FILED
United States Court of Appeals
Tenth Circuit

October 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL JACKSON WINROW,

Defendant - Appellant.

No. 23-6017
(D.C. No. 5:19-CR-00394-PRW-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.**

Michael Jackson Winrow pled guilty to one count of felon in possession of a firearm in violation of 18 U.S.C § 922(g)(1). The district court initially sentenced Winrow to 188 months' imprisonment. Winrow appealed. For his first appeal, we vacated his sentence and remanded for resentencing. *United States v. Winrow*, 49 F.4th 1372, 1382 (10th Cir. 2022). On remand, the district court resentenced Winrow to a term of 105 months' imprisonment.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

**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.

Winrow appealed again. This time, however, his appellate counsel submitted an *Anders* brief, stating that there are no non-frivolous claims to be brought on appeal and seeking leave to withdraw from representing Winrow. *See Anders v. California*, 386 U.S. 738, 744 (1967). Upon an independent review of the record, we agree that there are no non-frivolous arguments that Winrow may bring on appeal. We thus grant counsel's motion and dismiss the appeal.

I.

In December 2019, Winrow was indicted on one count of felon in possession of a firearm. *See* 18 U.S.C. §§ 922(g)(1), 924(d). Winrow pled guilty to the count in the indictment on August 12, 2020. The district court sentenced Winrow on June 2, 2021. Winrow's crime would have ordinarily been subject to a maximum sentence of 10 years. 18 U.S.C. § 924(a)(2). But the district court concluded that Winrow had previous convictions that qualified him for an enhancement under the Armed Career Criminal Act ("ACCA"), which requires a minimum term of 15 years when a defendant has at least three prior convictions for a "violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1).

Winrow appealed on the basis that two of his convictions—both for aggravated assault and battery—were not categorically violent felonies under Oklahoma law, and thus did not constitute qualifying offenses under the ACCA. *See Winrow*, 49 F.4th at 1375. We agreed with Winrow, holding that "[a]ggravated assault and battery in Oklahoma is not categorically a violent felony" and finding that "his convictions under Okla. Stat. tit. 21, § 646 should not have counted as ACCA predicates." *Id.* at

1382. We reasoned that "[w]ithout them, he lacked the three predicates necessary for the enhanced, 188-month sentence he received." *Id*. We vacated the sentence and remanded to the district court with the instruction that Winrow be resentenced without the ACCA enhancement. *Id*.

The United States Probation Office prepared a revised Presentence Investigation Report ("PSR"). The Probation Office considered Winrow's prior conviction for possession of a controlled dangerous substance as a controlled substance offense under U.S.S.G. § 2K2.1, which requires a base offense level of 24. The PSR calculated Winrow's total offense level as 22 and his criminal history category as VI. The advisory Guidelines range for imprisonment was calculated as 84 to 105 months.

At sentencing, Winrow objected to the application of the controlled substance offense provision on the basis that Oklahoma's definition of a controlled dangerous substance is broader than the federal schedule and not divisible. But he acknowledged that Tenth Circuit precedent foreclosed the objection. The district court overruled the objection.

The district court then considered the 18 U.S.C. § 3553(a) sentencing factors to determine Winrow's sentence. The district court noted, "I think you knew you weren't able to possess a gun, but there was [sic] at least some mitigating reasons why you possessed the gun. It appeared that someone was out to get you at the time." R. Vol. III at 24–25. The district court also noted that Winrow's criminal history score was extremely high, and "if there were a category, it would be, like,

Category XII, but we max out at Category VI. So, you know, that's definitely concerning to me." *Id.* at 25. It went on to note that the original sentence "wasn't driven by the mandatory minimum" and that Winrow "had the opportunity to learn from the first [felon in possession conviction] and not repeat that mistake" but "chose to do so again." *Id*. at 37. The district court also went back through the original PSR and original sentencing memoranda, as well as Winrow's statement he made at his first sentencing.

Winrow requested a sentence on the low end of the Guidelines on the basis that he was "trying to change" despite his history. *Id.* at 26. Winrow's counsel echoed this sentiment, arguing that Winrow's history—witnessing his father's murder as a child, struggling with drug abuse, yet successfully completing employment training programs while incarcerated—justified a sentence at the bottom of the Guidelines. The Government requested a variant sentence of 110 months. The district court, noting its "concerns about respect for the law and deterring criminal conduct in the future," ultimately sentenced Winrow to a sentence of 105 months—at the top of the Guidelines but not above them. *Id.* at 37–38.

Winrow believed the sentence was both procedurally and substantively unreasonable and requested his counsel file this appeal. *See Anders* Br. at 9–17. Counsel then filed the *Anders* brief before us. Neither Winrow nor the government submitted a response brief.

II.

Appellate counsel's "role as advocate requires that he support his client's appeal to the best of his ability." *Anders*, 386 U.S. at 744. However, when counsel for the defendant has found the case to be "wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Id.* Once counsel files an *Anders* brief, this Court must conduct a "full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If, after performing an independent review of the record, we agree with counsel, then we may grant his request to withdraw and dismiss the appeal. *Id.* In this case, we agree with counsel.

a.

"Our appellate review for reasonableness includes both a procedural component, encompassing the method by which a sentence was calculated, as well as a substantive component, which relates to the length of the resulting sentence." *United States v. Balbin-Mesa*, 643 F.3d 783, 787 (10th Cir. 2011). Winrow frivolously challenges both components on appeal.

We begin with the first possible basis for Winrow's appeal that counsel identifies: that Winrow's sentence was procedurally unreasonable because the district court incorrectly calculated his Guideline range. *Anders* Br. at 9–10. We review a sentence for procedural reasonableness by applying the abuse of discretion standard to the district court's decision. *See United States v. Smart*, 518 F.3d 800, 805 (10th Cir. 2008). In reviewing a sentence's procedural reasonableness, we look at, among

other things, whether the district court properly calculated a defendant's Guidelines range. *United States v. Todd*, 515 F.3d 1128, 1135 (10th Cir. 2008). "In determining whether the district court correctly calculated the recommended Guidelines range, we review de novo the district court's legal conclusions pertaining to the Guidelines and review its factual findings . . . under the Guidelines for clear error." *Id.*

Per counsel, Winrow could argue that the district court erred when it enhanced his base offense level because of his prior Oklahoma law conviction for possession of a controlled dangerous substance with intent to distribute. But as Winrow noted at the time of sentencing and as the *Anders* brief points out, this Court's decision in *United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 268 (2022), has already squarely foreclosed Winrow's argument. Winrow's counsel noted at sentencing that Oklahoma's definition of a controlled dangerous substance is broader than the federal schedule. *See* R. Vol. III at 20.

We have held that "Oklahoma case law makes it impossible to say with certainty that the Oklahoma statute is divisible by individual drug." *United States v. Cantu*, 964 F.3d 924, 930 (10th Cir. 2020). In *United States v. Cantu*, we concluded that an Oklahoma drug offense did not match the ACCA's definition of "serious drug offense" and thus the enhancement of Cantu's sentence under the ACCA was in error. *Id.* at 934.

Next, in *United States v. Jones*, we considered whether *Cantu* affected a defendant's calculation under U.S.S.G. § 2K2.1. *Jones*, 15 F.4th at 1290. The defendant argued that post-*Cantu*, a prior state offense could only qualify as a

controlled-substance offense under the relevant Guidelines enhancement if it matched the controlled substances listed in the Controlled Substances Act ("CSA"). *Id.* at 1291. We disagreed and declined to extend *Cantu*, holding that to trigger the controlled-substance enhancement, a "defendant must violate a federal or *state* law," with no need to cross-reference to the CSA if the defendant committed a state offense. *Id.* at 1292–93 (emphasis added).

The argument Winrow made at sentencing, which counsel suggests he would also make here, is identical to the argument in *Jones*. This contention goes that the district court committed legal error when it considered Oklahoma state law rather than the CSA definition of a controlled substance when it determined that the base level enhancement under U.S.S.G. § 2K2.1 applied. But again, we need not just look to the CSA; rather we can look to federal *or* state law. *Id.* As a result, *Jones* forecloses this argument.

There is no other indication in the record that the district court incorrectly calculated Winrow's total offense level of 22 or his Category VI in criminal history. We thus conclude that Winrow has no non-frivolous arguments that the district court erred in its calculation of his Guidelines range. No procedural error occurred.

b.

The only other challenge that counsel suggests and we can surmise is a challenge on the substantive reasonableness of Winrow's sentence. *Anders* Br. at 12. We see no non-frivolous argument here either. We review substantive reasonableness for abuse of discretion. *See United States v. Sayad*, 589 F.3d 1110,

1116 (10th Cir. 2009). An inquiry into the substantive reasonableness of a sentence is based on whether "the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in [§ 3553(a)]." *Id.* at 1116 (alteration in original) (citation omitted). When a sentence falls within the properly calculated advisory Guidelines range, the sentence is "entitled to a rebuttable presumption of reasonableness" on appeal. *United States v. Alvarez–Bernabe*, 626 F.3d 1161, 1165 (10th Cir. 2010).

Because Winrow's sentence fell within the Guidelines range he must show that his sentence was unreasonable in light of the 18 U.S.C. § 3553(a) sentencing factors. *See id.* at 1167. He cannot. In full consideration of the § 3553(a) factors, the district court weighed Winrow's criminal history category score, his failure to learn from his past felon-in-possession conviction, and his lack of respect for the law when it sentenced him to 105 months. Winrow's counsel indicates that Winrow "may argue the district court did not give sufficient weight to his efforts at changing and leaving his past life." *Anders* Br. at 13. At sentencing the district court explicitly noted these mitigating factors, but found that they did not overcome Winrow's criminal behavior, going as far as to state: "I want to believe that the path that [counsel] just talked about is the right path . . . . I'm not convinced of that yet." R. Vol. III at 37.

But on appeal, "[w]e do not reweigh the sentencing factors" that the district court already considered. *United States v. Blair*, 933 F.3d 1271, 1274 (10th Cir. 2019). And nothing otherwise indicates that Winrow's sentence fell outside of the range of "rationally available choices that facts and the law at issue can fairly

support." *Id.* (quoting *United States v. Martinez*, 610 F.3d 1216, 1227 (10th Cir. 2010)). Indeed, no other facts in the record indicate the district court abused its discretion when it sentenced Winrow to an in-Guidelines sentence. Thus, any appeal on this issue is frivolous, and no abuse of discretion occurred.

III.

For the reasons stated above, we agree with counsel that there is no non-frivolous basis for appeal. Accordingly, we GRANT counsel's motion to withdraw and DISMISS the appeal.

Entered for the Court

Allison H. Eid
Circuit Judge