APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

April 7, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HIDEY DIAZ, a/k/a Silvio Manuel Amador, a/k/a Celio Alvarez-Carrasco,

Defendant - Appellant.

No. 20-1269
(D.C. No. 1:18-CR-00553-RBJ-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges.

Hidey Diaz[1], a previously deported Honduran national, was arrested and charged with first-degree trespass of a dwelling in Arapahoe County, Colorado. While he was in state custody, a federal grand jury in the United States District Court for the District of Colorado indicted Mr. Diaz on a charge of illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a). The Government obtained an arrest warrant for Mr. Diaz but did not

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Mr. Diaz also goes by the name of Silvio Amador.

proceed on the federal charge at that time. Before the Government pursued the federal prosecution, Mr. Diaz pleaded guilty to the state charge.

Mr. Diaz made his initial appearance in federal court almost a year after the federal indictment. Mr. Diaz then pleaded guilty to the federal illegal reentry charge. The state conviction altered his United States Sentencing Guidelines range in two ways: (1) the applicable criminal history category increased from V to VI, and (2) the applicable offense level score increased by eight levels.

At sentencing, Mr. Diaz moved for a variance, citing the Guidelines range that would have applied if the Government had pursued the federal prosecution without delay and before his state conviction. The district court denied Mr. Diaz's motion for a variance and sentenced him to 63 months' incarceration. Mr. Diaz now challenges his sentence as substantively unreasonable. For the following reasons, we affirm his sentence.

I. BACKGROUND

A. Factual History

Mr. Diaz, a Honduran national, has a history of immigration violations. He was previously deported in 2010, 2012, and 2018, and convicted of illegally reentering the country in 2012. On November 4, 2018, Mr. Diaz was arrested on a first-degree trespass of a dwelling charge in Arapahoe County, Colorado after he opened an unlocked window to enter a residence and "[a] fight ensued." ROA Vol. 3 at 30. The day after his arrest, federal immigration authorities discovered Mr. Diaz in custody at the Arapahoe County Detention Facility. On December 4, 2018, a grand jury sitting in the District of Colorado charged Mr. Diaz with illegal reentry after deportation, in violation

of 8 U.S.C. § 1326(a). The Government obtained an arrest warrant for Mr. Diaz but did not serve him at that time.

On October 28, 2019, Mr. Diaz pleaded guilty to the state charge and was sentenced the same day to two years' incarceration. On December 2, 2019, almost a full year after his federal indictment, Mr. Diaz appeared in federal court for the first time. He pleaded guilty to the federal charge on January 23, 2020. The plea agreement estimated the Guidelines range as 41–51 months' incarceration, based on an offense level of sixteen, a criminal history category of V, and a one-level downward departure because of the "fast-track" nature of the proceedings pursuant to the United States Sentencing Commission, *Guidelines Manual*, §5K3.1 (2018).

The Presentence Investigation Report ("PSR") calculated the applicable Guidelines range as 70–87 months' incarceration, with a criminal history category of VI and an offense level of twenty, accounting for the one-level downward departure for fast-track proceedings. The increase in the criminal history category from V, as contemplated by the plea agreement, to VI, was due to the three points added to Mr. Diaz's criminal history score as a result of the state conviction. The offense level calculation was also impacted by the state conviction. Under USSG §2L1.2(b)(3)(A)-(D), an increase is called for where, at any time after having first been deported, a defendant is convicted of a felony that is not an illegal reentry offense. The size of the increase under §2L1.2(b)(3)(A)-(D) is tied to the length of the sentence for the triggering felony. Because Mr. Diaz was sentenced to two years' incarceration in his state case, he received an eight-level increase pursuant to USSG §2L1.2(b)(3)(B). Ultimately, the PSR

recommended a total offense level of twenty-one, after a reduction for acceptance of responsibility. The one-level downward departure for fast-track proceedings then brought the offense level down to twenty. Without the impact of the state conviction, the applicable Guidelines range would have been 27–33 months.[2]

B. Procedural History

Prior to sentencing, Mr. Diaz moved for a variance, requesting a sentence of 30 months' incarceration and citing the Guidelines range which would have applied without the state conviction. His motion largely focused on the prejudice created by the delay in the federal prosecution. He argued a 30-month sentence was appropriate due to "the sentencing disparity and prejudice caused by the government's failure to transfer [Mr. Diaz] to federal custody at the time of his Indictment." ROA Vol. 1 at 37. Without the delay in the federal prosecution, he argued a lower Guidelines range would have applied and his sentence would have been significantly lower. In response, the Government argued it was "within its right" to let the state case "resolve prior to securing [Mr. Diaz's] presence in federal court." *Id.* at 51.

The district court denied Mr. Diaz's request for a variance. In imposing the sentence, the district court emphasized the importance of deterrence given Mr. Diaz's history of illegal reentries. The district court also cited community safety issues,

[2] In the absence of the state conviction, Mr. Diaz's total offense level would have been twelve and his criminal history category V. This can be calculated by simply removing the three points added to Mr. Diaz's criminal history score due to his state conviction, as well as the eight-level offense level increase he received under USSG §2L1.2(b)(3)(B). The resultant Guidelines range would then be 27–33 months. *See* USSG Chapter 5 Pt. A Sentencing Table.

referencing the state trespassing case and Mr. Diaz's previous conviction for driving while ability impaired.

The district court ultimately decided some variance from the Guidelines range was warranted—sentencing Mr. Diaz to 63 months' incarceration. The district court explained it varied for two reasons: (1) because the plea agreement contemplated the applicable criminal history category as V; and (2) because it could arrive at 63 months by deducting 24 months (reflecting the state sentence) from the 87-month sentence warranted by the top of the Guidelines range. Mr. Diaz filed a timely notice of appeal.

II. DISCUSSION

Mr. Diaz argues his sentence is substantively unreasonable because the delay in the federal prosecution resulted in an increase to the applicable Guidelines range due to the intervening state conviction. For the following reasons, we affirm Mr. Diaz's sentence.

"We review the substantive reasonableness of a sentence for abuse of discretion." *United States v. Lawless*, 979 F.3d 849, 855 (10th Cir. 2020). We give "substantial deference" to the district court and will only overturn a sentence only if it was "arbitrary, capricious, whimsical, or manifestly unreasonable." *Id.* (quotation marks omitted). Mr. Diaz must therefore show that the sentence fell "outside the realm of the rationally available sentencing choices available to the district court." *United States v. Rendon-Alamo*, 621 F.3d 1307, 1310 n. ** (10th Cir. 2010). Indeed, "there are perhaps few arenas where the range of rationally permissible choices is as large as it is in sentencing." *United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007). In addition, because Mr. Diaz's

63-month sentence was below the computed Guidelines range of 70– 87 months, there is a presumption of reasonableness. *United States v. Balbin-Mesa*, 643 F.3d 783, 788 (10th Cir. 2011).

Mr. Diaz argues his "guideline range was markedly higher than it otherwise would have been," because the delay in the federal prosecution[3] allowed for the intervening state conviction that increased the applicable Guidelines range, resulting in a substantively unreasonable sentence. App. Br. at 13. Specifically, he argues he was "treated much worse than one in his situation who did not experience unjustified government delay." *Id.* at 14. In support of his argument, Mr. Diaz points to 18 U.S.C. § 3553(a)(6), which requires the district court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," when imposing a sentence.

Mr. Diaz argues the district court should have compared his sentence to those imposed on "others similarly situated who are not subjected to such delay," under § 3553(a)(6). *Id.* at 13. In particular, he claims the district court should have compared his sentence to those available to defendants without an intervening state conviction. However, nothing in the plain language of the statute supports the comparison Mr. Diaz advances. Mr. Diaz does not argue the district court's sentence was unreasonable for someone with his record—only that his record would have been different if the

[3] Mr. Diaz does not claim a violation of his Sixth Amendment right to speedy trial. A discussion of whether the delay in prosecution was constitutionally appropriate is therefore unwarranted.

Government had pursued the federal prosecution before his state conviction. The statute, however, does not contemplate comparisons of defendants with different criminal records. At the time of sentencing on the federal offense, the district court properly considered Mr. Diaz's record as it was, not as it might have been. We therefore reject Mr. Diaz's argument that the sentence imposed created unwarranted disparities.

Even if Mr. Diaz was correct that the district court should have considered the delay under § 3553(a)(6), the need to avoid unwarranted sentencing disparities is "but one of several factors for a court to consider in determining a reasonable sentence." *United States v. Morales-Chaires*, 430 F.3d 1124, 1131 (10th Cir. 2005). The district court appropriately reviewed other factors under 18 U.S.C. § 3553 in imposing its sentence. The district court cited deterrence as a primary consideration, noting Mr. Diaz's "repetitive history of illegal reentries," and the fact that "his previous sentences of imprisonment, including most recently 24 months in federal prison, have not deterred him." ROA Vol. 4 at 37; *see also* 18 U.S.C. § 3553(a)(2)(B). The district court also considered community safety, citing "[t]he home invasion where he actually got into a scuffle with one of the residents" and a prior conviction for driving while ability impaired. ROA Vol. 4 at 37; *see also* 18 U.S.C. § 3553(a)(2)(C). The district court was also influenced by Mr. Diaz's criminal history, specifically that "each time he comes back illegally he commits additional crimes," "the nature and circumstances of the offense," and the "particulars of his personal history." ROA Vol. 4 at 33, 36; *see also* 18 U.S.C. § 3553(a)(1).

Because the district court appropriately considered a variety of factors in reaching its sentence and did not create unwarranted sentencing disparities, the sentence was not "arbitrary, capricious, whimsical, or manifestly unreasonable." *Lawless*, 979 F.3d at 855 (quotation marks omitted). Instead, the sentence fell within "the realm of the rationally available sentencing choices available to the district court." *Rendon-Alamo*, 621 F.3d at 1310 n. **.

III. CONCLUSION

For the foregoing reasons, we AFFIRM Mr. Diaz's sentence.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

PROBATION OFFICER: Thank you, Your Honor. The only thing I do want to add is that according to my records he was paroled to U.S. Marshal custody on April 9th, of 2020, so technically the Bureau of Prisons will give him 74 days credit for the instant offense up to today's date.

THE COURT: All right. Thank you. Anything else, Ms. Meador?

PROBATION OFFICER: No. Thank you, Your Honor.

THE COURT: All right. The Court will proceed to sentence. The Court has considered all of the written submissions, as well as the speeches. The defendant, Mr. Diaz, is before the Court having pled guilty to illegal reentry. The statutory range for the offense is up to ten years in prison, plus a substantial fine, three years of supervised release.

Briefly, the facts are that Mr. Diaz is a citizen of Honduras. He has been removed from the United States three times already: January 14, 2010; December 10, 2012; and March 21, 2018. Notwithstanding all of those removals, however, he was found in the Arapahoe County jail on November 5, 2018. He was in custody on charges of controlled substance possession, felony trespassing, and an outstanding warrant out of Adams County.

His criminal history includes felonies for first-degree criminal trespass, possession of a Schedule II

controlled substance, as well as a DWAI. There are six convictions of record total. The Court has already ruled on the defendant's objections to the probation report.

The Government has moved, Number 31, for an additional offense level reduction for acceptance of responsibility and also for a fast-track departure, Number 32. Those motions are granted. The defendant has moved for a departure under Guideline 2L1.2 -- 2L1.2. However, the Court is not persuaded, having looked at application note seven to that guideline, which instructs the Court to consider whether the defendant has engaged in additional criminal activity after illegal reentry, how serious that criminal activity was, and the overall seriousness of his criminal history.

The Court finds that he's not qualified for the departure. That is because the record shows that each time he comes back illegally he commits additional crimes. After the most recent deportation, he came back and committed the most serious of his three felonies, which was a home invasion, and the overall criminal history warrants a category VI.

The defendant has also moved for a variance on multiple grounds. The first ground, and the one that got the most emphasis, is the Government -- or the defendant's contention that there was unreasonable delay in indicting and bringing Mr. Diaz before the court, and during that period of delay the guidelines changed to his detriment.

My view is to the contrary for two reasons. First, the defendant is in no position to complain about when the Government indicts him given his removal and criminal history past. If he didn't want the Government to indict him, the answer would have been to stay in Honduras; or if he couldn't restrain himself from coming back illegally a fourth time, at least not committing an additional felony. In fact, my second reason is that what he is suggesting amounts to he should have been given an opportunity to have a guideline that the commission has determined to be wrong, whereas now he is to be sentenced under a guideline that the commission has determined to be correct.

The second reason for the variance given by the defendant is that he has mental health issues. That is, of course, unfortunate. That is true of at least a quarter, maybe a third to a half of people in custody. It's a great tragedy, but there's nothing the Court can do about it. The fact is that he keeps coming back here and committing crimes. That, to me, trumps the mental illness piece in terms of a variance.

The defendant's third reason for a variance points to the difficult conditions generally in Honduras and even specifically to the defendant since he has evidently been threatened, according to him, by his uncle with physical harm, and possibly by organized crime in Honduras as well. Although

the Court does not consider the defendant at all credible, due to his criminal history and other reasons that have been articulated by the Government, nevertheless, the Court does find it credible that conditions in Honduras are poor, because I've seen it in many other cases.

In his response to the request for a variance, the Government points out that Mr. Diaz has not taken advantage of procedures that are available to aliens to obtain asylum or protection in the United States, and the Government cites the statutes and regulations to that effect. The Government says those procedures are available to prior deportees; however, realistically, I strongly doubt that the Government is going to give someone with his criminal history asylum. But, again, I come back to the fact that he's put himself in this position by committing all these crimes in the U.S. Had he maintained a crime-free life and sought asylum in the United States, then I would hope that he would be considered eligible for that, but he has eliminated that possibility for himself.

The next reason for a variance given by the Government -- or by the defendant is that his condition has deteriorated in custody. Frankly, when I listen to his statement of allocution, it seemed like the contrary was true. I accept that conditions in the Bureau of Prisons may be different, his opportunities to work and earn money might be different, but that's what happens when you commit federal

crimes.

Finally, the defendant suggests that he will not return to the United States because, given his physical and mental issues, the return would be too arduous. In other words, it's not because he respects the law of the United States. It's because, according to counsel, it would simply be too difficult for him illegally to return again. For all those reasons, the Court denies the defendant's motion for a variance. The Court is going to grant a variance, but not for any of the reasons suggested by the defendant.

Turning next to the sentencing factors, first, the Court finds that the offense level under the guidelines is 20, the criminal history category is VI, and the recommended range is 70 to 87 months.

THE INTERPRETER: Repetition, please, Your Honor.

THE COURT: The Court finds the guideline calculation to be offense level 20, criminal history category VI, and a recommended range of 70 to 87 months. With respect to the other factors under 3553, the Court has considered the nature and circumstances of the offense, but recognizes that if one sets aside the felony criminal felony trespass, we would be looking simply at another illegal reentry. The Court has considered the defendant's criminal history and those particulars of his personal history that the defendant has emphasized in writing and orally here today.

The Court also considers deterrence to be an important factor given his repetitive history of illegal reentries. It is significant that his previous sentences of imprisonment, including most recently 24 months in federal prison, have not deterred him. I should have said his prior to his most recent illegal reentry sentences have not deterred him. I stand corrected.

I also consider that there are community safety issues with Mr. Diaz. The home invasion where he actually got into a scuffle with one of the residents and his DWAI show me that he is a danger to the community. The reason, however, that I'm going to consider a variance is this -- actually, two reasons. The first is that in the plea agreement the parties assumed and believed that his criminal history category was V, and Ms. Suelau has made an argument as to why it still should be V, with which I disagree, but it was a reasonable argument. And if one would assume hypothetically a criminal history category of V, then the guideline recommendation would be 63 to 78 months.

On the other hand, if one takes the two years he has served out of the equation, because that, after all, is the violent piece here, and subtract the 24 months from the guideline top, you end up, once again, with 63 months. And given that he has served his sentence for the felony offense that involved the home invasion, and we're only really looking

now at what's appropriate for illegal reentry, it seems to me that it would be more fair to deduct those 24 months.

I have certainly considered the recommendations of counsel: The defense lawyer for 30 months, probation for 70 months, and the Government lawyer, 70 months. But for the reasons I have given, I have come to the decision that the most fair and appropriate sentence would be a variance below the guidelines to the bottom of the guideline for category V. Whether you get to that number 63 that way or by deducting the 24 months, you come to the same number.

Therefore, the Court sentences the defendant to 63 months in federal prison, three years of supervised release with the sole condition be that he not return illegally to the United States. The Court will not impose a fine, but will require a $100 special assessment fee. If he's entitled to the 74 days as indicated by Ms. Meador, then, of course, the Court recommends that those be granted to him. He's entitled to appeal within 14 days of the entry of the Court's judgment, and I don't believe there was an appellate waiver in this case.

Is there anything else?

MS. SUELAU: Your Honor, there was a waiver --

THE COURT: If there was a waiver, then that's in the plea agreement, and his right to appeal will be subject to his plea agreement. Anything else?