

United States Court of Appeals
For the Eighth Circuit

No. 18-2318

United States of America,

Plaintiff - Appellee,

v.

Benjamin Michael McCauley,

Defendant - Appellant.

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: March 7, 2019

Filed: March 18, 2019

[Unpublished]

Before LOKEN, COLLOTON, and KOBES, Circuit Judges.

PER CURIAM.

Benjamin McCauley appeals the sentence imposed by the district court¹ after he pleaded guilty to a drug offense. His counsel has moved to withdraw and has filed a brief under *Anders v. California*, 386 U.S. 738 (1967). McCauley has filed a pro se brief.

At sentencing, the district court granted the government's motion for an upward departure under U.S.S.G. § 4A1.3(a), and denied McCauley's requests for a downward departure or variance based on his mental health history and other characteristics. Counsel argues that the district court should have departed or varied downward, and that the court failed adequately to explain the extent of the upward departure. We lack authority to review the district court's decision not to depart downward, as there is no indication that the court failed to recognize its authority to depart downward, *see United States v. Lopez-Arce*, 267 F.3d 775, 784 (8th Cir. 2001), and we conclude the district court did not abuse its discretion in denying a downward variance, as it addressed McCauley's arguments and concluded a variance was not warranted, *see United States v. Lewis*, 593 F.3d 765, 773 (8th Cir. 2010). Further, we discern no plain error in the district court's explanation of the upward departure. *See United States v. Walking Eagle*, 553 F.3d 654, 657 (8th Cir. 2009); *see also United States v. Johnson*, 648 F.3d 940, 944 (8th Cir. 2011).

As to McCauley's pro se arguments, we reject his assertion that the district court judge was biased, *see In re Steward*, 828 F.3d 672, 682 (8th Cir. 2016), and we conclude that the district court did not deny his right to allocution, *see United States v. Kaniss*, 150 F.3d 967, 969 (8th Cir. 1998). Finally, we decline to consider

¹The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

McCauley's ineffective-assistance-of-counsel claims on direct appeal. *See United States v. Hughes*, 330 F.3d 1068, 1069 (8th Cir. 2003).

Having independently reviewed the record under *Penson v. Ohio*, 488 U.S. 75 (1988), we find no non-frivolous issues for appeal. Accordingly, we grant counsel's motion and affirm.
