

United States Court of Appeals
for the Fifth Circuit

No. 20-10087
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

December 8, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ZAVION NUNLEY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-197-1

Before WIENER, SOUTHWICK, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

Zavion Nunley appeals his 96-month sentence of imprisonment for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). He contends that his above-guidelines sentence was substantively unreasonable because the district court

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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failed to adequately consider his traumatic childhood and the disparities the sentence would create between Nunley and similarly situated defendants. Further, Nunley argues that the district court erred by ordering that two of his anticipated state sentences would run consecutively to his federal sentence because the conduct involved in those pending state charges was relevant conduct to the federal offense.

Here, the district court relied on appropriate factors in determining that an upward variance was warranted, as its reasons addressed Nunley's history and characteristics, and the needs to deter Nunley from future criminal conduct and to protect the public. *See 18 U.S.C. § 3553(a); United States v. Mondragon-Santiago*, 564 F.3d 357, 360 (5th Cir. 2009).

Nunley contends that the district court failed to consider his upbringing, but the district court clearly did and determined that Nunley's extensive criminal history warranted an upward variance. Further, Nunley does not show that he received a higher sentence than other criminal defendants nationwide who were similarly situated in terms of offense conduct, acceptance of responsibility, criminal history, or guidelines calculations. *See United States v. Guillermo Balleza*, 613 F.3d 432, 435 (5th Cir. 2010); *United States v. Candia*, 454 F.3d 468, 476 (5th Cir. 2006).

Nothing suggests that the district court failed to consider a factor that should have received significant weight, gave significant weight to an improper factor, or made a clear error of judgment in balancing the sentencing factors; therefore, we defer to the district court's determination that the § 3553(a) factors, on the whole, warrant the variance and justify the extent of the upward variance imposed. *See United States v. Gerezano-Rosales*, 692 F.3d 393, 400 (5th Cir. 2012); *United States v. Broussard*, 669 F.3d 537, 551 (5th Cir. 2012).

Nunley argues that his state charges for burglary of a vehicle and theft of a firearm were relevant conduct to the instant federal offense because they involved the pistol that was the subject of the federal offense. Thus, he claims

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that the district court mistakenly failed to order these relevant conduct offenses to run concurrently with his federal sentence, pursuant to U.S.S.G. § 5G1.3. Nunley did not raise this issue before the district court, and therefore, plain error review applies. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 364 (5th Cir. 2009). To establish plain error, Nunley must show a forfeited error that is clear or obvious and that affected his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes such a showing, this court has the discretion to correct the error but should do so only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

In this case, the district court adopted the presentence report, which found that the state sentences that were ordered to run concurrently were related to the instant federal offense. The district court ordered the other anticipated state sentences for unrelated conduct to run consecutively. Additionally, the concurrent anticipated state sentences were for offenses related to possessing or firing a firearm, and the consecutive anticipated state sentences were for offenses comprising all other criminal conduct, including the contested burglary and theft offenses. The district court did not make any findings with respect to relevant conduct, and therefore Nunley's claim of a mistaken relevant conduct determination does not constitute a clear or obvious error on plain error review. Further, the district court had the discretion to order the sentences for the related state offenses to run concurrently and the other anticipated state sentences to run consecutively to the federal sentence, and the record shows that the district court did not exceed its discretion. *See Setser v. United States*, 566 U.S. 231, 236-37 (2012). Therefore, Nunley has not demonstrated an error, plain or otherwise. *See Puckett*, 556 U.S. at 135.

Given the foregoing, the judgment of the district court is
AFFIRMED.

Table 8

**COMPARISON OF SENTENCE IMPOSED AND
POSITION RELATIVE TO THE GUIDELINE RANGE
Fiscal Year 2017**

| | National | | Northern Texas | |
|---|---------------|--------------|----------------|--------------|
| | N | % | N | % |
| TOTAL CASES¹ | 66,266 | 100.0 | 1,428 | 100.0 |
| CASES SENTENCED WITHIN GUIDELINE RANGE | 32,552 | 49.1 | 886 | 62.0 |
| CASES SENTENCED ABOVE GUIDELINE RANGE | 1,950 | 2.9 | 79 | 5.5 |
| DEPARTURE ABOVE GUIDELINE RANGE | 456 | 0.7 | 12 | 0.8 |
| Upward Departure From Guideline Range ² | 352 | 0.5 | 5 | 0.4 |
| Upward Departure With <i>Booker</i> /18 U.S.C. § 3553 ³ | 104 | 0.2 | 7 | 0.5 |
| OTHERWISE ABOVE GUIDELINE RANGE | 1,494 | 2.3 | 67 | 4.7 |
| Above Guideline Range With <i>Booker</i> /18 U.S.C. § 3553 ⁴ | 1,411 | 2.1 | 67 | 4.7 |
| All Remaining Cases Above Guideline Range ⁵ | 83 | 0.1 | 0 | 0.0 |
| GOVERNMENT SPONSORED BELOW RANGE⁶ | 18,417 | 27.8 | 222 | 15.5 |
| §5K1.1 Substantial Assistance Departure | 7,128 | 10.8 | 187 | 13.1 |
| §5K3.1 Early Disposition Program Departure | 5,828 | 8.8 | 1 | 0.1 |
| Other Government Sponsored Below Range | 5,461 | 8.2 | 34 | 2.4 |
| NON-GOVERNMENT SPONSORED BELOW RANGE | 13,347 | 20.1 | 241 | 16.9 |
| DEPARTURE BELOW GUIDELINE RANGE | 1,563 | 2.4 | 28 | 2.0 |
| Downward Departure From Guideline Range ² | 1,142 | 1.7 | 21 | 1.5 |
| Downward Departure With <i>Booker</i> /18 U.S.C. § 3553 ³ | 421 | 0.6 | 7 | 0.5 |
| OTHERWISE BELOW GUIDELINE RANGE | 11,784 | 17.8 | 213 | 14.9 |
| Below Guideline Range With <i>Booker</i> /18 U.S.C. § 3553 ⁴ | 11,457 | 17.3 | 211 | 14.8 |
| All Remaining Cases Below Guideline Range ⁵ | 327 | 0.5 | 2 | 0.1 |

¹ This table reflects the 66,873 cases sentenced nationally in fiscal year 2017, 1,430 of which were from the Northern District of Texas. Of these, 607 cases nationally and two cases from the Northern District of Texas were excluded because information was missing from the submitted documents that prevented the comparison of the sentence and the guideline range.

² All cases with departures in which the court did not indicate as a reason either *United States v. Booker*, 18 U.S.C. § 3553, or a factor or reason specifically prohibited in the provisions, policy statements, or commentary of the *Guidelines Manual*.

³ All cases sentenced outside of the guideline range in which the court indicated both a departure (see footnote 2) and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system.

⁴ All cases sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system.

⁵ All cases sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. This category includes cases in which no reason was provided for a sentence outside of the guideline range.

⁶ Cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, 2017 Datafile, USSCFY17.

Table 8**SENTENCE IMPOSED RELATIVE TO THE GUIDELINE RANGE¹****Fiscal Year 2018**

| | National | | Northern Texas | |
|--|-----------------|--------------|-----------------------|--------------|
| | N | % | N | % |
| TOTAL CASES | 68,902 | 100.0 | 1,479 | 100.0 |
| SENTENCES UNDER THE GUIDELINES MANUAL | 51,702 | 75.0 | 1,194 | 80.7 |
| Within Guideline Range | 35,127 | 51.0 | 948 | 64.1 |
| Upward Departure ² | 396 | 0.6 | 13 | 0.9 |
| Downward Departure | | | | |
| §5K1.1 Substantial Assistance | 6,948 | 10.1 | 178 | 12.0 |
| §5K3.1 Early Disposition Program | 6,259 | 9.1 | 1 | 0.1 |
| Other Government Motion ³ | 1,272 | 1.8 | 21 | 1.4 |
| Non-Government Departure ⁴ | 1,700 | 2.5 | 33 | 2.2 |
| VARIANCES | 17,200 | 25.0 | 285 | 19.3 |
| Upward Variance ⁵ | 1,404 | 2.0 | 78 | 5.3 |
| Downward Variance | | | | |
| Government Motion ⁶ | 3,795 | 5.5 | 10 | 0.7 |
| Non-Government Variance ⁷ | 12,001 | 17.4 | 197 | 13.3 |

¹ This table reflects the 69,425 cases reported to the Commission in fiscal year 2018, 1,484 of which were from the Northern District of Texas. Of these, 523 cases nationally and five cases from the Northern District of Texas were excluded because information was missing from the submitted documents that prevented the comparison of the sentence and the guideline range.

² Cases in which the sentence imposed was above the applicable guideline range and for which the court cited a reason on Part V of the Statement of Reasons form, other than §5K1.1 or §5K3.1.

³ Cases in which the sentence imposed was below the applicable guideline range and for which the court cited a reason on Part V of the Statement of Reasons form, other than §5K1.1 or §5K3.1, and where the prosecution initiated, proposed, or stipulated to the sentence.

⁴ Cases in which the sentence imposed was below the applicable guideline range and for which the court cited a reason on Part V of the Statement of Reasons form, other than §5K1.1 or §5K3.1, and where the prosecution did not initiate, propose, or stipulate to the sentence.

⁵ Cases in which the sentence imposed was above the applicable guideline range and for which the court cited a reason on Part VI of the Statement of Reasons form.

⁶ Cases in which the sentence imposed was below the applicable guideline range and for which the court cited a reason on Part VI of the Statement of Reasons form, and where the prosecution initiated, proposed, or stipulated to the sentence.

⁷ Cases in which the sentence imposed was below the applicable guideline range and for which the court cited a reason on Part VI of the Statement of Reasons form, or where no reason was given, and where the prosecution did not initiate, propose, or stipulate to the sentence.

SOURCE: U.S. Sentencing Commission, 2018 Datafile, USSCFY18.

Table 8

SENTENCE IMPOSED RELATIVE TO THE GUIDELINE RANGE¹
Fiscal Year 2019

| | National | | Northern Texas | |
|--|-----------------|--------------|-----------------------|--------------|
| | N | % | N | % |
| TOTAL CASES | 76,034 | 100.0 | 1,556 | 100.0 |
| SENTENCES UNDER THE GUIDELINES MANUAL | 56,995 | 75.0 | 1,202 | 77.2 |
| Within Guideline Range | 39,078 | 51.4 | 971 | 62.4 |
| Upward Departure ² | 364 | 0.5 | 16 | 1.0 |
| Downward Departure | | | | |
| §5K1.1 Substantial Assistance | 7,272 | 9.6 | 184 | 11.8 |
| §5K3.1 Early Disposition Program | 7,119 | 9.4 | 0 | 0.0 |
| Other Government Motion ³ | 1,410 | 1.9 | 10 | 0.6 |
| Non-Government Departure ⁴ | 1,752 | 2.3 | 21 | 1.3 |
| VARIANCES | 19,039 | 25.0 | 354 | 22.8 |
| Upward Variance ⁵ | 1,431 | 1.9 | 95 | 6.1 |
| Downward Variance | | | | |
| Government Motion ⁶ | 4,083 | 5.4 | 17 | 1.1 |
| Non-Government Variance ⁷ | 13,525 | 17.8 | 242 | 15.6 |

¹ This table reflects the 76,538 cases reported to the Commission in fiscal year 2019, 1,556 of which were from the Northern District of Texas. Of these, 504 cases nationally were excluded because information was missing from the submitted documents that prevented the comparison of the sentence and the guideline range, while none from the Northern District of Texas were excluded.

² Cases in which the sentence imposed was above the applicable guideline range and for which the court cited a reason on Part V of the Statement of Reasons form, other than §5K1.1 or §5K3.1.

³ Cases in which the sentence imposed was below the applicable guideline range and for which the court cited a reason on Part V of the Statement of Reasons form, other than §5K1.1 or §5K3.1, and where the prosecution initiated, proposed, or stipulated to the sentence.

⁴ Cases in which the sentence imposed was below the applicable guideline range and for which the court cited a reason on Part V of the Statement of Reasons form, other than §5K1.1 or §5K3.1, and where the prosecution did not initiate, propose, or stipulate to the sentence.

⁵ Cases in which the sentence imposed was above the applicable guideline range and for which the court cited a reason on Part VI of the Statement of Reasons form.

⁶ Cases in which the sentence imposed was below the applicable guideline range and for which the court cited a reason on Part VI of the Statement of Reasons form, and where the prosecution initiated, proposed, or stipulated to the sentence.

⁷ Cases in which the sentence imposed was below the applicable guideline range and for which the court cited a reason on Part VI of the Statement of Reasons form, or where no reason was given, and where the prosecution did not initiate, propose, or stipulate to the sentence.

SOURCE: U.S. Sentencing Commission, 2019 Datafile, USSCFY19.