FILED
United States Court of Appeals
Tenth Circuit

August 22, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DENILSON CARDONA-ZUNIGA,

Defendant - Appellant.

No. 18-4117
(D.C. No. 2:18-CR-00251-CW-1)
(D. Utah)

ORDER AND JUDGMENT*

Before **MATHESON**, **McKAY**, and **BACHARACH**, Circuit Judges.

Denilson Cardona-Zuniga appeals his sentence following the entry of a guilty plea. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In July 2018, Mr. Cardona-Zuniga pled guilty to unlawful reentry, a violation of 8 U.S.C. § 1326(b). He was sentenced to 15 months' imprisonment, to be

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

followed by remand to Immigration and Customs Enforcement for deportation proceedings. Mr. Cardona-Zuniga appealed.

On appeal, his counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that he "ha[d] reviewed the trial record available, and [could not] find any reasonable grounds for appeal in this case." (Appellant's Br. at 3.) Mr. Cardona-Zuniga did not file his own brief, but his counsel's *Anders* brief identified two issues for this court's consideration: whether the court should have sentenced him even further below the advisory guidelines range, and whether the court adequately explained the sentence. Our own review of the record additionally persuades us to address Mr. Cardona-Zuniga's decision not to participate in the "fast-track" program at sentencing.

"To obtain leave to withdraw under *Anders* in a direct criminal appeal where counsel conscientiously examines a case and determines that any appeal would be wholly frivolous, counsel . . . must submit a brief to the client and the appellate court indicating any potential appealable issues based on the record." *United States v. Griffith*, 928 F.3d 855, 863–64 (10th Cir. 2019) (internal quotation marks omitted). At that point, the defendant may file his own brief, and we "must then conduct a full examination of the record to determine whether [the] defendant's claims are wholly frivolous." *Id.* at 864 (internal quotation marks omitted). As *Anders* requires, we have conducted a full examination of the record before us and conclude there are no non-frivolous grounds for appeal. We address each of the three issues identified above in turn.

Unlawful reentry has a base offense level of 8, which was subject to two 4-level enhancements because of Mr. Cardona-Zuniga's felony convictions both before he was first deported and after. *See* U.S.S.G. § 2L1.2(a), (b)(2)(D), (b)(3)(D). He received a 3-level reduction for acceptance of responsibility, giving him a total offense level of 13. *See* U.S.S.G. § 3E1.1. With his criminal history category of III, this resulted in an advisory sentencing guidelines range of 18 to 24 months' imprisonment. *See* U.S.S.G. Sentencing Table, Zone D.

Mr. Cardona-Zuniga's presentence investigation report (PSR) had miscalculated his total offense level by only applying the 4-level increase for his post-deportation felony conviction and not his pre-deportation felony conviction. He was also participating in the "fast-track" program at the time, causing the PSR to anticipate an additional 4-level reduction, which resulted in the PSR calculating an advisory sentencing range of 2 to 8 months' imprisonment.

At the sentencing hearing, Mr. Cardona-Zuniga's attorney indicated that his client was no longer participating in the fast-track program following the discovery of the error in the PSR's offense-level calculation because "he [wa]s married to an eight[-]month sentence" and "[could not] ask for anything less" under the fast-track program. (R. Vol. II at 23.) The district court judge explained to Mr. Cardona-Zuniga that the guidelines range without the fast-track option would be 18 to 24 months, whereas if he continued in that program, the sentencing range would be 8 to 14 months. The judge also asked Mr. Cardona-Zuniga whether he had discussed the matter thoroughly with his attorney and decided not to proceed with fast track, to

which Mr. Cardona-Zuniga assented. Although that decision may have been a poor one, nothing in the record suggests that it was in any way involuntary or uninformed. *Cf. United States v. Cruz-Banegas*, 430 F. App'x 742, 743, 747 (10th Cir. 2011) (affirming conviction and sentence where defendant entered guilty plea and opted out of fast-track program in order to request below-guidelines sentence: "The fact he . . . opted out of the fast-track program in hopes of obtaining a shorter sentence does not demonstrate" a valid reason for withdrawing his plea, as "[b]uyer's remorse is not grounds for reversal.").

As for the issues appellate counsel has identified, Mr. Cardona-Zuniga's sentence is three months below the bottom of the guidelines range (and only one month above the top of the range that would have applied if he had remained in the fast track program). As counsel recognizes, our review of a district court's sentencing variance is "highly deferential" and requires us to "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *United States v. Friedman*, 554 F.3d 1301, 1307–08 (10th Cir. 2009) (internal quotation marks omitted). The district court must "state in open court the reasons for its imposition of the particular sentence" "at the time of sentencing." 18 U.S.C. 3553(c). However, "we do not demand that the district court recite any magic words" in explaining the sentence. *United States v. Rodriguez-Quintanilla*, 442 F.3d 1254, 1258 (10th Cir. 2006) (internal quotation marks omitted).

At sentencing, the district court judge expressed a concern that Mr. Cardona-Zuniga had "become involved in drug trafficking at a very young age" and had

received a lenient sentence for his pre-deportation felony conviction only to return "within a very short period of time and . . . again becom[e] involved in drug traffic and trade." (R. Vol. II at 24.) The judge found that it was "reasonable to infer that he [returned to the United States] with the intention to become involved in drug trafficking." (*Id.* at 25.) The judge additionally noted that Mr. Cardona-Zuniga had been involved in criminal activity while released on bail during the pendency of his immigration case. (*Id.*) Finally, in sentencing him to 15 months' imprisonment, the judge stated he believed that Mr. Cardona-Zuniga was "prepared to accept the consequences" of foregoing fast track and that "some leniency" was permissible because of the time he had spent in custody and "because of his youth." (*Id.*)

We conclude that Mr. Cardona-Zuniga has no non-frivolous argument to make challenging the extent to which his sentence deviated from the guidelines range, or whether the district court adequately explained the sentence. The district court expressly identified several reasons weighing in favor of a higher and a lower sentence for Mr. Cardona-Zuniga and ultimately concluded that the appropriate sentence under the circumstances was three months below the guidelines range. The district court provided a sufficient explanation for this sentencing variance and did not abuse its discretion in giving it.

Therefore, we **DISMISS** Mr. Cardona-Zuniga's appeal and **GRANT** his attorney's request for permission to withdraw as counsel.

Entered for the Court

Monroe G. McKay
Circuit Judge