FILED
United States Court of Appeals
Tenth Circuit

June 23, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOHN SCOTT BROOKS, Defendant - Appellant.	No. 22-6070 (D.C. No. 5:20-CR-00124-SLP-1) (W.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **BRISCOE**, Circuit Judges.

Mr. John Scott Brooks was convicted of armed bank robbery and sentenced to 120 months' imprisonment. On appeal, he argues that the sentence is substantively unreasonable because the district court gave

- inadequate weight to his bipolar disorder and
- excessive weight to aggravating factors.

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* The parties have not requested oral argument, and it would not help us decide the appeal. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G). So we have decided the appeal based on the briefs and the appellate record.

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

We reject these arguments and affirm.

1. We apply the abuse-of-discretion standard.

The length of a sentence must be substantively reasonable. *United States v. Walker*, 844 F.3d 1253, 1255 (10th Cir. 2017). In addressing the substantive reasonableness of Mr. Brooks's sentence, we apply the abuse-of-discretion standard. *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009). Under this standard, a sentence is substantively unreasonable only if it is arbitrary, capricious, whimsical, or manifestly unreasonable. *United States v. Lente*, 759 F.3d 1149, 1158 (10th Cir. 2014). We "do not reweigh the sentencing factors but instead ask whether the sentence fell within the range of 'rationally available choices that facts and the law at issue can fairly support.'" *United States v. Blair*, 933 F.3d 1271, 1274 (10th Cir. 2019) (quoting *United States v. Martinez*, 610 F.3d 1216, 1227 (10th Cir. 2010)).

2. The district court sentenced Mr. Brooks to 120 months' imprisonment.

Mr. Brooks was convicted of armed bank robbery. *See* 18 U.S.C. §§ 2113(a), (d). The court found an offense level of 26 and a criminal-history category of III. The offense level included upward adjustments for

- taking the property of a financial institution and
- using a dangerous weapon (a fake bomb).

Based on the offense level and criminal-history category, the guideline range was 78 to 97 months.

Mr. Brooks requested a downward variance to 72 months. For this request, Mr. Brooks emphasized that he had bipolar disorder and hadn't taken his medications before committing the robbery. He also pointed to other potentially mitigating factors, including childhood abuse and use of cocaine to self-medicate.

The government requested the statutory maximum sentence of 25 years. In urging this sentence, the government pointed to aggravating factors involving Mr. Brooks's

- efforts to plan and commit the crime,
- use of his children to create an alibi,
- extensive criminal history, and
- repeated attempts to smuggle and sell marijuana while awaiting trial.

After considering the parties' arguments and the statutory sentencing factors, the court imposed a 10-year sentence, varying 23 months above the ceiling of the guideline range.

3. The district court acted within its discretion by varying upward despite Mr. Brooks's mental illness.

On appeal, Mr. Brooks argues that his sentence is substantively unreasonable based on inadequate weight given to his bipolar disorder. But the district court considered Mr. Brooks's bipolar disorder. R. vol. 3, at

447–48; *id.* at 452. Granted, the court could have given greater weight to the bipolar disorder. But the court had leeway in determining how to weigh Mr. Brooks's bipolar disorder.

For his argument, Mr. Brooks relies on three cases:

1. *United States v. Robinson*, 778 F.3d 515, 523 (6th Cir. 2015),
2. *United States v. DeRusse*, 859 F.3d 1232, 1238 (10th Cir. 2017), and
3. *United States v. Chatman*, 986 F.2d 1446, 1452 (D.C. Cir. 1993).

None of these cases establish an abuse of discretion.[1]

First, *Robinson* doesn't prevent an upward variance when the defendant is mentally ill. In *Robinson*, the Sixth Circuit held that a defendant's "mental illness, if credible, *could* qualify as a compelling justification that may support a significant downward variance from the Guidelines range." *Robinson*, 778 F.3d at 523 (emphasis added). But *Robinson* doesn't *require* a downward variance whenever a defendant presents evidence of mental illness.

The same is true of *DeRusse*. In *DeRusse*, we held that a court didn't abuse its discretion by giving "primary consideration" to the defendant's

[1] Mr. Brooks also cites scientific evidence about bipolar disorder. Appellant's Opening Br. at 13–14. But he did not present that evidence to the district court, and parties cannot create a new record on appeal. *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000). So we do not consider that evidence.

delusional motivation. *United States v. DeRusse*, 859 F.3d 1232, 1238 (10th Cir. 2017). But we didn't require district courts to assign any particular weight to a defendant's delusions.

Chatman provides no greater guidance. There the D.C. Circuit recognized that the statutory goals of punishment and incarceration "lose some of their relevance when applied to those with reduced mental capacity." *United States v. Chatman*, 986 F.2d 1446, 1452 (D.C. Cir. 1993). But *Chatman* expressly excluded individuals whose mental capacity is diminished through the elective use of drugs. *Id.* And here, Mr. Brooks chose to self-medicate with cocaine rather than take his prescribed medication for bipolar disorder. So *Chatman* doesn't undermine Mr. Brooks's sentence.

The district court expressly considered Mr. Brooks's mental illness when determining the sentence. That consideration wasn't arbitrary, capricious, or manifestly unreasonable.

4. The district court acted within its discretion by varying upward based on the aggravating factors.

Mr. Brooks also argues that his sentence is substantively unreasonable because the district court gave too much weight to three aggravating factors:

1. his use of a fake bomb,
2. his decision to use his children to manufacture an alibi, and

3. his significant criminal history, including some crimes that hadn't generated any criminal-history points.

The district court didn't abuse its discretion by relying on these factors to vary upward by 23 months.

First, the district court could consider the fake bomb as an aggravating factor. Mr. Brooks argues that the guideline sentence had already accounted for his use of a dangerous device. Granted, the guideline sentence did include an enhancement for the fake bomb. But the district court could consider the fake bomb anyway: "District courts have broad discretion to consider particular facts in fashioning a sentence under 18 U.S.C. § 3553(a) even when those facts are already accounted for in the advisory guidelines range." *United States v. Gross*, 44 F.4th 1298, 1304 (10th Cir. 2022) (quoting *United States v. Barnes*, 890 F.3d 910, 921 (10th Cir. 2018)). So the district court could consider how Mr. Brooks's use of a fake bomb had terrified the teller. R. vol. 3, at 449.

Second, the district court found that Mr. Brooks had used his children to manufacture an alibi. Mr. Brooks characterizes this finding as "mistaken." Because this argument involves a factual finding, we consider only whether the court clearly erred. *See United States v. Pinson*, 542 F.3d 822, 835 (10th Cir. 2008). Any potential error wouldn't have been clear.

After committing the robbery, Mr. Brooks picked up his children, drove to Texas, and ran errands. When questioned by authorities, Mr. Brooks

- said that he had been driving to Texas with his children when the robbery had taken place and
- denied that he would have robbed a bank while his children were with him.

This evidence supports a finding that Mr. Brooks used his children to manufacture an alibi, and the district court could rely on this finding to vary upward.

Finally, the district court could consider the past convictions that hadn't triggered any criminal-history points. As Mr. Brooks points out, these convictions involved relatively minor crimes. But the district court didn't vary upward only because of these crimes. Instead, the court determined that Mr. Brooks's lengthy criminal history had shown "a lack of respect for the law." R. vol. 3, at 450.[2] So the district court didn't abuse

[2] Mr. Brooks overstates the district court's reliance on his prior criminal history. The court just explained that his uncounted offenses "counsel[] in the direction of an upward variance" because they're not factored into the guidelines. R. vol. 3, at 454–55. The district court used stronger language when discussing Mr. Brooks's use of his family to smuggle drugs into prison, explaining that it showed not only that he would "easily engage in criminal conduct" but also that he would "expose[] his family members to criminal prosecution" for his own personal benefit. *Id.* at 455.

its discretion by considering the uncounted part of Mr. Brooks's criminal history.

5. Conclusion

The district court did not abuse its discretion by varying upward 23 months and imposing a 10-year sentence. So we affirm the sentence.

Entered for the Court

Robert E. Bacharach
Circuit Judge