

United States v. McCormick

United States Court of Appeals for the Fourth Circuit

March 29, 2019, Submitted; April 19, 2019, Decided

No. 18-4401

Reporter

765 Fed. Appx. 4 *, 2019 U.S. App. LEXIS 11451 **, 2019 WL 1766053

UNITED STATES OF AMERICA, Plaintiff - Appellee, v.
PHYTEAF PHEQUAN MCCORMICK, Defendant -
Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. (7:17-cr-00120-FL-1). Louise W. Flanagan, District Judge.

Disposition: AFFIRMED.

Core Terms

sentence, quotation, marks, substantively, variance, upward, criminal history, impose sentence, factors, variant, argues

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Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, Kristine L. Fritz, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Judges: Before DIAZ and QUATTLEBAUM, Circuit Judges, HAMILTON, Senior Circuit Judge.

Opinion

[*5] PER CURIAM:

Phyteaf Phequan McCormick appeals the 90-month sentence imposed following his guilty plea to

possession of ammunition by a convicted felon, in violation of [18 U.S.C. §§ 922\(g\)\(1\), 924 \(2012\)](#). On appeal, McCormick argues that the district court's upward variant sentence—33 months above the high end of the Sentencing Guidelines range—is substantively unreasonable.* We affirm.

In determining whether McCormick's above-Guidelines-range sentence is substantively reasonable, "we consider whether the sentencing court acted reasonably both with respect to its decision **[**2]** to impose such a sentence and with respect to the extent of the divergence from the sentencing range." [United States v. Washington, 743 F.3d 938, 944 \(4th Cir. 2014\)](#) (internal quotation marks omitted). "While a district court's explanation for the sentence must support the degree of the variance, it need not find extraordinary circumstances to justify a deviation from the Guidelines." [United States v. Spencer, 848 F.3d 324, 327 \(4th Cir. 2017\)](#) (citations and internal quotation marks omitted). Because our review is ultimately for an abuse of discretion, see [Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 \(2007\)](#), "we give due deference to the district court's decision that the [\[18 U.S.C.\] § 3553\(a\) \[\(2012\)\]](#) factors, on a whole, justify the extent of the variance," [United States v. Zuk, 874 F.3d 398, 409 \(4th Cir. 2017\)](#) (internal quotation marks omitted). "[E]ven [if] we might reasonably conclude that a different sentence is appropriate, that conclusion, standing alone, is an insufficient basis to vacate the district court's chosen sentence." *Id.* (alterations and internal quotation marks omitted).

Our review of the record confirms that McCormick's sentence is substantively reasonable. In imposing an upward variant sentence, the district court considered McCormick's criminal history, the offense conduct, and the need for the sentence imposed to promote respect for the law, deter McCormick from engaging in future

* McCormick does not contend that his Guidelines range was miscalculated.

criminal conduct, and **[**3]** protect the community. McCormick argues that his offense conduct and criminal history should not have been used to support the upward variance as such factors should be principally accounted for in the Guidelines range. This assertion is misplaced because "a fact that is taken into account in computing a Guidelines range is not excluded from consideration when determining whether the Guideline[s] sentence adequately serves the four purposes of [§ 3553\(a\)\(2\)](#)." [United States v. Bollinger, 798 F.3d 201, 221 \(4th Cir. 2015\)](#) (internal quotation marks omitted).

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

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