester were contemplating the request for a downward departure alongside the request for concurrent sentences. Mr. Lester's sentencing memorandum asked the court to impose "a sentence of thirty-six (36) months per count, to run concurrent with each other and concurrently with his two (2) Oklahoma County cases . . . , a variance from the advisory guideline range." Rec., vol. I at 32. At multiple times during the sentencing hearing, defense counsel characterized the requested variance as a downward departure on each

count, with the sentences running concurrently to each other and to the state sentences. And the district court both imposed the sentence and ordered that it run consecutively to the state sentences immediately after offering its reasoning.

Mr. Lester has not identified any precedent requiring a sentencing court to offer separate reasoning for the length of sentence imposed and the decision to impose a consecutive sentence. While the sentencing court in *Hurlich* explicitly stated that its reasons for departing upward also supported its decision to impose a consecutive sentence, a court is not required to make such an explicit statement. For these reasons, the district court did not fail to adequately explain its imposition of a consecutive sentence, let alone plainly err in doing so.

Conclusion

We hold that the district court did not plainly err by failing to adequately explain its decision to impose a consecutive sentence. However, the court did plainly err in failing to consider § 5G1.3(d) and related application notes. Accordingly, we vacate the sentence and remand this matter to the district court for resentencing after consideration of the potential impact of § 5G1.3(d) and Mr. Lester's state court sentences.

Entered for the Court

Stephanie K. Seymour
Circuit Judge