FILED
United States Court of Appeals
Tenth Circuit

July 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FELIX ANTONIO CAIVINAGUA-SANCHEZ,

Defendant - Appellant.

No. 22-2128
(D.C. No. 2:22-CR-01226-MIS-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **PHILLIPS**, and **McHUGH**, Circuit Judges.

Felix Antonio Caivinagua-Sanchez ("Caivinagua") pled guilty to illegal reentry into the United States. The district court sentenced him to 24 months' imprisonment, varying upward from the U.S. Sentencing Guidelines range of one to seven months based on his 2013 conviction for a sexual offense against a minor. Caivinagua appeals, arguing his sentence was procedurally and substantively unreasonable. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* 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. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. Background

In 2013, Caivinagua, a citizen of Ecuador, was charged with multiple felonies in New York state court. Under a plea agreement he pled guilty to one misdemeanor. He was sentenced to one year in prison and removed from the United States in 2014.

In 2022 Caivinagua was arrested in New Mexico and pled guilty to illegal reentry to the United States in violation of 8 U.S.C. § 1326. A Presentence Investigation Report ("PSR") summarized the facts of his 2013 charges and conviction and set his offense level at six and criminal history category at II. The guidelines sentencing range was therefore one to seven months.

The district court advised Caivinagua it was considering an upward variance, "because of your prior sexual offense against a minor,"[1] and allowed him to file a written response. R. vol. III at 42. Caivinagua opposed an upward variance based on his 2013 conviction, arguing "there should not be a substitution of present judgment for what happened procedurally in 2013," and that "[a] guidelines sentence would not create unwarranted sentence disparities; it would be consistent with others . . . facing sentencing on a first immigration offense." R. vol. I at 19, 20.

At sentencing, the district court asked Caivinagua about the circumstances of the 2013 offense. He represented, through counsel: that he had been "severely intoxicated" at a party, R. vol. III at 31, 33; that he "has taken steps to make sure that

[1] As summarized in the government's brief, the 2013 charges were brought because Caivinagua "held down an 11-year old girl against her will and rubbed her breasts and vagina." Aplee. Br. at 1.

nothing like that happens again," *id.* at 32, that he is "sincerely remorseful," *id.* at 31; that the victim was "unfamiliar to him," *id.* at 33; and that his charges were reduced to a misdemeanor because "the victim . . . did not wish to testify," *id.* at 34.

The district court adopted the PSR's factual findings, to which Caivinagua has never objected. The court then explained how it evaluated the 18 U.S.C. § 3553(a) sentencing factors to impose an above-guidelines sentence:

> The Court's considering the following [§] 3553(a) factors: The nature and circumstances of the offense and the history and characteristics of the defendant. The defendant has a prior offense in which he sexually assaulted a young child after a—a stranger child when he was intoxicated. The Court's considering that, in this offense, the defendant came back to the country and committed another crime in the country in which he committed his sex offense and came back to here, where he should be a registered sex offender. The Court's considering the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.
>
> The Court finds this is a serious crime, given the defendant's prior behavior while in the United States, and that an upward variance is needed to promote respect for the law and provide just punishment for this offense. The Court's considering the need to afford adequate deterrence of criminal conduct and finds, given the defendant's behavior while in the country, more than a Guideline sentence is needed to adequately deter future criminal conduct. The Court is especially concerned with the need to protect the public from further crimes of the defendant because of the age of his victim, the circumstances in which the victim was a stranger to him; he simply did this after drinking too much at a party.
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> . . . .
>
> The Court's also considering the need to avoid unwarranted sentencing disparities among defendants with

> similar records who have been found guilty of similar conduct. The Court finds that defendants who have committed crimes like the defendant's in this country do frequently serve much lengthier sentences than one to seven months. And so the Court is upward varying, in part, to avoid unwarranted sentencing disparities, but even if there is a sentencing disparity with similarly-situated defendants, the Court finds that it's justified, given the nature of the defendant's prior sentence.

R. vol. III at 35–37. The court sentenced Caivinagua to 24 months' imprisonment, the statutory maximum. Caivinagua now appeals, challenging the sentence as substantively and procedurally unreasonable.

II. Discussion

"We review challenges to a district court's sentencing decision in two steps. First, we ensure that the district court committed no significant procedural error. Second, if there is no reversible procedural error, we then consider the substantive reasonableness of the sentence. *United States v. Eddington*, 65 F.4th 1231, 1237 (10th Cir. 2023) (internal quotation marks, citations, and brackets omitted).

Caivinagua argues the district court's sentence was both procedurally and substantively unreasonable. We summarize why we see no abuse of discretion, then address Caivinagua's arguments.

District courts imposing sentence are charged to "engage in a holistic inquiry of the § 3553(a) factors," *United States v. Lente*, 759 F.3d 1149, 1174 (10th Cir. 2014), and to "consider every convicted person as an individual," *Gall v. United States*, 552 U.S. 38, 52 (2007) (internal quotation marks omitted). They may "consider[] a wide variety of aggravating and mitigating factors relating to the

circumstances of both the offense and the offender." *Concepcion v. United States*, 142 S. Ct. 2389, 2399 (2022) (internal quotation marks omitted). "A district court properly engages in [the § 3553(a)] inquiry when it bases its decision on specific, articulable facts supporting [a] variance and does not employ an impermissible methodology or rely on facts that would make the decision out of bounds." *United States v. Barnes*, 890 F.3d 910, 916 (10th Cir. 2018).

Here, the district court considered both parties' arguments. It explained how Caivinagua's 2013 offense warranted an above guidelines sentence under several § 3553(a) factors, including: "the history and characteristics of the defendant," R. vol. III at 35:24–36:7; "the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment," *id.* at 36:7–9; and the need "to adequately deter future criminal conduct," *id.* at 36:17–18. The court noted it was "especially concerned with the need to protect the public," given the circumstances of the 2013 offense. *See id.* at 36:18–22. The court's explanation is adequate for our review, and we see no abuse of discretion in its evaluation of the § 3553(a) factors.

A. Procedural Reasonableness

"[P]rocedural reasonableness focuses on the manner in which the sentence was calculated." *Eddington*, 65 F.4th at 1237 (internal quotation marks omitted). "Procedural errors include failing to calculate (or improperly calculating) the Guidelines range, failing to consider the § 3553(a) factors, and failing to adequately explain the chosen sentence." *Id.* "A district court must set forth enough to satisfy the appellate court that it has considered the parties' arguments and has a reasoned

basis for exercising its own legal decisionmaking authority." *Lente*, 759 F.3d at 1156 (internal quotation marks and brackets omitted).

"When a defendant has preserved his procedural challenge in district court, we generally review the procedural reasonableness of that defendant's sentence using the familiar abuse-of-discretion standard of review." *Eddington*, 65 F.4th at 1237 (internal quotation marks omitted). "[W]e review de novo the district court's legal conclusions regarding the Guidelines and review its factual findings for clear error." *Id.* (internal quotation marks and brackets omitted). "But, when a procedural challenge was not preserved, it is reviewed for plain error." *Id.* "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (internal quotation marks omitted).

Caivinagua does not challenge the district court's explanation of his sentence as insufficient or argue it erred in computing his guidelines range. Rather, he makes several related arguments challenging the upward variance based on his 2013 conviction. We address those arguments below.

1. Consideration of Potential Sentence Disparities

Caivinagua objects to the district court's statement "find[ing] that defendants who have committed crimes like the defendant's in this country do frequently serve much lengthier sentences than one to seven months." R. vol. III at 37:9–11; *see also* Aplt. Br. at 14–16, 26–27. He argues there was "no evidence in the record regarding

the sentence length imposed on other reentry defendants." Aplt. Br. at 8. He suggests the district court was wrong about the length of sentences imposed on defendants with similar records, citing Sentencing Commission data calculating a four-month average and median length for the sentences of illegal reentry defendants with the same offense level and criminal history category. *Id.* at 16. Caivinagua also makes this argument as one of plain error, arguing the district court "relied on non-record purported facts concerning sentences imposed on other . . . defendants," without giving him notice and opportunity to rebut its finding. *See id.* at 26.

Because these arguments were not presented to the district court, we review for plain error. *Eddington*, 65 F.4th at 1237.[2] Under that standard, Caivinagua has not shown a basis to reverse. To prevail, Caivinagua would need to show "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *Gonzalez-Huerta*, 403 F.3d at 733 (internal quotation marks omitted). But at sentencing, the district court stated: "*even if there is a sentencing disparity . . . the Court finds that it's justified*, given the nature of the

[2] In the district court, Caivinagua argued a within-guidelines "would not create unwarranted sentencing disparities." R. Vol. I at 20. That argument relates to weighing the § 3553(a) factors, and therefore substantive reasonableness, addressed *infra*, Part II.B. *See United States v. Gross*, 44 F.4th 1298, 1303–04 (10th Cir. 2022) ("[P]rocedural error is the failure to consider all the relevant factors, whereas substantive error is when the district court imposes a sentence that does not fairly reflect those factors." (internal quotation marks omitted)).

But Caivinagua did not make *procedural* objections regarding sentence disparities in the district court. In particular, he did not present evidence or examples of sentences given to other defendants with similar records, or argue that was required, as he does here. His procedural arguments therefore were not preserved.

defendant's prior sentence." R. vol. III at 37:13–16 (emphasis added). This shows the court most likely would have imposed the same sentence, even if Caivinagua had demonstrated a disparate sentence. He therefore has not shown a reasonable probability that he would have received a shorter sentence but for the alleged error. *See Gonzalez-Huerta*, 403 F.3d 733 (placing burden on appellant to show plain error that affected his substantial rights). While we are skeptical of Caivinagua's claim of procedural error, we therefore need not further address it.

2. Alleged Improper Focus on Prior Conviction

Caivinagua also argues that the district court erred by focusing on his 2013 conviction to the exclusion of the circumstances of his 2022 illegal reentry. This is primarily an argument about substantive reasonableness—that the district court gave too much consideration to his 2013 offense and too little to other § 3553(a) factors—which we reject below. But to the extent Caivinagua also argues the district court committed *procedural* error by focusing on his 2013 conviction, we see no abuse of discretion. The district court was clear about the offense for which it was imposing sentence, stating, "*in this offense*, the defendant came back to the country and committed another crime in the country in which he committed his sex offense," and that "this is a serious crime, *given the defendant's prior behavior*." R. vol. III at 36 (emphasis added). This shows no misapprehension about which offense the district court was evaluating. Rather than improperly re-sentencing Caivinagua for his 2013 offense, we conclude that the district court permissibly evaluated the significance of that offense under the § 3553(a) factors.

3. Assessment of Prior Sentence

Caivinagua relatedly argues that the district court "committed procedural error by presuming that [he] should have received a longer sentence for his prior conviction." Aplt. Br. at 16 (boldface omitted). We review this argument for abuse of discretion but see none.

Initially, Caivinagua's claim that the district court "procedurally erred by taking into account a perceived disparity in how different states prosecute sex offenses" is not supported by the record. *See id.* The district court nowhere made any statement about how different states prosecute sex offenses. It focused only on Caivinagua's own prior conviction, evaluating it under the § 3553(a) factors.

Caivinagua's broader argument—that the district court erred by varying upwards based on a belief that his 2013 sentence was too lenient—also does not reflect an abuse of discretion. A district court may vary upwards where "the criminal history level fails to adequately account for the prior crime or crimes," so long as it explains its reasons. *See United States v. Atencio*, 476 F.3d 1099, 1106 (10th Cir. 2007), *overruled on other grounds by Irizarry v. United* States, 553 U.S. 708 (2008); *see also Gross*, 44 F.4th at 1304–05 (affirming upward variance based on criminal history and rejecting argument that district court erred by "overstat[ing] the seriousness" of criminal history which "include[d] no 'actual' felony convictions"); *United States v. Garcia*, 946 F.3d 1191, 1214 (10th Cir. 2020) ("[T]he drafters of the Guidelines themselves have recognized that their criminal-history computation scheme may not always fully reflect the seriousness of an offender's criminal

background and that, in such circumstances, action to elevate sentences above the . . . Guidelines range may be appropriate.") (affirming upward variance)).

That is what occurred here. The district court explained that it was varying upwards based on Caivinagua's 2013 offense. The court's sentence and explanation reflect its conclusion that Caivinagua's offense level, criminal history score, and guidelines range did not fully reflect the seriousness of his 2013 offense—largely because his misdemeanor conviction and one-year sentence did not increase his offense level, as a felony would have. The district court had discretion to impose an above guidelines sentence on that basis. *See Gross*, 44 F.4th at 1305. Caivinagua acknowledges that the district court concluded his criminal history was under-represented by the guidelines, and he cites no authority that precluded the court from varying its sentence on that basis.

Finally, Caivinagua's reliance on *United States v. Begay*, 974 F.3d 1172 (10th Cir. 2020) is misplaced. In *Begay*, we reaffirmed that "a district court may not consider a federal/state sentencing disparity under § 3553(a)(6)." *Id.* at 1177. Nothing here suggests the district court ran afoul of that rule by considering a disparity between Caivinagua's federal conviction (for illegal reentry) and sentences imposed in state courts for any similar convictions.

B. Substantive Reasonableness

Caivinagua also argues his sentence is substantively unreasonable. "Substantive review involves whether the length of the sentence is reasonable given all the circumstances of the case in light of the [§ 3553(a) factors]." *United States v.*

Alapizco-Valenzuela, 546 F.3d 1208, 1215 (10th Cir. 2008) (internal quotation marks omitted). We "review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 41 (2007). "'If the district court decides that an outside-Guidelines sentence is warranted, the court [of appeals] must consider the extent of the deviation and ensure that the justification is sufficiently compelling.'" *United States v. Peña*, 963 F.3d 1016, 1028–29 (10th Cir. 2020) (quoting *Gall*, 552 U.S. at 50) (brackets omitted). However, when reviewing an above-guidelines sentence, this court "do[es] not apply a presumption of unreasonableness." *Alapizco-Valenzuela*, 546 F.3d at 1216 (internal quotation marks omitted). Rather, we "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* (internal quotation marks omitted).

Appellate review is therefore "highly deferential." *United States v. McCrary*, 43 F.4th 1239, 1249 (10th Cir. 2022) (internal quotation marks omitted). "We do not reweigh the § 3553 sentencing factors," *id.* (internal quotation marks and brackets omitted), and "will not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them anew," *Gross*, 44 F.4th at 1305 (internal quotation marks omitted). "[W]e uphold even substantial variances when the district court properly weighs the § 3553(a) factors and offers valid reasons for the chosen sentence." *Barnes*, 890 F.3d at 916. "A district court abuses its sentencing discretion only if the sentence exceeded the bounds of permissible choice." *Id.* at 915 (internal quotation marks omitted). We

will affirm "as long as the balance struck by the district court among the factors set out in § 3553(a) is not arbitrary, capricious, or manifestly unreasonable, . . . even if we would not have struck the same balance in the first instance." *McCrary*, 43 F.4th at 1249 (internal quotation marks and brackets omitted).

Caivinagua argues his sentence was substantively unreasonable for several reasons, but none are persuasive. First, he cites data to compare his sentence to the guidelines range, to the average and median length of sentences given to others convicted of illegal reentry, and to the length of upward variances in other immigration cases.[3] But we do not "mathematically calculate the percentage variance from the Guidelines and use that percentage as the standard for determining the strength of the justifications required." *United States v. Huckins*, 529 F.3d 1312, 1317–18 (10th Cir. 2008) (internal quotation marks omitted). This is, in part, because "deviations . . . will always appear more extreme—in percentage terms—when the range itself is low," as it is here. *Gall*, 552 U.S. at 47–48.

Caivinagua's arguments merely restate in numeric terms the central point that his sentence was longer than those imposed in many other cases. But that does not show the district court's sentence was "arbitrary, capricious, whimsical, or manifestly unreasonable" or "exceeded the bounds of permissible choice." *McCrary*, 43 F.4th at

[3] *See* Aplt. Br. at 16 (noting his sentence was "*six times* longer than the average or median" of those imposed on others with immigration offenses in fiscal years 2017–21 with the same offense level and criminal history category (emphasis in original)); *id.* at 20 (arguing sentence was "more than twice" the top of the guidelines range"); *id.* at 19–20 (comparing to variances in other immigration cases; arguing the variance here was "twice as long as the mean . . and three times . . the median").

1249 (internal quotation marks omitted). The bare fact that his sentence was longer than others does not warrant reversal. *See United States v. Worku*, 800 F.3d 1195, 1207, 1208 (10th Cir. 2015) (affirming variance above "guidelines ranges capped at 3 years" to impose 22-year statutory maximum; holding, "a district court can vary from the guidelines so long as it does not do so arbitrarily and capriciously"); *Gross*, 44 F.4th at 1301, 1305 (affirming variance from guidelines range topped at 71-months to impose 120-month statutory maximum based on criminal history).

Moreover, Caivinagua's arguments, at most, would show a disparity with sentences in other cases. But such disparities, are "but one factor that a district court must balance." *United States v. Martinez*, 610 F.3d 1216, 1228 (10th Cir. 2010). Here the district court concluded other factors warranted an above-guidelines sentence, "even if" it created some sentencing disparity. R. vol. III at 37.

Next, Caivinagua argues that "[g]iven that the Guidelines already took [his] prior conviction into account, there was no reason to impose an upward variance based on it." Aplt. Br. at 24. But "district courts have broad discretion to consider particular facts . . . even when those facts are already accounted for in the advisory guidelines range." *Barnes*, 890 F.3d at 921 (internal quotation marks and brackets omitted). As stated above, Part II.A.3, the court could vary upwards based on finding the guidelines under-represented the seriousness of Caivinagua's prior offense.

Caivinagua also emphasizes other facts which he argues warrant a shorter sentence, including that this was his first illegal reentry, that he did not resist arrest, and the absence of other offenses between 2013 and his arrest in 2022. But the

district court considered these factors and found them outweighed by other considerations. Ultimately, Caivinagua disagrees with the district court's balancing of the § 3553(a) factors—particularly the weight it gave to his prior offense. But "no algorithm exists that instructs the district judge how to combine the factors or what weight to put on each one." *Barnes*, 890 F.3d at 916. Even if this court might in the first instance have given less weight to his 2013 offense or more to other considerations, we do not re-weigh the § 3553(a) factors anew on appeal. *McCrary*, 43 F.4th at 1249. Given our deferential standard of review, Caivinagua has not shown his sentence was substantively unreasonable.

III. Conclusion

Because we find no plain error or abuse of discretion by the district court, we affirm.

Entered for the Court

Carolyn B. McHugh
Circuit Judge