

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-4922

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JULIE A. NELSON,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Bruce H. Hendricks, District Judge. (6:17-cr-00537-BHH-1)

Submitted: April 30, 2020

Decided: May 19, 2020

Before WYNN, THACKER, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Steven M. Hisker, HISKER LAW FIRM, PC, Duncan, South Carolina, for Appellant. A. Lance Crick, Acting United States Attorney, William J. Watkins, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Julie A. Nelson pled guilty to conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (2018). As a result of this criminal activity, the district court also revoked Nelson's term of supervised release. The court sentenced Nelson to 60 months' imprisonment for the conspiracy conviction consecutive to a 24-month revocation sentence. Nelson appeals from the conspiracy judgment. Nelson's counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there are no meritorious grounds for appeal but questioning whether Nelson's sentence is reasonable. Nelson has filed a pro se brief, and the Government has declined to file a response brief. After reviewing the record pursuant to *Anders*, we ordered the parties to submit supplemental briefs addressing whether the district court adequately explained its reasons for denying Nelson's motion for a downward departure or variance.

We first address whether Nelson's guilty plea was knowing and voluntary. In her pro se brief, Nelson contended that at the time she entered the plea, she was incompetent due to bipolar disorder. Before accepting a guilty plea, the district court must conduct a colloquy in which it informs the defendant of, and determines that she understands, the nature of the charges to which she is pleading guilty, any mandatory minimum penalty, the maximum possible penalty, and the rights the defendant is relinquishing by pleading guilty. Fed. R. Crim. P. 11(b)(1); *United States v. DeFusco*, 949 F.2d 114, 116 (4th Cir. 1991). The court also must ensure that the defendant's plea is voluntary and supported by an independent factual basis. Fed. R. Crim. P. 11(b)(2), (3). A defendant is competent to plead guilty if she has both a "sufficient present ability to consult with [her] lawyer with a

reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against [her].” *United States v. Moussaoui*, 591 F.3d 263, 291 (4th Cir. 2010) (internal quotation marks omitted). Because Nelson did not move to withdraw her guilty plea or otherwise preserve any error in the plea proceedings, we review the adequacy of the plea colloquy for plain error. *United States v. Sanya*, 774 F.3d 812, 815 (4th Cir. 2014).

Our review of the transcript reveals that the district court complied with the requirements of Rule 11 and that Nelson’s plea was supported by a factual basis. Also, the record reveals that the district court fully questioned Nelson regarding factors relevant to her competency during the plea hearing, Nelson’s counsel confirmed Nelson was competent, and Nelson was found competent to stand trial by both a forensic examiner and a magistrate judge before her Rule 11 hearing. Accordingly, Nelson’s guilty plea is valid.

We next consider the issues addressed in the parties’ supplemental briefs—whether the district court adequately explained its reasons for denying Nelson’s motion for a downward departure or variance, and whether Nelson’s sentence is reasonable. We review a sentence for reasonableness “under a deferential abuse-of-discretion standard.” *Gall v. United States*, 552 U.S. 38, 41 (2007). In reviewing a sentence, we must first ensure that the district court did not commit any “significant procedural error,” such as failing to properly calculate the applicable Sentencing Guidelines range, failing to consider the 18 U.S.C. § 3553(a) (2018) factors, or failing to adequately explain the sentence. *Id.* at 51. If the sentence is free of “significant procedural error,” we review the substantive reasonableness of the sentence, “tak[ing] into account the totality of the circumstances.”

Id. “Any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable.” *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014).

“When rendering a sentence, the district court must make an *individualized* assessment based on the facts presented” and explain the basis for its sentence sufficiently to “allow[] for meaningful appellate review.” *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009) (alteration and internal quotation marks omitted). The court, however, is not required to “robotically tick through § 3553(a)’s every subsection, particularly when imposing a within-Guidelines sentence.” *United States v. Powell*, 650 F.3d 388, 395 (4th Cir. 2011) (internal quotation marks omitted). The court “must address or consider all non-frivolous reasons presented for imposing a different sentence and explain why [it] has rejected those arguments.” *United States v. Ross*, 912 F.3d 740, 744 (4th Cir.), *cert. denied*, 140 S. Ct. 206 (2019). “The adequacy of the sentencing court’s explanation depends on the complexity of each case. There is no mechanical approach to our sentencing review.” *United States v. Blue*, 877 F.3d 513, 518 (4th Cir. 2017). Based on our review of the sentencing transcript, we agree that the district court’s explanation in this case was inadequate, thereby rendering Nelson’s sentence procedurally unreasonable.

Nelson argues that the district court committed procedural error by failing to address, directly or indirectly, her nonfrivolous arguments for a downward departure or variance. This error, she contends, warrants vacating her sentence and remanding the case for a new sentencing hearing. The Government concedes that the court did not address all of Nelson’s arguments but argues that some arguments were weak and that the record

shows that the court considered some of the arguments when imposing her sentence. In any event, the Government argues that the court's error was harmless.

Because Nelson properly preserved this issue for review, we must reverse unless we conclude that the error was harmless. *See United States v. Lynn*, 592 F.3d 572, 576-79 (4th Cir. 2010). For a procedural error to be harmless, the Government must establish that “the error did not have a substantial and injurious effect or influence on the result” such that “we can say with fair assurance, that the district court’s explicit consideration of the defendant’s arguments would not have affected the sentence imposed.” *United States v. Boulware*, 604 F.3d 832, 838 (4th Cir. 2010) (alterations, ellipses and internal quotation marks omitted). Remand is appropriate when the absence of explanation prevents us from “determin[ing] why the district court deemed the sentence it imposed appropriate” or “produce[s] a record insufficient to permit even . . . routine review for substantive reasonableness.” *Lynn*, 592 F.3d at 582 (internal quotation marks omitted).

We conclude that the Government has satisfied its burden of showing that the district court’s error was harmless. The record establishes that the district court considered at least some of Nelson’s arguments for a variant sentence. Our review confirms that the other arguments Nelson raised were weak and not particularly compelling when juxtaposed with her lengthy criminal history, new criminal conduct, and her attempts to abscond supervision. The court also properly weighed the § 3553(a) sentencing factors and noted that this was Nelson’s second federal conviction for similar conduct. Finally, although the court did not specifically address Nelson’s arguments regarding her history of mental illness and drug addiction when it denied her motion for a variance or downward departure,

the court recommended Nelson receive “drug treatment, cognitive behavior therapy, and mental health treatment” while incarcerated. Thus, even though the district court did not adequately explain its reasons for rejecting Nelson’s argument for a below-Guidelines sentence, it appears that the district court considered her argument for a downward variance based on mental health and drug abuse challenges. *See Boulware*, 604 F.3d at 839. We are thus persuaded that, in this case, any shortcoming in the court’s explanation for the sentence it selected is harmless and that remand is not warranted.

We are also convinced that the district court correctly calculated Nelson’s Guidelines range, afforded the parties an opportunity to argue for an appropriate sentence, and considered the § 3553(a) factors in arriving at a presumptively reasonable sentence. Nothing in the record rebuts the presumption of reasonableness accorded to Nelson’s within-Guidelines sentence.

Accordingly, we affirm the judgment of the district court. In accordance with *Anders*, we have reviewed the entire record in this case and have found no other meritorious issues for appeal. This court requires that counsel inform Nelson, in writing, of the right to petition the Supreme Court of the United States for further review. If Nelson requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel’s motion must state that a copy thereof was served on Nelson.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED