

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 19-11231
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 30, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff — Appellee,

versus

ALFORD DONTA TARPLEY,

Defendant — Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-146-1

Before JOLLY, ELROD, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Alford Donta Tarpley challenges the 100-month sentence imposed by the district court following his guilty-plea conviction of felon in possession of a firearm. He contends that the sentence, which constitutes an upward

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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variance from the guidelines range of 46-57 months of imprisonment, is procedurally and substantively unreasonable.

We review criminal sentences, including those based on variances, for reasonableness. *Gall v. United States*, 552 U.S. 38, 49-51 (2007). First, we determine whether the district court committed any “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [or] selecting a sentence based on clearly erroneous facts.” *Id.* at 51. If the sentence is procedurally sound, we will “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard . . . tak[ing] into account the totality of the circumstances.” *Id.*

Although Tarpley objected to the procedural reasonableness of the district court’s imposition of an above-guidelines sentence based upon his juvenile history, at no point did he contend that the descriptions of his juvenile criminal conduct contained in the presentence report were unreliable or that the district had procedurally erred by sentencing him based on clearly erroneous facts. *See Gall*, 552 U.S. at 51. We therefore review for plain error his contention that the district court improperly based his sentence, in part, upon incorrect factual findings regarding his juvenile record. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). As Tarpley does not even attempt to show plain error, his challenge fails. *See id.*

We also review for plain error Tarpley’s unpreserved argument that the district court miscalculated the guidelines range by holding that his conviction for robbery causing bodily injury under Texas Penal Code § 29.02(a)(1) constituted a crime of violence for purposes of U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1). *See id.* Tarpley correctly concedes that his argument is foreclosed by *United States v. Burris*, 920 F.3d 942, 948-52 (5th Cir. 2019), *petition for cert. filed* (U.S. Oct. 3, 2019) (No. 19-6186), in

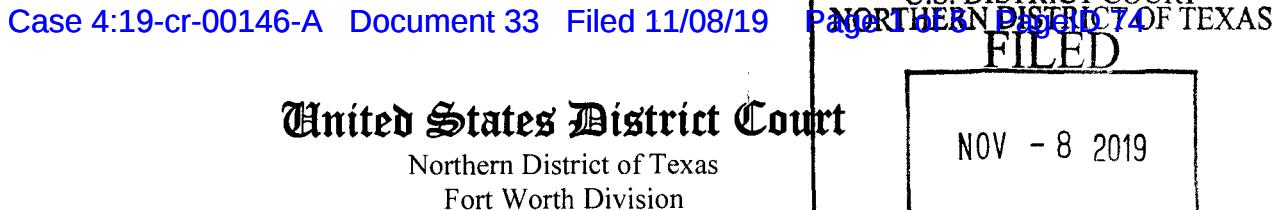
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which we held that a conviction under § 29.02(a)(1) categorically requires the use of physical force.

Finally, Tarpley contends that his sentence is substantively unreasonable because the district court gave significant weight to an improper factor by citing certain juvenile conduct, which he characterizes as minor, as part of the basis for his sentence. *See United States v. Diehl*, 775 F.3d 714, 724 (5th Cir. 2015). However, a district court may consider a defendant's criminal history, including his juvenile conduct, in imposing a non-Guidelines sentence. *United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006).

AFFIRMED.

APPENDIX B



UNITED STATES OF AMERICA

§

v.

§

ALFORD DONTA TARPLEY

§

Case Number: 4:19-CR-146-A(01)

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Laura G. Montes. The defendant, ALFORD DONTA TARPLEY, was represented by Federal Public Defender through Assistant Federal Public Defender Jaidee Serrano.

The defendant pleaded guilty on May 31, 2019 to the one count Information filed on May 14, 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>
18 U.S.C. § 922(g)(1) Felon in Possession of a Firearm	12/10/2018	1

As pronounced and imposed on November 8, 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 100 months. This sentence shall run concurrently with any sentence which may be imposed in Case No. 1573900D in Criminal District Court No. 3 of Tarrant County, Texas.

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.

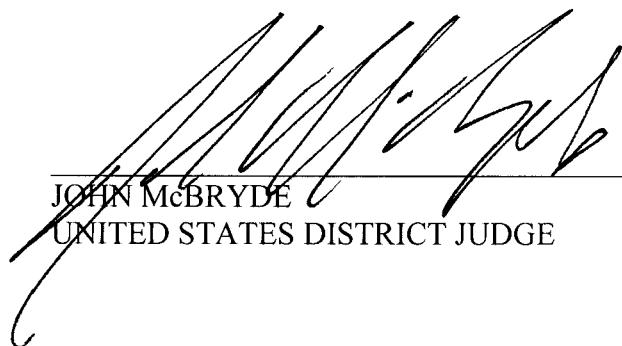
FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: a Smith & Wesson, Model SW 40VE, .40 caliber semi-auto pistol, bearing Serial No. DTE6723, including any ammunition, magazines, and/or accessories recovered with the firearm.

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 8th day of November, 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