NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 31, 2024
Decided January 31, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 22-2581

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OSCAR ORTIZ,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:16-CR-00462(8)

Rebecca R. Pallmeyer,
Chief Judge.

O R D E R

Oscar Ortiz appeals the 18-year sentence imposed on him for crimes he committed while serving as the chief enforcer of the Latin Kings street gang for a village just west of Chicago. His appointed lawyer, however, asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). Counsel's brief explains the nature of the case and addresses issues that an appeal of this kind might be expected to involve, and Ortiz has responded. CIR. R. 51(b). Because counsel's brief

appears thorough, we limit our review to subjects that counsel and Ortiz discuss. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Ortiz pleaded guilty to a racketeering conspiracy, 18 U.S.C. § 1962(d), and discharging a firearm during a crime of violence. 18 U.S.C. § 924(c). The § 924(c) conviction carried a statutory minimum sentence of 10 years.

The probation officer who prepared the presentence investigation report (PSR) separated Ortiz's conduct into ten groups covering the following racketeering activities: conspiracy to commit murder (Groups 1 and 3); attempted murder (Groups 2, 4, 5, and 6); arson (Group 7); aggravated assault (Groups 8 and 9); and extortion (Group 10). Whichever group had the highest adjusted offense level would determine the offense level for the § 1962(d) violation, so long as it was greater than 19. U.S.S.G. § 2E1.1.

The probation officer concluded that Group 2, which involved the attempted murder of a "runaway" member of the Latin Kings, had the highest adjusted offense level and therefore guided the offense level for the racketeering conspiracy. The PSR began with a base offense level of 33 because the completed offense would have constituted first degree murder, U.S.S.G. § 2A2.1(a)(1), and added a four-point specific offense characteristic because the victim sustained permanent bodily injury. U.S.S.G. § 2A2.1(b)(1)(A). The PSR then assessed a three-point adjustment for Ortiz's supervisory role, U.S.S.G. § 3B1.1(b), and a five-point adjustment because some of the other racketeering activities were of similar seriousness. U.S.S.G. § 3D1.4. The adjusted offense level of 45 for the attempted murder, by operation of § 2E1.1(a)(2), then became the offense level for the racketeering conspiracy conviction. Ortiz received a three-point decrease for timely acceptance of responsibility, § 3E1.1(a)–(b), resulting in a total offense level of 42 which, when combined with a criminal history category of II, yielded a guideline range of 360 months to life in prison. But because 18 U.S.C. § 1963 provides a 240-month statutory maximum for the racketeering conspiracy, the guideline sentence was capped at 240 months' imprisonment. U.S.S.G. § 5G1.2(b).

The district court largely adopted these calculations and sentenced Ortiz to 216 months' imprisonment. It imposed a below-guidelines sentence of 96 months for the racketeering conviction and the statutory minimum 120 months for the conviction for discharging a firearm during a crime of violence—served consecutively under 18 U.S.C. § 924(c)(1)(D)(ii). The court also imposed concurrent three-year and four-year terms of supervised release for the § 1962(d) and § 924(c) offenses, respectively.

Counsel tells us that she advised Ortiz of the risks and benefits of withdrawing his guilty plea and confirms that he wishes to challenge only his sentence. Counsel therefore properly refrains from discussing possible challenges to the validity of Ortiz's guilty plea. *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002).

Counsel first considers whether Ortiz could challenge the base offense level for the grouping that relates to conspiracy to commit murder (Groups 1 and 3). Ortiz did not object to any of the Guidelines used for these groups, so our review would be for plain error. *United States v. Hyatt*, 28 F.4th 776, 781–82 (7th Cir. 2022). A plain-error challenge here would be frivolous because the district court applied the correct Guidelines. The PSR recounts that Ortiz agreed with gang leaders to issue "shoot on sight" orders for both runaway Latin King and rival gang members. And as chief enforcer, Ortiz disciplined members for not carrying out such orders. Because the conduct outlined for Groups 1 and 3 constituted conspiracy to commit murder, the district court appropriately applied the corresponding Guideline, U.S.S.G. § 2A1.5, to assign a base offense level of 33 for both groups. *See United States v. Porraz*, 943 F.3d 1099, 1103 (7th Cir. 2019) (applying § 2A1.5 to Latin Kings gang leader because of his leadership role and the gang's activities).

Similarly, counsel explores, but rightly declines, challenging the base offense levels for the grouping related to Ortiz's attempted murder offenses (Groups 2, 4, 5, and 6). Regarding Group 2, Ortiz was unsuccessful in trying to drive his truck into a runaway Latin King member, but he later agreed with gang leaders to issue a "shoot on sight" order that was carried out. As for Groups 4–6, the PSR reflects that Ortiz assisted other Latin Kings in several shootings that targeted rival gangs. The district court correctly applied U.S.S.G. § 2A2.1 to assign a base offense level of 33 to these groups because the offense conduct constituted attempted murder. *See* U.S.S.G. § 2A2.1 cmt. n. 1; 18 U.S.C. § 1111(a) (defining murder).

Counsel next considers challenging the role-in-the-offense adjustment, *see* U.S.S.G. § 3B1.1(b), which the district court assessed for nine of the ten offense groups. But counsel appropriately rejects such a challenge as frivolous because Ortiz's leadership role in the overall racketeering enterprise was alone sufficient to trigger the three-point adjustments. *See United States v. Damico*, 99 F.3d 1431, 1436–38 (7th Cir. 1996). A district court can also "inoculate" its sentence from reversal by providing a detailed explanation of the basis for a "parallel result"—that its decision would be the same even if a defendant could successfully challenge an aspect of the court's guideline

calculation. *See United States v. Asbury*, 27 F.4th 576, 581–82 (7th Cir. 2022) (internal quotation omitted). And the court here did just that by carefully explaining that Ortiz's personal history, not the adjustment, primarily influenced its sentencing decision, thereby rendering harmless any error in applying the role-in-the-offense adjustments.

Counsel is also correct that it would be futile to challenge the application of the bodily injury specific offense characteristic, U.S.S.G. § 2A2.1(b)(1)(A), assessed for Group 2 (one of the attempted murders). The district court committed no plain error because the victim in that attempted murder recounted having to undergo seven surgeries after a shooting and suffered permanent colon damage—the sort of bodily injury presenting a "substantial risk of death" and permanent impairment contemplated by the enhancement. U.S.S.G. § 1B1.1 cmt. n. 1(K) (defining "permanent or life-threatening bodily injury").

Counsel considers but rightly declines challenging the offense levels for Groups 8 and 9 (aggravated assault) or Group 10 (extortion). We see no error in the district court's application of the Guidelines and, even if we did, any error would be harmless because these groups did not determine the offense level for the racketeering conviction (by way of § 2E1.1(a)(2)) or play a role in the multiple-count adjustment because their adjusted offense levels were significantly lower than Group 2 (the group with the highest offense level). U.S.S.G. § 3D1.4(c).

Counsel also correctly rules out any other procedural or substantive challenge to Ortiz's sentence. The court adequately considered the sentencing factors under 18 U.S.C. § 3553(a), emphasizing the seriousness of the offense and thoughtfully considering Ortiz's primary arguments in mitigation (particularly his personal history). Nor did the court rely on clearly erroneous facts, treat the Guidelines as mandatory, or otherwise fail to adequately explain its chosen sentence. *See United States v. Davis*, 43 F.4th 683, 687 (7th Cir. 2022) (outlining examples of procedural error). Finally, the presumption that below-guidelines sentences, like Ortiz's, are substantively reasonable is "nearly irrebuttable," and nothing indicates that Ortiz could make the requisite showing that his sentence failed to comport with the factors outlined in 18 U.S.C. § 3553(a). *United States v. Oregon*, 58 F.4th 298, 302 (7th Cir. 2023).

Finally, we agree with counsel that any challenge to the length and conditions of supervised release would be frivolous. Both terms of supervised release are within statutory limits, and the district court's justification of Ortiz's sentence, which was adequate, necessarily covers the term of supervised release. *United States v. Armour*, 804 F.3d 859, 867–68 (7th Cir. 2015). Counsel also considers challenging one supervised

release condition in the written judgment—a bar on Ortiz associating with any Latin King member—that omitted the court's clarification at sentencing that the bar applied only to active, not former members. Counsel assures us, however, that Ortiz does not wish to raise this issue on appeal, so we need say no more about that.

In his response to counsel's *Anders* motion, Ortiz argues that his trial counsel was ineffective in advising him to plead guilty to the § 924(c) charge, rendering that conviction invalid. To the extent Ortiz wishes to pursue this claim, it is best saved for collateral review, where an evidentiary foundation can be fully developed. *See Massaro v. United States*, 538 U.S. 500, 503–05 (2003).

Accordingly, we GRANT counsel's motion to withdraw and DISMISS the appeal.