

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEAN CLAUDE McKENZIE

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS SUFFICIENTLY DETERMINED THAT THE DISTRICT COURT'S UPWARD VARIANCE IN ITS SENTENCING OF PETITIONER BY 31 MONTHS TO IMPOSE A SENTENCE OF 71 MONTHS AND IN DOING SO PLACED TOO MUCH EMPHASIS ON 18 U.S.C. § 3553(a) SENTENCING FACTORS NATURE AND CIRCUMSTANCES OF THE CASE AND TOO LITTLE EMPHASIS ON THE HISTORY AND CHARACTERISTICS OF PETITIONER?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Jean Claude Phillip Mckenzie respectfully petitions for a writ of certiorari to the Sixth Circuit Court of Appeals in *United States of America v. Jean Claude Phillip Mckenzie*, No. 18-3529.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is not recommended for publication. It is reported at 769 Fed. Appx. 333 and is attached at A1-A7.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on April 30, 2019 (App. A1). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On October 1, 2017, Petitioner was stopped by the Cleveland Police Department following a traffic infraction. During the stop the police searched his vehicle and recovered a 9 mm pistol with a magazine loaded with four rounds of ammunition. Petitioner was an unlawful alien in the United States having been removed from the United States in 2012 following his conviction for drug trafficking, a felony of the third degree.

On November 8, 2018, a federal grand jury returned a two-count indictment naming Petitioner in Count One with Illegal Reentry pursuant to 8 U.S.C. § 1326 and in Count Two with Illegal Alien in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(5) (R #1, Indictment, PageID #1-2).

On February 1, 2018, Petitioner changed his plea to guilty to Counts One and Two of the Indictment (R.#28, Change of Plea Transcript, PageID #95-112) and did so without the benefit of a written plea agreement.

Petitioner was sentenced on May 22, 2018 (R #29, Sentencing Transcript, PageID #113-143). The offense conduct in this case was taken from the Cleveland Police Department incident report and summarized as follows in the Presentence Investigation Report (PSR) and discussed at the sentencing hearing. On October 1, 2017, officers were patrolling the downtown area due to an increase in gun and gang activity. Officers received a call from an off-duty officer indicating that he was taking a statement from an aggravated robbery victim when he heard gunshots fired that he thought were directed at him. He believed the individual got into a black vehicle and headed south towards Hamilton. Officers responded to the call and began travelling on Hamilton when they observed a black SUV. It was the only black vehicle in the area. Officers followed the vehicle for a brief period until the driver failed to use a turn signal, leading officers to initiate

a traffic stop. Instead of pulling off the road and coming to a stop, the vehicle continued a short distance and pulled into a BP gas station parking lot. The vehicle came to an abrupt stop and the driver, later identified as the Petitioner, jumped out while the vehicle was still running and fled on foot. One officer pursued Petitioner on foot and another officer gave pursuit in a vehicle. Another officer stayed behind with the vehicle that was abandoned. The officer who stayed behind approached the driver's side of the abandoned vehicle and observed a semi-automatic handgun on the driver's side floorboard, which was a 9 mm pistol. It was later determined that the firearm was manufactured in Florida and travelled in interstate commerce. Petitioner was subsequently caught and arrested. He provided a false name at the time of his arrest, at which time the officers were unable to determine his true identity. A search was conducted on the gun located in the vehicle which found that the gun had been reported stolen. Petitioner was transported to the Cuyahoga County Jail where his identity was established through fingerprints. It was further determined that he had a prior felony drug trafficking conviction and was previously deported.

At sentencing, the district court determined that the combined guideline calculation for Counts One and Two resulted in a total offense level of 22. The PSR determined that Petitioner was a Criminal History Category II, which resulted in an advisory guideline sentencing range of 33 – 41 months (R.#29, Sentencing Transcript, PageID #125-126).

Prior to sentencing the district court put the parties on notice that it was contemplating a substantial upward variance from the guidelines based upon the nature and circumstances of the offense. The specific reasons given by the court being (1) the court found Petitioner's conduct to be serious in nature given the fact that he fled from the police which placed others in the community at risk as well as the officer; (2) he had a loaded firearm under the driver's side seat.

of the vehicle; (3) the court did not believe Petitioner's story that the firearm in the SUV belonged to an associate he had just dropped off at the Greyhound bus station. The court further noted that when Petitioner was arrested, he gave a false name and date of birth and was in the country illegally. The court stated that for armed individuals in the neighborhoods who flee from the police, lengthy sentences are necessary to provide deterrence (R.#29, Sentencing Transcript, PageID #127-128).

Defense counsel noted that Petitioner originally entered the country legally but was deported and then had re-entered illegally; that Petitioner was married, had an 11-year-old daughter and his mother lived in New York City. Petitioner was in the country to support his family and to be with his wife and daughter. Petitioner does not have history of violence, has never been convicted of a crime of violence and his felony conviction was for drug trafficking in marijuana for which he received probation (R.#29, Sentencing Transcript, Page ID #129-130).

The district court considered the nature and circumstances of the offense, Petitioner's history and characteristics and the need for the sentence imposed to be just punishment, adequate deterrence, protect the public, reflect the seriousness of the offense, and improve the offender's conduct and condition. Having considered these factors, the Court noted that the high end of the advisory guideline sentencing range of 41 months was not sufficient to adequately protect the public, reflect the seriousness of the offense and improved the offenders conduct and condition and imposed a sentence of imprisonment of 72 months on each count to be served concurrently and not consecutively (R.#29, Sentencing Transcript, PageID #140).

Petitioner appealed as of right the upward variance to the Sixth Circuit Court of Appeals. The Sixth Circuit issued its opinion on April 30, 2019, finding that the upward variance was not an abuse of discretion.

REASONS FOR GRANTING THE PETITION

THE SIXTH CIRCUIT COURT OF APPEALS FAILED TO ADEQUATELY CONSIDER THE EXTENT OF THE UPWARD DEVIATION BY THE DISTRICT COURT OF 31 MONTHS FROM THE GUIDELINE.

In finding that the upward variance by the district court of 31 months was not an abuse of discretion, the Sixth Circuit Court of Appeals held that “[a]lthough not insubstantial, we cannot say that the variance here was an abuse of its discretion, because the district court “selected a punishment that it believed fit {McKenzie’s] crimes and provided sufficient reasons to justify it.”” (citation omitted) App. A6. However, it is Petitioner’s position that, based upon the special circumstances as argued at sentencing, a within guidelines sentence would have been reasonable. Unlike the defendant in *Rita v. U.S.*, 551 U.S. 338 (2007), where he received a within guideline sentence, or *Gall v. U.S.*, 552 U.S. 38 (2007), where the defendant received a downward variance, Petitioner herein is arguing that the special circumstances that he presented to the district court supported his position that an upward variance was unreasonable.

It is Petitioner’s position that the district court unreasonably placed too much emphasis on the nature and circumstances of the offense and too little on Petitioner’s history and characteristics. At sentencing the district court advised the parties it was contemplating an upward variance based upon the nature and circumstances of the offense (R.#29, Sentencing Transcript, PageID #126-127). The district courts basis included Petitioner’s fleeing from the police; a loaded firearm under the driver’s side seat; Petitioner’s story which he stated in the courtroom that the firearm in the SUV belonged to an associate he had just dropped off at the Greyhound bus station was not credible; Petitioner gave a false name and date of birth when he was arrested; and he was in the country illegally. The district court further indicated that for armed individuals in the neighborhoods, and who flee from the police, lengthy sentences are

necessary to provide deterrence to make sure individuals understand that they are not going to be doing this type of activity (R.#29, Sentencing Transcript, PageID #127-128). For these reasons, the maximum guideline sentence in this case of 41 months was not sufficient for the district court.

A good portion of the sentencing hearing revolved around the nature and circumstances of the case. A limited portion of the sentencing hearing was focused on the history and characteristics of Petitioner. Defense counsel noted that originally Petitioner entered the country legally, was deported, and then had re-entered illegally. He noted that Petitioner was married and had an 11-year-old daughter and that his mother lives in New York City while his father still lived in Jamaica. Petitioner was in the country because he wanted to support his family and could make more money in the United States than he could in Jamaica and he wanted to be with his wife and daughter and support his family emotionally and financially. Counsel further pointed out to the court that Petitioner did not have a history of violence, that he has never been convicted of a crime of violence and that his felony conviction was for drug trafficking in marijuana for which he received probation (R.#29, Sentencing Transcript, Page ID #129-130). In his allocution, Petitioner stressed his family and what he has done for others (R.#29, Sentencing Transcript, Page ID #132-133). The district court reflected on the history and characteristics of Petitioner by noting his age, family, self-employment, and criminal history.¹ (R.#29, Sentencing Transcript, Page ID #137).

There was extensive background information to support Petitioner's request for a within

¹ Petitioner's criminal history included Disorderly Conduct, a misdemeanor of the fourth degree; Driving Under Suspension, a misdemeanor of the first degree; and Trafficking in Marijuana, a felony of the third degree for which he received probation (R.#29, Sentencing Transcript, Page ID #137).

guidelines sentence and to support his position that the district court abused its discretion when it varied upwards 31 months to impose a sentence of 72. For example, the environment that Petitioner was raised in was supportive. Both of his parents shared parenting and responsibility for his upbringing. Both of his parents worked. Neither of his parents abused drugs or alcohol, nor did he suffer any type of abuse growing up. Petitioner played soccer and was active in the church as a youth. He moved to the United States in 2005, obtained a resident card in 2008 but was removed from the country in 2010 due to a felony conviction. Petitioner's wife, with whom he resided with in Cleveland, is a dispatcher with Case Western Reserve. Petitioner's daughter also resides in Cleveland and he has maintained daily contact with her and has helped her out financially when he could. Petitioner reported that he has never used any illegal substances. He drank beer on a limited basis but has never passed out or blacked out from drinking. Petitioner graduated from Kingston High School in Jamaica. Prior to his arrest Petitioner reported that he worked as a self-employed barber (Pre-Sentence Report, Pages 8-9).

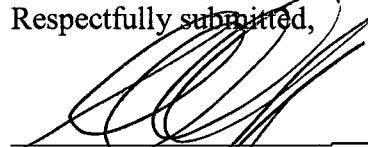
In *Gall v. United States, supra*, this court noted that “[i]n reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.” Id. at 47. This Court again, when advising appellate courts to review the substantive reasonableness of a sentence under the abuse of discretion standard, stated, “[w]hen conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.” Id. at 51.

The Sixth Circuit in its decision noted that the upward departure was “not insubstantial” but otherwise failed to take into account the extent of the upward variance herein. Appx. A6. While even one day in prison can have a detrimental effect on an individual requiring a review, to upwardly depart to increase a sentence by 31 months should require more of an analysis than a cursory nod to it being “not insubstantial”. In *Gall, supra*, this Court noted that the appellate court “...may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Id.* at 51. Even giving due deference to the district court’s upward variance, the appellate court failed to adequately set forth in its decision how the undue weight given to the nature and circumstances of the offense justified an upward variance of 31 months when compared to Petitioner’s history and characteristics.

CONCLUSION

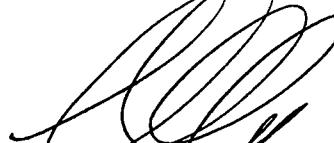
For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,


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PROOF OF SERVICE

I hereby certify that on July 26, 2019, a copy of the foregoing Petition for Writ of Certiorari were served on each party to the proceeding or that party's counsel by depositing in the United States mail with first class postage pre-paid to Brad J. Beeson, Assistant United States Attorney, 801 W. Superior Avenue, Suite 400, Cleveland, Ohio 44113.


NATHAN A. RAY
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NOT RECOMMENDED FOR PUBLICATION
File Name: 19a0232n.06

No. 18-3529

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA.

Plaintiff-Appellee,

V.

JEAN CLAUDE PHILLIP MCKENZIE,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE
NORTHERN DISTRICT OF
OHIO

FILED
Apr 30, 2019
DEBORAH S. HUNT, Clerk

BEFORE: SUHRHEINRICH, BUSH, and READLER, Circuit Judges.

SUHRHEINRICH, Circuit Judge. In this appeal, Defendant Jean Claude Phillip McKenzie claims that his sentence, which varied upward from the advisory guidelines range by 31 months, is substantively unreasonable because the district court placed too much emphasis on the nature and circumstances of the offense and too little emphasis on his history and characteristics. We AFFIRM.

The Offense Conduct. On October 1, 2017, while patrolling the downtown area, Cleveland police officers received a call from an off-duty officer stating that, while he was taking a statement from an aggravated robbery victim, he heard shots fired that he thought were intended for him. The officer indicated that the shooter entered a black vehicle and headed onto Hamilton Avenue. Nearby on-duty officers located one black vehicle on Hamilton. The officers initiated a traffic stop after the vehicle failed to use a turn signal. Rather than stopping immediately, the vehicle continued a short distance and pulled into a gas station parking lot. The vehicle came to an abrupt

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stop, and the driver jumped out and fled on foot. The driver, McKenzie, was caught and arrested. A search of the vehicle revealed a firearm on the driver's side floorboard. The firearm, a stolen 9mm pistol, was loaded with four rounds of ammunition.

McKenzie did not have identification on him. He provided a false name and date of birth. He claimed to be a United States citizen. Fingerprinting revealed his true identity. McKenzie was born in Jamaica. He was admitted into the United States on a non-immigrant visa on July 2, 2005. On January 2, 2008, McKenzie's immigration status was adjusted to lawful permanent resident, on a conditional basis. On January 18, 2012, McKenzie was sentenced to one year of custody, suspended, after he was convicted of felony drug trafficking between 5 and 20 grams of marijuana. On May 11, 2010, his conditional status was removed. On July 12, 2012, McKenzie was deported to Jamaica. McKenzie unlawfully reentered the United States sometime before October 1, 2017.

Procedural History. McKenzie was charged with one count of illegal reentry, in violation of 8 U.S.C. § 1326, and one count of possession of a firearm by an alien, in violation of 18 U.S.C. § 922(g)(5). McKenzie pled guilty to the charges. McKenzie's combined adjusted offense level for the two counts was 22. The presentence report set McKenzie's total offense level at 19, after three points for acceptance of responsibility. McKenzie's criminal history category was II. This gave him an advisory Sentencing Guidelines range of 33 to 41 months' imprisonment.

The Sentencing Hearing. Neither party had objections to the presentence report. The district court did, expressing concern that McKenzie only accepted responsibility for illegal reentry, and that his statement to the probation officer did not mention his illegal possession of a firearm and ammunition.¹ McKenzie's attorney, and then McKenzie, explained that a friend of McKenzie had left the gun in the vehicle after McKenzie dropped him off at the bus station, and

¹ The district court referenced a written statement, but the presentence report characterized it as verbal.

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that McKenzie knew it was there, albeit on the passenger side of the car. The court reiterated that, according to the police reports, the gun was found on the driver's side.

The district court turned to the government's attorney, who stated that McKenzie had provided a factual basis consistent with the statutory elements of the crime (because he admitted to constructive possession), and recommended that McKenzie be given credit for acceptance of responsibility. Though with misgivings, the district court nevertheless credited McKenzie's acceptance of responsibility.

Consistent with the presentence report, the district court found McKenzie's total offense level to be 19 and criminal history category of II, resulting in an advisory sentencing guidelines range of 33 to 41 months. Neither party objected to the calculation. The district court then informed the parties that the court was contemplating an upward variance based on the nature and circumstances of the offense, stressing the seriousness of the offense. The court cited three factors: (1) McKenzie fled from police, (2) he had a loaded firearm at his side of the vehicle, and (3) he lacked credibility. The court further noted that McKenzie was in the country illegally, and also added that he did not fully cooperate with police when he was arrested.

Defense counsel requested a within Guidelines sentence, asserting that McKenzie returned to the United States to support his family (a wife, a child, and a mother), that he did not have a violent criminal history, and that under the current political climate, it would be "relatively impossible" for McKenzie to return to the United States legally. In his allocution, Defendant stressed his family and service to others and apologized for his actions. The government requested a Guidelines sentence.

The 18 U.S.C. § 3553(a) Factors. Regarding the nature and circumstances of the offense, the district court "restated" the offense conduct factors to reinforce its variance. These details

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included the off-duty officer's report of shots fired, the pursuit, the loaded firearm on the driver's side of the vehicle, the false self-identification, and the firearm's stolen status. The court further noted that, after entering the United States lawfully, McKenzie was convicted of drug trafficking and removed to Jamaica, but then illegally returned to violate the law again. The district court also reviewed McKenzie's personal history and characteristics. The court noted McKenzie's prior record, including the convictions for disorderly conduct and drug trafficking. The court discussed McKenzie's family and employment history.

The Variance. The court felt that 41 months was not sufficient to protect the public, reflect the seriousness of the offense, and improve McKenzie's conduct. The court reiterated that it was imposing an upward variance because McKenzie had been previously deported to Jamaica after being convicted of a felony, had returned to the United States, and again flouted the law by fleeing from police, possessing a loaded firearm, and providing false information to law enforcement upon arrest. The court also felt that McKenzie fabricated the story about the friend and the firearm. Thus, the court determined that it was "necessary that he be removed and sentenced to a lengthy period of time, also to send a message to" McKenzie to obey the law should he consider returning to the United States again. Finally, the court noted that the average sentence for offenses involving immigration with a criminal history category II is 10 months, and for firearms it is 59 months, both present in this case. The district court sentenced McKenzie to 72 months custody on each count, to be served concurrently, followed by three years of supervised release on each of counts 1 and 2.

Analysis. As noted, McKenzie claims that his sentence is substantively unreasonable because the district court overemphasized the nature and circumstances of the offenses and underplayed his history and characteristics. A sentence is substantively unreasonable if the

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sentencing court selected the sentence arbitrarily, based the sentence on impermissible factors, failed to consider pertinent § 3553(a) factors, or gave an unreasonable amount of weight to any pertinent factor. *United States v. Cunningham*, 669 F.3d 723, 733 (6th Cir. 2012).

We review a sentence for substantive reasonableness under the abuse-of-discretion standard. *United States v. Zobel*, 696 F.3d 558, 569 (6th Cir. 2012). The review “take[s] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.” *Gall v. United States*, 552 U.S. 38, 51 (2007). If the sentence is outside the Guidelines range, it may not be presumed unreasonable. *Id.* The reviewing court may “consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” *Id.* And we may not reverse simply because we might have concluded that a different sentence was appropriate. *Id.*

The district court spoke with perspicuity, basing its upward variance on the following factors: (1) the nature and circumstances of the offense, including the fact that McKenzie possessed a stolen firearm loaded with ammunition after illegally reentering the United States, as well as the fact that McKenzie fled the officers and then faked his identity when caught; (2) McKenzie’s unlawful reentry to the United States after being removed to Jamaica; (3) McKenzie’s criminal history; (4) McKenzie’s family and employment history; (5) the need to reflect the seriousness of the offense; (6) the need to deter McKenzie; and (7) the need to protect the public. The district court examined all of the pertinent § 3553(a) factors, including disparities. McKenzie may not like that the court placed greater weight on the nature and circumstances of the offense than his history, but he has not demonstrated that this emphasis was unreasonable, especially in light of the district court’s clear iteration of numerous factors in support of its decision. *See Zobel*, 696 F.3d at 571 (stating that a district court may place great weight on one fact if warranted, and if the court,

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explicitly or implicitly considers and weighs all the pertinent factors, the defendant has a greater burden in proving the district court gave unreasonable weight to one factor).

Epilogue. Although not insubstantial, we cannot say that the variance here was an abuse of its discretion, because the district court “selected a punishment that it believed fit [McKenzie’s] crimes and provided sufficient reasons to justify it.” *United States v. Vowell*, 516 F.3d 503, 512 (6th Cir. 2008). McKenzie’s sentence is **AFFIRMED**.