UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4088

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JEAN ANDREW MCKINNEY, a/k/a Red,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Irene M. Keeley, Chief District Judge. (1:03-cr-00059-IMK)

Submitted: June 29, 2007 Decided: December 13, 2007

Before MICHAEL, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

L. Richard Walker, Assistant Federal Public Defender, Clarksburg, West Virginia, for Appellant. Sharon L. Potter, United States Attorney, Robert H. McWilliams, Jr., Assistant United States Attorney, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jean Andrew McKinney was convicted by a jury of making a threatening telephone call in violation of 18 U.S.C. § 875(b) (2000) and was sentenced to fifty-seven months of incarceration. We affirmed his conviction on appeal but vacated and remanded his sentence in light of United States v. Booker, 543 U.S. 220 (2005). On remand, the district court again sentenced him to fifty-seven months of imprisonment, the bottom of his properly-calculated Sentencing Guidelines range of 57-71 months of imprisonment. On appeal, McKinney raises two issues, whether: (1) the district court's resentencing was erroneous in light of McKinney's age, health, and criminal history, and (2) a presumption of correctness for a sentence within the advisory sentencing range renders the federal Sentencing Guidelines mandatory. For the reasons that follow, we affirm.

First, the record is uncontroverted that the district court took into consideration McKinney's age, health, criminal history, and other factors at his resentencing. The court also referred to the factors listed in 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2007). The court again sentenced McKinney to fifty-seven months of imprisonment. Under these circumstances, we find the sentence to be reasonable. United States v. Moreland, 437 F.3d 424, 433 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006).

Second, we have held that a sentence within a properly-calculated advisory sentencing range is presumptively reasonable. United States v. Green, 436 F.3d 449, 455-56 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006); United States v. Johnson, 445 F.3d 339, 341, 344 (4th Cir. 2006). The Supreme Court has recently approved of the presumption. See Rita v. United States, 127 S. Ct. 2456 (2007) (holding that an appellate court may apply a presumption of reasonableness to a district court's sentence that reflects a proper application of the Sentencing Guidelines). McKinney has failed to rebut the presumption of reasonableness by demonstrating that the sentence is unreasonable when measured against the § 3553(a) factors. United States v. Montes-Pineda, 445 F.3d 375, 379 (4th Cir. 2006), cert. denied, 127 S. Ct. 3044 (2007).

Accordingly, we affirm McKinney's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED