

No. __ - _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE ELEUTERIO NAVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the
Northern District of Texas

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-11209
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
July 26, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE ELEUTERIO NAVA,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CR-62-1

Before BENAVIDES, GRAVES, and HO, Circuit Judges.

PER CURIAM:*

Jose Eleuterio Nava appeals the 36-month sentence imposed following his guilty-plea conviction for unlawful escape from custody in violation of 18 U.S.C. § 751(a). Nava argues that this above-guidelines sentence is substantively unreasonable and, further, that our caselaw declining to re-weigh the statutory sentencing factors conflicts with both the demands of due process and Supreme Court precedent. Because the latter argument is raised

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

for the first time in Nava's reply brief, we will not consider it. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

In reviewing a sentence for substantive reasonableness, we apply an abuse of discretion standard "regardless of whether the sentence imposed is inside or outside the Guidelines range." *United States v. Fraga*, 704 F.3d 432, 437 (5th Cir. 2013) (internal quotation marks, brackets, and citation omitted). A non-guidelines sentence is substantively unreasonable if it fails to reflect the 18 U.S.C. § 3553(a) sentencing factors in that it: "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006).

There is no merit to Nava's assertion that the district court failed to account for a significant sentencing factor because it did not consider certain mitigating facts discussed by the defense at sentencing, namely his sympathetic reasons for leaving custody, his good behavior while out of custody, and his lack of violent conduct during the past 12 years. While the district court did not specifically reference these arguments in its reasons, there is no indication in the record that the district court did not consider them. To the contrary, the district court expressly stated at sentencing that it had considered Nava's history and characteristics, the needs for adequate criminal deterrence and the protection of the public from any further crimes by the defendant, and all of the § 3553(a) factors. *See* § 3553(a)(1), (2)(B)-(C).

Neither is there merit to Nava's apparent contention that the district court improperly gave significant weight to an improper factor by considering his offense of unauthorized absence from community corrections, which he committed at age 17. Even if it is assumed arguendo that this was a juvenile

adjudication and that the district court relied on it in sentencing Nava, we have rejected the argument that a non-guidelines sentence based in part on unscored juvenile adjudications took into account an improper sentencing factor. *See Smith*, 440 F.3d at 709.

Finally, Nava has failed to show that his sentence represents a clear error of judgment in balancing the sentencing factors because the extent of the variance was not justified by his criminal history. As we have explained, “a defendant’s criminal history is one of the factors that a court may consider in imposing a non-Guideline sentence.” *Fraga*, 704 F.3d at 440 (internal quotation marks, brackets, and citation omitted). Where, as here, the defendant has engaged in violent criminal conduct that has gone unscored, a guidelines sentence may underrepresent the seriousness of his criminal history and the likelihood that he will commit other crimes. *See id.* at 441. Nava has failed to overcome the due deference owed to the district court’s decision that the extent of the variance is justified by the statutory sentencing factors in this case. *See id.* at 437, 440-41 (upholding upward variance from guidelines maximum of 18 months in prison to 27 months).

In sum, Nava has failed to show that the district court abused its discretion by imposing an above-guidelines sentence of 36 months in prison. *See id.* at 440. Rather, it appears that Nava is merely expressing his disagreement with how the district court weighed the § 3553(a) factors, which “is not a sufficient ground for reversal.” *United States v. Malone*, 828 F.3d 331, 342 (5th Cir. 2016).

The judgment of the district court is AFFIRMED.

APPENDIX B

FILED

AUG 31 2018

CLERK, U.S. DISTRICT COURT
By _____
Deputy

UNITED STATES OF AMERICA

§

v.

§

Case Number: 4:18-CR-062-A(01)

JOSE ELEUTERIO NAVA

§

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Christopher R. Wolfe. The defendant, JOSE ELEUTERIO NAVA, was represented by Federal Public Defender through Assistant Federal Public Defender Jaidee Serrano.

The defendant pleaded guilty on March 29, 2018 to the amended one count superseding information filed on March 27, 2018. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
18 U.S.C. § 751(a) Unlawful Escape From Custody	10/04/2017	1

On motion of the United States, the court ORDERS as to this defendant that the indictment filed March 21, 2018, be, and is hereby, dismissed.

As pronounced and imposed on August 31, 2018, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years and that while on supervised release, the defendant shall comply with the standard conditions ordered by this Court and shall comply with the following additional conditions:

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.
5. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.
5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support his dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.

9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

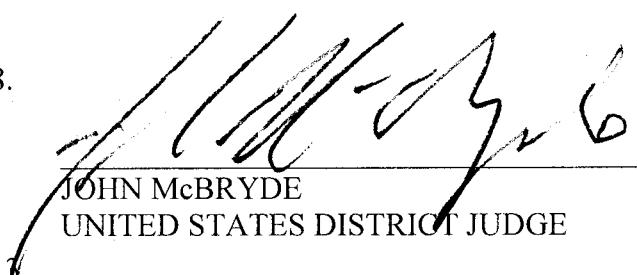
FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 31st day of August, 2018.


JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

Defendant delivered on _____, 2018 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal