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United States Court of Appeals for the Fifth Circuit

No. 19-11101
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 14, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

WESLEY WAYNE WAKEFORD,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-112-4

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Wesley Wayne Wakeford pleaded guilty to conspiring to possess with intent to distribute methamphetamine and was sentenced within the advisory guidelines range to 71 months in prison. On appeal, he challenges the district court's application of a two-level enhancement, its failure to apply a two-level

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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reduction, and its failure to grant a downward variance. We find no error and affirm.

Because Wakeford’s offense involved methamphetamine imported from Mexico, the district court applied an enhancement under U.S.S.G. § 2D1.1(b)(5). Wakeford does not dispute the origin of the drug but maintains that based on our decision in *United States v. Rodriguez*, 666 F.3d 944 (5th Cir. 2012), the enhancement also required a showing of proximity, familiarity, and repeated business with the importers. This argument is foreclosed by *United States v. Foulks*, 747 F.3d 914, 914-15 (5th Cir. 2014), as Wakeford acknowledges. Although he argues that *Foulks* was wrongly decided, one panel of this court may not overturn the decision of another panel absent an intervening change in the law. *See Jacobs v. Nat’l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

Wakeford also contends he should have received a minor-role adjustment under U.S.S.G. § 3B1.2(b). Even assuming this contention was preserved in the district court, it fails. Whether a defendant qualifies as a minor participant under § 3B1.2(b) is a factual question reviewed for clear error, and a factual finding is not clearly erroneous if it is plausible in light of the record as a whole. *See United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016). A defendant is entitled to a § 3B1.2 adjustment only if he shows by a preponderance of the evidence that he is substantially less culpable than the average participant in an offense. *United States v. Castro*, 843 F.3d 608, 613 (5th Cir. 2016). Wakeford, who presented no evidence concerning the offense at issue, has not done that. He fails to establish that the district court clearly erred. *See Gomez-Valle*, 828 F.3d at 327.

Lastly, we consider Wakeford’s argument that the district court erred in not granting a downward variance, a claim that “amounts to a challenge to the substantive reasonableness” of the sentence imposed. *United States v.*

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Douglas, 957 F.3d 602, 609 (5th Cir. 2020) (internal quotation marks and citation omitted). We review for substantive reasonableness under an abuse-of-discretion standard. *See United States v. Odom*, 694 F.3d 544, 547 (5th Cir. 2012). Because Wakeford's 71-month sentence falls within the guidelines range of 57 to 71 months, it is entitled to a presumption of reasonableness. *See United States v. Alonzo*, 435 F.3d 551, 553-54 (5th Cir. 2006). "The presumption is rebutted only upon a showing that the sentence does not account for 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). Although Wakeford argues that the district court failed to consider his allegedly minor role, the record shows that the court listened to his arguments in mitigation but assigned greater weight to his criminal history. We will not reweigh the district court's balancing of relevant factors, *see Douglas*, 957 F.3d at 609-10, and accordingly conclude that the court's sentence was substantively reasonable.

AFFIRMED.

B

SEP 27 2019

CLERK, U.S. DISTRICT COURT
By Deputy

UNITED STATES OF AMERICA

§

v.

§

Case Number: 4:19-CR-112-A(04)

WESLEY WAYNE WAKEFORD

§

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Laura Montes. The defendant, WESLEY WAYNE WAKEFORD, was represented by George DeWayne Huston.

The defendant pleaded guilty on April 24, 2019 to the one count Second Superseding Information filed on April 19, 2019. 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. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(C)) Conspiracy to Possess with Intent to Distribute a Controlled Substance	February 21, 2019	1

On motion of the United States, the court ORDERS as to this defendant that the information filed April 16, 2019, be, and is hereby, dismissed.

As pronounced and imposed on September 27, 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 71 months. This sentence shall run consecutively to any sentence which may be imposed in Case No. CR20478 in 271st Judicial District Court of Wise County.

The court recommends to the Bureau of Prisons that defendant be allowed to participate in the Institution Residential Drug Abuse Treatment Program. The Bureau of Prisons to notify the court if the defendant cannot participate in the Institution Residential Drug Abuse Treatment Program, and is to give the court an explanation of why the defendant cannot participate.

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 participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered at a rate of at least \$25 per month.
6. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$25 per month.
7. 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).

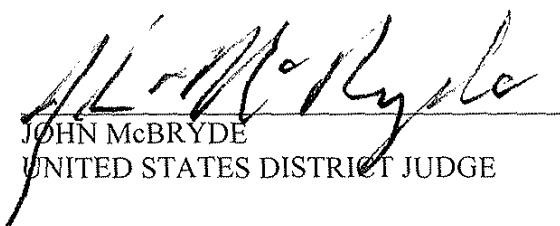
FINE

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 27th day of September, 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