

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DO KYUN KIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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Northern District of Texas

APPENDIX A

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

United States Court of Appeals
Fifth Circuit

FILED

January 28, 2020

Lyle W. Cayce
Clerk

No. 19-10289
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DO KYUN KIM,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CR-233-1

Before BARKSDALE, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Regarding his guilty-plea conviction for distribution of a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), Do Kyun Kim contends solely that his within-Sentencing-Guidelines-advisory-range sentence of, *inter alia*, 135 months' imprisonment was substantively unreasonable.

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). Kim’s objecting to the substantive reasonableness of his sentence, following its imposition, preserved his challenge on appeal.

“A discretionary sentence imposed within a properly calculated [G]uidelines range is presumptively reasonable.” *United States v. Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir. 2008) (citations omitted). “The presumption is rebutted only upon [defendant’s] showing that the sentence does not account for a[n] [18 U.S.C. § 3553(a)] factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors.” *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009) (citation omitted). These factors include, as Kim contends is essential in this instance, “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”. 18 U.S.C. § 3553(a)(6).

At the sentencing hearing, Kim urged the court to vary downward from the advisory Guidelines sentencing range (135–168 months’ imprisonment) the court adopted because: his Guidelines range was based on drug quantities he admitted when he cooperated with authorities immediately following his

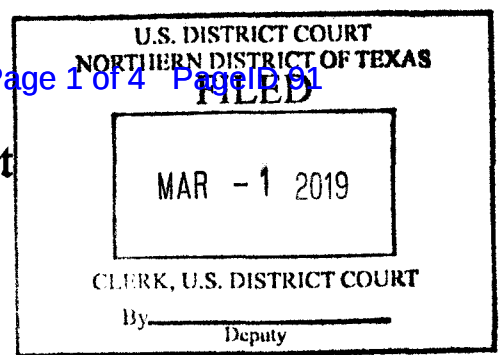
arrest; if he had waited to cooperate until speaking with an attorney, the Government would have entered a cooperation agreement with him; pursuant to Guideline § 1B1.8(a), such an agreement would have prevented the court from using the drug quantities he discussed with authorities to calculate his Guidelines range; and it would have been much lower (57–71 months’ imprisonment) without those drug quantities. The court considered this claim; but, in weighing the § 3553(a) sentencing factors and all information presented to it for sentencing, it concluded that “a sentence within the [G]uideline[s] range [was] required for the sentencing factors contemplated by [18 U.S.C. §] 3553(a) to be satisfied”.

On the other hand, based on its consideration of those factors, the court sentenced Kim “at the very bottom of the advisory [G]uideline[s] range, taking into account all of the things that have been presented to the Court”. Kim objected to the sentence as, *inter alia*, substantively unreasonable.

Regarding his substantive-unreasonableness claim, Kim has not provided any evidence, beyond his own speculation, showing the Government would have offered him a cooperation agreement, pursuant to Guideline § 1B1.8(a), had he delayed in cooperating. Nor has he showed the court failed to consider “the need to avoid unwarranted sentencing disparities” or give proper weight to the other § 3553(a) factors in imposing his sentence. *See* 18 U.S.C. § 3553(a); *Cooks*, 589 F.3d at 186 (citation omitted). His “disagreement with the propriety of the sentence imposed does not suffice to rebut the presumption of reasonableness that attaches to a within-[G]uidelines sentence”. *United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010) (citations omitted).

AFFIRMED.

APPENDIX B

United States District CourtNorthern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §

v. §

DO KYUN KIM §

Case Number: 4:18-CR-233-A(01)

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney John P. Bradford. The defendant, DO KYUN KIM, was represented by Federal Public Defender through Assistant Federal Public Defender Brook Antonio.

The defendant pleaded guilty on November 9, 2018 to the one count indictment filed on September 19, 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>
21 U.S.C. §§ 841(a)(1) and (b)(1)(C) Distribution of a Controlled Substance	July 26, 2017	1

As pronounced and imposed on March 1, 2019, 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 135 months.

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

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 1st day of March, 2019.


JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

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

Defendant delivered on _____, 2019 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal