

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

December 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRINIDAD NANEZ-RIVERA,

Defendant - Appellant.

No. 17-1419

(D.C. No. 1:16-CR-00368-WJM)

(D. Colo.)

ORDER AND JUDGMENT*

Before TYMKOVICH, Chief Judge, EBEL, and LUCERO, Circuit Judges.

Trinidad Nanez-Rivera pleaded guilty to both assault using a dangerous weapon with intent to cause bodily injury and possession of a weapon in prison. He was sentenced to 68 months in prison, which was within the applicable guidelines range of 57–71 months. Nanez-Rivera appeals his sentence, arguing that it is substantively unreasonable because the district court inadequately weighed the sentencing factors under 18 U.S.C. § 3553(a). He argues that the

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and 10th Cir. Rule 32.1.

district court disregarded certain facts that weigh in favor of a downward variance.

We conclude the district court properly applied the sentencing factors and did not substantively err in imposing the sentence. Accordingly, we affirm.

I. Background

Nanez-Rivera is a federal inmate at the United States Penitentiary in Florence, Colorado. While in prison, he stabbed another inmate in the torso with a homemade eight-inch shank. As the victim attempted to flee, Nanez-Rivera and his co-defendant chased him. The guards ordered all three individuals to drop to the floor, but Nanez-Rivera pursued the victim, overtaking and striking him repeatedly. The victim was treated for superficial wounds and has since recovered.

Nanez-Rivera was charged and pleaded guilty to assault with a dangerous weapon and possession of a weapon in prison. With his extensive criminal history, Nanez-Rivera's advisory guideline sentencing range was 57–71 months. He moved for a six-month downward variance, asking the court to impose a sentence of 51 months. He pointed to numerous facts in the record—notably, that the victim had insulted Nanez-Rivera in the cafeteria the day before the stabbing, that the victim's stab wounds were relatively minor, and that the Bureau of Prisons (BOP) had placed members of different gangs in the same prison yard.

The district court rejected the argument that these were mitigating factors and sentenced Nanez-Rivera to 68 months—three months below the top of the applicable sentencing range.

II. Analysis

Nanez-Rivera challenges the district court’s application of the § 3553(a) factors, focusing on the arguments he made below. He asserts that the district court did not properly consider the circumstances giving rise to the assault or the minor nature of the wounds that resulted.

We review the substantive reasonableness of a sentence for abuse of discretion and consider whether the district court’s judgment was “arbitrary, capricious, whimsical or manifestly unreasonable.” *United States v. Gantt*, 679 F.3d 1240, 1249 (10th Cir. 2012). Our review for substantive reasonableness “is informed by the district court’s consideration of [the § 3553(a)] factors and explanation for the sentence.” *United States v. Walker*, 844 F.3d 1253, 1256 (10th Cir. 2017). “The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case.” *Gall v. United States*, 552 U.S. 38, 51 (2007). This is because “[t]he judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.” *United States v. Barnes*, 890 F.3d 910, 915–16 (10th Cir. 2018).

A sentence within the applicable guidelines range is presumed to be reasonable. *See United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006). This presumption, along with the abuse-of-discretion standard of review, creates a “hefty burden” for a criminal defendant to overcome. *United States v. Verdin-Garcia*, 516 F.3d 884, 898 (10th Cir. 2008). Thus, we review the record “to determine whether the district court satisfactorily engaged and examined the factors in a holistic fashion.” *Barnes*, 890 F.3d at 916.

Nanez-Rivera contends the district court erred in the weight he gave to two defendant-specific characteristics—his non-violent criminal history and his status as an immigrant. He also argues the district court failed to give weight to the circumstances giving rise to the assault—the previous confrontation between Martinez and Nanez-Rivera and the ongoing gang-related activity in prison. He further argues the district court did not properly consider the nature of Martinez’s minor wounds.

Nanez-Rivera points to *Walker*, where the district court failed to consider general deterrence or the applicable guidelines range when it ordered a sentence of time served—33 days in pretrial detention—for an individual who had committed multiple bank robberies. 844 F.3d at 1257–58. But this case is distinguishable from *Walker*. Here, the sentence falls within the applicable guidelines range, and is presumptively reasonable.

In any event, the record in this case is clear. The district court considered each of the relevant § 3553(a) factors at sentencing. For example, the district court considered Nanez-Rivera's history and characteristics and the nature and circumstances of his offenses. Whereas Nanez-Rivera argued the attack was a necessary response to the disrespect he had been shown in the cafeteria, the district court disagreed. The court highlighted Nanez-Rivera's membership in the Texas Syndicate gang and the premeditated nature of the attack, finding it "vicious" and "cowardly." R., Vol. 3 at 58. The district court also noted the seriousness of the offense and the need to deter inmates from such future attacks. When fashioning Nanez-Rivera's sentence, the district court considered the applicable guidelines range, rejecting Nanez-Rivera's argument in support of a downward variance. The court concluded the discussion of the § 3553(a) factors, saying the sentence imposed "reflects the seriousness of the offense, affords adequate deterrence to future criminal conduct, and will protect the public from further crimes of this defendant." R., Vol. 3 at 61. In the face of those facts, Nanez-Rivera simply disputes how the district court weighed these factors.

As to the ultimate sentence, the district court found the facts surrounding the attack warranted an upper-guidelines sentence. The court was unpersuaded by Nanez-Rivera's arguments that the victim was somehow asking to be assaulted, or that the BOP is partially at fault for placing gang members together. Where Nanez-Rivera saw mitigating circumstances, the district judge saw aggravating

factors. Nanez-Rivera fails to cite any instance where an appellate court has considered either the possibly provoking conduct by the victim or the BOP's placement of gang members as mitigating circumstances. If anything, these circumstances weigh against Nanez-Rivera.

In sum, we are only tasked with determining whether the district court abused its discretion and ordered a substantively unreasonable sentence. We hold the district court did not.

III. Conclusion

The facts of the case support the within-guidelines sentence ordered by the district court. Accordingly, we AFFIRM.

ENTERED FOR THE COURT

Timothy M. Tymkovich
Chief Judge

1 superficial wounds.

2 I already told you I'm considering the fact that
3 the victim was not sent off in an ambulance with an
4 emergency wound to the abdomen, bleeding to death. That
5 would have made it a very different crime. So that's --
6 and as Ms. Spencer pointed out, that's already factored in
7 the appropriate sentencing enhancements that the probation
8 officer selected to include in her report.

9 Okay. Anything else in support of your motion?

10 MS. CHRISTL: No, Your Honor.

11 THE COURT: Before I rule on the motion, I'm going
12 to consider some of the Section 3553(a) sentencing factors
13 as they apply to this defendant. The record indicates that
14 Mr. Nanez is 54 years old. He is a citizen of Mexico, he's
15 not a citizen or national of the United States. The
16 defendant's mother brought him to the United States for the
17 first time as a child in 1973. They settled in Soledad,
18 California, where they lived until 1994.

19 The defendant attended an elementary school in
20 that city. He does not have a high school diploma or GED
21 certificate and can only read and understand a very minimal
22 amount of English, notwithstanding the fact he's been in
23 this country for 44 years.

24 In 1995, the defendant moved to Texas where he
25 resided until he was deported to Mexico for the first time

1 in February of 2003, but then he quickly returned to Texas.
2 In August of 2006, the defendant was sentenced to two years
3 in custody for possession of methadone and possession with
4 intent to deliver heroin. Prior to his release, Mr. Nanez
5 was arrested by immigration officials and charged with
6 illegal re-entry and was also convicted of that offense.
7 All of this resulted in the defendant being incarcerated
8 continuously from August of 2006 until he was deported back
9 to Mexico for a second time in March of 2012.

10 At the time of the incident which gave rise to the
11 indictment in this case, the defendant was serving a
12 60-month prison sentence upon his conviction in July of
13 2014 in the United States District Court for the Southern
14 District of Texas for unlawful reentry into this country
15 after a prior removal.

16 According to Bureau of Prisons records, Mr. Nanez
17 is a long-term member of the Texas Syndicate gang.
18 Furthermore, the instant offense was allegedly a
19 gang-related attack. At his presentence interview with the
20 probation officer, the defendant admitted -- freely
21 admitted he was an associate of the Texas Syndicate.

22 From 2004 to 2009, the defendant was in a romantic
23 relationship with one Luz de la Cruz. She currently
24 resides in Reynosa, Mexico, and is a citizen of that
25 country. Together they have two children, Jose Trinidad,

1 age 14, and Jesus Angel, age 12. Both boys reside in
2 Mexico with their mother, and they are also citizens of
3 Mexico. The defendant has not had contact with his
4 children since he went to prison in 2006.

5 With regard to Mr. Nanez's criminal history,
6 according to the presentence report he has no juvenile
7 criminal adjudications and has been assessed 14 criminal
8 history points and he is before me on his 10th adult felony
9 conviction.

10 Turning to the nature and circumstances of the
11 offense, the parties agree that the Government's evidence
12 would be as follows: On March 21st, 2016, inmate
13 Christopher Martinez was assaulted by inmates and
14 codefendants in this case. On that date, all three inmates
15 were in the custody of the United States Penitentiary at
16 Florence, Colorado, at a location within the special
17 maritime and territorial jurisdiction of the United States.
18 The codefendants were not housed in the same unit as the
19 victim.

20 On that date, the codefendants entered the unit
21 where Mr. Martinez was housed but this defendant denies it
22 was for the specific purpose of assaulting the victim.. In
23 a common area of Unit E/A -- what does that stand for, Ms.
24 Spencer? E slash A?

25 MS. SPENCER: They just number -- or they letter

1 all the units, so it's a E unit. The A unit just
2 establishes a place. There's an E unit with a B, so
3 there's E/B and E/A.

4 THE COURT: There's no significance like the SHU?

5 MS. SPENCER: It's Echo unit. It's general
6 population only.

7 THE COURT: Thank you for that.

8 In a common area of the Unit E/A of the United
9 States Penitentiary, in a surprise maneuver, Mr. Luna
10 grabbed the victim around the neck in a chokehold while the
11 victim was seated at a computer station. Mr. Luna yanked
12 the victim on to his feet while this defendant, Mr.
13 Nanez-Rivera, rushed in with a home-made eight-inch shank
14 and stabbed the victim twice in the torso while he was --
15 while he struggled unsuccessfully to get out of Mr. Luna's
16 grasp.

17 This assault was captured very clearly on
18 surveillance cameras. I viewed this video for myself and
19 saw for myself the premeditated and vicious character of
20 this cowardly attack. The cameras caught the shank falling
21 to the floor where it was recovered by prison guards later.
22 The defendant chased the victim out of the common area.
23 Although all three inmates were ordered by guards to drop
24 to the floor, only Mr. Luna complied with the guards'
25 orders and Mr. Nanez chased the victim outside.

1 The assault continued with Mr. Martinez on the
2 floor trying to parry Mr. Nanez's blows and kicks. The
3 continued assault is caught on camera as well. The victim
4 was subsequently treated for two stab wounds to the
5 abdomen, bruising to his left leg as noted -- as were
6 noted as well.

7 This defendant, Mr. Nanez, was treated for a
8 superficial laceration on his right palm and a broken
9 finger.

10 All right, Ms. Roberts, do you wish to make any
11 statement at this time on behalf of the probation office?

12 PROBATION OFFICER: No. Thank you, Your Honor.

13 THE COURT: All right. Thank you.

14 Mr. Nanez, do you wish to make any statement to
15 the Court on your own behalf before I announce your
16 sentence?

17 THE DEFENDANT: No.

18 THE COURT: All right. The record will reflect
19 that the defendant has waived his right to an allocution.

20 I'm prepared to rule on the defendant's motion. I
21 agree with the Government that the two grounds for the
22 defendant's motion -- two primary grounds in the
23 defendant's motion can be summarized as follows:

24 First, that because of his risky activities in the
25 prison, the victim had it coming to him; and, second, the

1 Bureau of Prisons is in great part responsible for this
2 attack because it put Mr. Martinez on the yard with other
3 Texas Syndicate gang members. I reject that these grounds
4 either singly or in combination are mitigating factors
5 under Section 3553(a), let alone a sufficient basis for the
6 granting of a downward variant motion to a defendant
7 culpable of this kind of reprehensible and violent crime.
8 As a consequence, the defendant's motion is denied.

9 I intend to impose the defendant to a period of
10 imprisonment of 68 months on Count 1 to be served
11 consecutive to the sentence he is currently serving. I
12 also intend to sentence the defendant to 68 months on Count
13 2 to run concurrent to the sentence I intend to impose on
14 him on Count 1. I also intend to order the defendant to
15 serve a period of supervised release of three years on both
16 counts, both to run concurrent.

17 Given the defendant's financial -- lack of
18 financial means, I intend to waive the payment of any fine
19 other than the special assessment of \$200.

20 Before I impose sentence, I'll give counsel a
21 final opportunity to make any record they believe
22 appropriate. Ms. Spencer.

23 MS. SPENCER: Nothing further. Thank you.

24 THE COURT: Thank you. Ms. Christl.

25 MS. CHRISTL: Nothing, Your Honor.

1 THE COURT: All right. I find no reason to depart
2 from the guideline sentencing range in this case, which
3 does not exceed 24 months, and will impose a sentence
4 within that range. I find that the sentence I will impose
5 in this case reflects the seriousness of the offense,
6 affords adequate deterrence to future criminal conduct, and
7 will protect the public from further crimes of this
8 defendant.

9 Accordingly, pursuant to the Sentencing Reform Act
10 of 1984, it is the judgment of this Court that the
11 defendant, Trinidad Nanez-Rivera, be committed to the
12 custody of the Bureau of Prisons to be imprisoned for a
13 term of 68 months on Count 1. The sentence is ordered to
14 be served consecutive to the sentence imposed on the
15 defendant in case No. 14 cr 947 imposed in the United
16 States District Court for the Southern District of Texas.
17 It is further the judgment of this Court that the defendant
18 is to be imprisoned for a term of 68 months on Count 2 to
19 be served concurrent with the sentence on Count 1.

20 Upon release from imprisonment, the defendant
21 shall be placed on supervised release for a period of three
22 years on each of Counts 1 and 2 to run concurrently.

23 Within 72 hours of release from the custody of the
24 Bureau of Prisons, the defendant shall report in person to
25 the probation office to the district to which he is

1 released.

2 While on supervised release, the defendant shall
3 not commit another federal, state, or local crime; shall
4 not possess a firearm as defined in 18 United States Code
5 Section 921; and shall comply with the standard conditions
6 that have been adopted by this Court in District of
7 Colorado General Order 2016-1.

8 The defendant shall not unlawfully possess and he
9 shall refrain from unlawfully using a controlled substance.
10 The defendant shall submit to one drug test within 15 days
11 of release on supervised release and two periodic tests
12 thereafter. The defendant shall cooperate in the
13 collection of DNA as directed by the probation officer.

14 The Court finds that the following special
15 conditions of supervision are reasonably related to the
16 factors enumerated in Sections 3553(a) and 3583(d), and
17 they do not constitute a greater deprivation of liberty
18 than reasonably necessary to accomplish the goals of
19 sentencing.

20 No. 1: If the defendant is deported, he shall not
21 thereafter reenter the United States illegally. If the
22 defendant reenters the United States legally, he shall
23 report to the nearest United States probation office within
24 72 hours of his return to this country.

25 The defendant shall not associate with or have any

1 contact with any gang members, and he shall not participate
2 in any gang activity to include the displaying of any gang
3 paraphernalia.

4 The defendant shall pay a special assessment of
5 \$200 which shall be due and payable immediately. The Court
6 finds that the defendant does not have the ability to pay a
7 fine so the Court will waive the payment of any fine in
8 this case apart from the special assessment.

9 Mr. Nanez, you have the right to appeal the
10 sentence I've just imposed and, in very limited
11 circumstances, your conviction by guilty plea. If you wish
12 to file such an appeal, a notice of appeal must be filed
13 with the Clerk of the Court within 14 days after entry of
14 judgment or the right to appeal will be lost.

15 If you're unable to afford an attorney for an
16 appeal, the Court will appoint one to represent you. If
17 you're unable to afford the fees for filing an appeal, you
18 may file a request with the Court that such fees be waived.

19 All right. Is there anything further from the
20 Government at this time?

21 MS. SPENCER: No. Thank you, Your Honor.

22 THE COURT: Anything further from the defendant?

23 MS. CHRISTL: No, Your Honor.

24 THE COURT: Anything further from the probation
25 officer?

Supreme Court of the United States
Office of the Clerk U.S. C.
Washington, DC 20543-0001

U.S. CO. 11-10:37
2019 Sent 6/22/2019 11:10:37
Clerk of the Court
(202) 479-3011

March 18, 2019

Clerk
United States Court of Appeals for the Tenth
Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Re: Trinidad Nanez-Rivera
v. United States
Application No. 18A938
(Your No. 17-1419)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on March 18, 2019, extended the time to and including May 21, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by Edmund K. Barron

Redmond K. Barnes
Case Analyst