

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 14-31297

United States Court of Appeals
Fifth Circuit

FILED

June 29, 2016

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHANNING CHRISTOPHER MILLER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:13-CR-281

Before STEWART, Chief Judge, and JONES and DENNIS, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Channing Miller (“Miller”) pleaded guilty to possession with intent to distribute cocaine, and the district court sentenced him to 120 months’ imprisonment. Though the 120-month sentence was fifteen months above the Guidelines range adopted at sentencing, Miller did not object. He now appeals, arguing that the district court procedurally erred in imposing his sentence. Because we conclude that the district court

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 14-31297

inadequately explained Miller's above-Guidelines sentence, we VACATE and REMAND for resentencing.

FACTS & PROCEDURAL HISTORY

Miller pleaded guilty to a single-count indictment charging him with possession with intent to distribute cocaine hydrochloride in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). The Presentence Investigation Report ("PSR") stated that 3.5 "brick shaped objects wrapped in clear plastic" were seized from Miller's person upon arrest and that a subsequent laboratory analysis determined that the packages contained 4.469 kilograms of cocaine. Based in part on this amount,¹ the PSR assigned a total offense level of 25 and a criminal history category of V, which yielded a Guidelines range of 100 to 125 months' imprisonment.

On November 12, 2014, the district court held Miller's sentencing hearing. At the beginning of the hearing, the parties alerted the district court to a mistake in the PSR's cocaine accounting—the 4.469 kilograms referenced in the PSR was the *gross* weight of the packages seized from Miller upon arrest, whereas, according to the laboratory analysis, the *net* weight of cocaine in the packages was only 3.499 kilograms. The parties (and probation) agreed that the lower net cocaine quantity was appropriate for purposes of calculating the Guidelines and that this new quantity reduced Miller's total offense level to 23. The parties further agreed that this, in turn, reduced the applicable Guidelines range to 84 to 105 months' imprisonment. The district court explicitly adopted on the record the revised Guidelines range of 84 to 105 months as "unopposed by either side" and as supported by the reduced cocaine quantity.

¹ The PSR reflects that Miller also had 22.5 grams of marijuana and two bottles of a cutting agent in his possession at the time of his arrest. These substances are not at issue here.

No. 14-31297

After adopting the revised range, the district court made a number of statements in reference to the sentence it contemplated for Miller. For example, the court informed Miller that what was driving the sentence he was facing, other than the amount of cocaine that was adjusted to his benefit, was his extensive recidivism with drug offenses. To that end, the court outlined all of the prior drug offenses to which Miller pleaded guilty in state court before noting that, after each conviction, “his adjustment to supervision was poor.” Referencing the 18 U.S.C. § 3553(a) factors, the court returned to Miller’s recidivism and discussed how his “repetitive involvement in drug activities” aggravated his acceptance of responsibility, detracted from his ability to support his children, and showed a “sense of irresponsibility” and a lack of respect for the law.

After making all of these statements, the district court stated that it was “ready to proceed with sentencing.” Just before imposing a 120-month sentence, the court pronounced:

As indicated earlier, this is the defendant’s fourth conviction. This particular conviction is his first federal conviction for possession with intent to distribute a quantity of cocaine hydrochloride. The prior drug related convictions have already been documented and referenced in this hearing and in the report that we have here today.

In this situation, the Court is mindful again of Section 3553(a), considered all the factors there and finds [] this sentence to be a reasonable sentence, hopefully, to meet all of the factors, particularly those factors related to safety of the public, promoting respect for the law, avoiding recidivist behavior and considering the defendant’s personal history characteristics as well as the criminal history conduct as already noted.

Miller did not object.

On December 8, 2014, almost one month after sentencing, the district court entered its Statement of Reasons (“SOR”). The SOR contained a number

No. 14-31297

of inaccuracies—it erroneously indicated that the court had adopted the PSR without change at sentencing; it incorrectly listed Miller’s offense level as 25 and the Guidelines range as 100 to 125 months’ imprisonment; and it wrongly indicated that the 120-month sentence was within-Guidelines. The SOR also left blank a section dedicated to explaining the court’s reasons for imposing a non-Guidelines sentence.

Miller timely appealed.

STANDARD OF REVIEW

In light of his failure to object, Miller concedes that our review is for plain error. *See, e.g., United States v. Stanford*, 805 F.3d 557, 566 (5th Cir. 2015) (noting that unpreserved errors are reviewed for plain error). To demonstrate plain error, Miller must show a clear or obvious error that affects his substantial rights. *See United States v. Castaneda-Lozoya*, 812 F.3d 457, 459 (5th Cir. 2016). Even if Miller makes this showing, we retain discretion to remedy the error, which we exercise only if the “error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Puckett v. United States*, 556 U.S. 129, 135 (2009) (alteration and quotation marks omitted).

DISCUSSION

Miller’s appellate argument is not a model for clarity. He argues that the district court “forgot” the late-breaking cocaine reduction and coinciding revised Guidelines range and mistakenly sentenced him within the original, higher Guidelines range. As evidence of this error, he asserts that the district court was silent about a variance at sentencing and inadequately explained that it had imposed an above-Guidelines sentence. He also highlights the inaccuracies in the SOR, which states, *inter alia*, that the district court made no changes to the Guidelines at sentencing and imposed a within-Guidelines sentence. Minimally, we agree with Miller’s assertion that the district court

No. 14-31297

erred by inadequately explaining the 120-month sentence—particularly its decision to impose an above-Guidelines sentence and its reasons for doing so—as required by *Gall v. United States*, 552 U.S. 38 (2007), and its progeny. Accordingly, we vacate and remand for resentencing.

Miller has shown a clear or obvious error. The Supreme Court has explained that a district court “commits procedural error when [it] ‘fails to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.’” *United States v. Fraga*, 704 F.3d 432, 438–39 (5th Cir. 2013) (quoting *Gall*, 552 U.S. at 51); *see also Rita v. United States*, 551 U.S. 338, 357 (2007) (“Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so.”). Thus, “when a district court sentences outside the Guidelines range, it must explain on the record why the range would not serve the goals listed in Section 3553(a).” *United States v. Ibarra-Luna*, 628 F.3d 712, 717 (5th Cir. 2010) (citing *Gall*, 552 U.S. at 51). Miller is correct that the district court failed to satisfy this sentencing obligation. The district court thoroughly explained why a number of factors related to Miller’s recidivism justified a lengthy prison sentence. However, after reducing the applicable Guidelines range to 84 to 105 months’ imprisonment based on the cocaine reduction, the district court did not acknowledge that the 120-month sentence ultimately imposed was an above-Guidelines sentence.² Though the court cited its consideration of the § 3553(a)

² In its brief and at oral argument, the Government zealously pressed the notion that district courts are not required to use “magic words” or specific terminology when imposing an above-Guidelines sentence. We agree. *See Fraga*, 704 F.3d at 438–39 (“[W]e have previously explained that when imposing a non-Guidelines sentence, the district court need not engage in robotic incantations that each statutory factor has been considered.” (citation and internal quotation marks omitted)); *United States v. Denny*, 653 F.3d 415, 420 (6th Cir. 2011) (“[N]o specific magic words are necessary to render a sentence reasonable.” (citation and quotation marks omitted)); *United States v. Moton*, 226 F. App’x 936, 938 (11th Cir. 2007) (per curiam) (“We have never held that the term ‘variance’ is a magic word that district courts must utter during sentence hearings.”). However, this overarching principle does not excuse

No. 14-31297

factors, it did not explain why the Guidelines range would not serve the goals of § 3553(a), *see Ibarra-Luna*, 628 F.3d at 717, nor did it “discuss whether the sentence imposed was within the recommended range.” *United States v. Phillips*, 415 F. App’x 557, 559 (5th Cir. 2011). This omission was clear and obvious error. *See United States v. Nelson*, 591 F. App’x 37, 38 (2d Cir. 2015) (“To be sure, the district court provided ample justification for imposing a sentence with a lengthy term of incarceration. But the court did not acknowledge that it was imposing an above-guidelines sentence, so it therefore could not have satisfied its obligation to explain its reasons for doing so.”), *cert. denied*, 136 S. Ct. 237 (2015); *Ibarra-Luna*, 628 F.3d 717.

Miller has also shown that the error affected his substantial rights. A defendant may satisfy the third prong of plain error review by showing “a reasonable probability that, but for the district court’s error, [he] would have received a lower sentence.” *United States v. Davis*, 602 F.3d 643, 647 (5th Cir. 2010). More specifically, “in cases where the correct and incorrect Guidelines ranges overlap, but the court imposes a sentence significantly above the top-end of the correct Guidelines range, the imposed sentence affects the defendant’s substantial rights ‘where it is not apparent from the record that [the defendant] would have received an above-Guidelines sentence.’” *United States v. Hernandez*, 690 F.3d 613, 621 (5th Cir. 2012) (alteration in original) (quoting *United States v. Mudekunye*, 646 F.3d 281, 290 (5th Cir. 2011) (per curiam)). We are cognizant of the Supreme Court’s recent instruction that only in rare cases will a Guidelines error of this magnitude have no impact on a defendant’s substantial rights— “in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect,

a sentencing court from its primary obligation to explain its reasons for imposing an above-Guidelines sentence, which, minimally, would include acknowledging whether the sentence imposed is in fact within or above the Guidelines range.

No. 14-31297

higher Guidelines range and the sentence he received thereunder. Absent unusual circumstances, he will not be required to show more.” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016).

Here, the original (100 to 125 months) and revised (84 to 105 months) Guidelines ranges overlap by five months, and the district court imposed a sentence fifteen months higher than the top-end of the revised range. We have previously held that similar disparities affected a defendant’s substantial rights. *See Hernandez*, 690 F.3d at 621 (ranges overlapped by eleven months “and the district court imposed a sentence [twelve] months higher than the top-end of the correct Guidelines range”); *Mudekunye*, 646 F.3d at 290 (ranges overlapped by one month and the district court imposed a sentence nineteen months above the correct range); *United States v. Carrizales-Jaramillo*, 303 F. App’x 215, 217 (5th Cir. 2008) (one month overlap and defendant’s sentence exceeded the top end of the corrected range by one month). And, we emphasize that nothing in the record indicates that the court would have imposed the same sentence but for the procedural error. *See Molina-Martinez*, 136 S. Ct. at 1347 (“The Government remains free to point to parts of the record—including relevant statements by the judge—to counter any ostensible showing of prejudice the defendant may make. Where, however, the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court’s reliance on an incorrect range in most instances will suffice to show an effect on the defendant’s substantial rights.” (internal quotation marks, alteration, and citation omitted)). As discussed *supra*, the court explained why Miller’s recidivism motivated the sentencing determination, but nothing indicates that the court would have imposed the same sentence as a fifteen-month variance. *See, e.g., Carrizales-Jaramillo*, 303 F. App’x at 217 (distinguishing *United States v. Bonilla*, 524 F.3d 647, 656 (5th Cir. 2000), and vacating on plain error review where the “district court . . . did

No. 14-31297

not indicate that it would have imposed the same sentence as an alternative sentence”). Miller has thus shown that the court’s error affected his substantial rights.

Finally, Miller has shown that the district court’s error seriously affects the fairness, integrity, or public reputation of judicial proceedings. A “substantial disparity between the imposed sentence and the applicable Guideline range warrants the exercise of our discretion to correct the error.” *Mudekunye*, 646 F.3d at 291. Miller’s sentence was fifteen months above the top end of the revised Guidelines range. We have vacated sentences involving errors of a similar scale. *See, e.g., United States v. Santacruz-Hernandez*, No. 15-40260, ___ F. App’x ___, ___, 2016 WL 2909165, at *2 (5th Cir. May 18, 2016) (vacating on plain error review a sentence two months above the top end of the correct Guidelines range); *Mudekunye*, 646 F.3d at 290 (same; nineteen month disparity); *United States v. John*, 597 F.3d 263, 286–87 (5th Cir. 2010) (same; twenty-one month disparity); *United States v. Price*, 516 F.3d 285, 290 (5th Cir. 2008) (same; eighteen month disparity); *Carrizales-Jaramillo*, 303 F. App’x at 217 (same; one-month disparity). We see no reason to do otherwise in this case. Accordingly, we exercise our discretion to remedy the error with resentencing.

CONCLUSION

For the reasons considered above, we VACATE Miller’s sentence and REMAND for resentencing.