

APPENDIX A

United States v. King,
No. 21-50543, unpub. op.
(5th Cir. April 13, 2022)

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

April 13, 2022

No. 21-50543
Summary Calendar

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

TANNER LANCE KING,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:20-CR-330-1

Before KING, COSTA, and HO, *Circuit Judges.*

PER CURIAM:*

Tanner Lance King pleaded guilty to possessing 50 grams or more of actual methamphetamine with the intent to distribute. King was not given a reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility because he was repeatedly found with contraband while in detention. As a result, his

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 21-50543

guidelines range was 210 to 262 months of imprisonment. He was sentenced within that range to 262 months of imprisonment. He argues that the district court erred by denying him a reduction for acceptance of responsibility. He also argues that his 262-month sentence is substantively unreasonable.

There is no dispute that King truthfully admitted his criminal drug conduct and pleaded guilty; the issue is whether the district court reversibly erred by determining that King was not entitled to a reduction for acceptance of responsibility based on his post-plea conduct while in custody. A defendant is not entitled to a reduction for acceptance of responsibility merely because he truthfully admits his criminal conduct and pleads guilty. *See United States v. Hinojosa-Almance*, 977 F.3d 407, 410 (5th Cir. 2020). Evidence of a defendant's acceptance of responsibility may be outweighed by conduct inconsistent with such a claim of responsibility. § 3E1.1, comment. (n.3). In determining whether a reduction under § 3E1.1(a) applies, the district court may consider the defendant's "voluntary termination or withdrawal from criminal conduct or associations." § 3E1.1, comment. (n.1(b)); *cf. United States v. Watkins*, 911 F.2d 983, 985 (5th Cir.1990).

"A district court's refusal to reduce a sentence for acceptance of responsibility is reviewed under a standard even more deferential than a pure clearly erroneous standard." *United States v. Najera*, 915 F.3d 997, 1002 (5th Cir. 2019) (internal quotation marks and citation omitted). We will not reverse the district court's decision to deny a reduction for acceptance of responsibility unless the decision is "without foundation." *United States v. Juarez-Duarte*, 513 F.3d 204, 211 (5th Cir. 2008).

The record in this case does not demonstrate that the district court's decision to deny a § 3E1.1 reduction—based on King's possession of contraband on two separate occasions—was "without foundation." *Id.*; *see Watkins*, 911 F.2d at 985; § 3E1.1, comment. (n.1(B)). Accordingly, the

No. 21-50543

district court did not reversibly err by denying King an adjustment under § 3E1.1.

King also argues that his 262-month sentence is greater than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a) and fails to adequately account for his personal history of substance abuse. Because King has preserved his challenge to the substantive reasonableness of his sentence, *see Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766-77 (2020), we review the issue under a deferential abuse-of-discretion standard, *Gall v. United States*, 552 U.S. 38, 46-47, 49-51 (2007). The district court sentenced King within guidelines range, so the sentence is entitled to a rebuttable presumption of reasonableness on appeal. *See United States v. Rashad*, 687 F.3d 637, 644 (5th Cir. 2012).

King has not rebutted that presumption. He has not shown that his sentence fails to account for a factor that should receive significant weight, gives significant weight to an irrelevant or improper factor, or represents a clear error of judgment in balancing sentencing factors. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). The district court made an individualized assessment based on the facts of King's case, including his struggle with addiction, and the § 3553(a) factors, and provided lengthy reasons for imposing the chosen sentence. Even if we reasonably could conclude that a different sentence was proper, the district court's well-supported sentencing decision is entitled to deference, and we will not reweigh the § 3553(a) factors. *See Gall*, 552 U.S. at 50-51.

The judgment is AFFIRMED.

APPENDIX B

18 U.S.C. § 3553(a)

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part II. Criminal Procedure

Chapter 227. Sentences (Refs & Annos)

Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018

Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to [section 994\(a\)\(1\) of title 28, United States Code](#), subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(ii) that, except as provided in [section 3742\(g\)](#), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [section 994\(a\)\(3\) of title 28, United States Code](#), taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#));

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to [section 994\(a\)\(2\) of title 28, United States Code](#), subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(B) that, except as provided in [section 3742\(g\)](#), is in effect on the date the defendant is sentenced.¹

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) **In general.**--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) ² **Sentencing.**--In sentencing a defendant convicted of an offense under [section 1201](#) involving a minor victim, an offense under [section 1591](#), or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under [section 994\(a\) of title 28](#), taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) **Statement of reasons for imposing a sentence.**--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under [section 994\(w\)\(1\)\(B\) of title 28](#), except to the extent that the court relies upon statements received in camera in accordance with [Federal Rule of Criminal Procedure 32](#). In the event that the court relies upon statements received in camera in accordance with [Federal Rule of Criminal Procedure 32](#) the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the

order of judgment and commitment, to the Probation System and to the Sentencing Commission,³ and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to [section 3555](#), the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [section 994 of title 28, United States Code](#).

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act ([21 U.S.C. 841, 844, 846](#)), section 1010 or 1013 of the Controlled Substances Import and Export Act ([21 U.S.C. 960, 963](#)), or [section 70503 or 70506 of title 46](#), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under [section 994 of title 28](#) without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.--As used in this section, the term “violent offense” means a crime of violence, as defined in section 16, that is punishable by imprisonment.

CREDIT(S)

(Added [Pub.L. 98-473](#), Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended [Pub.L. 99-570](#), Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; [Pub.L. 99-646](#), §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; [Pub.L. 100-182](#), §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; [Pub.L. 100-690](#), Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; [Pub.L. 103-322](#), Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; [Pub.L. 104-294](#), Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; [Pub.L. 107-273](#), Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; [Pub.L. 108-21](#), Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; [Pub.L. 111-174](#), § 4, May 27, 2010, 124 Stat. 1216; [Pub.L. 115-391](#), Title IV, § 402(a), Dec. 21, 2018, 132 Stat. 5221.)

VALIDITY

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by [United States v. Booker](#), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).>

[Notes of Decisions \(2810\)](#)

Footnotes

- 1 So in original. The period probably should be a semicolon.
- 2 So in original. No subpar. (B) has been enacted.
- 3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 116-149.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

APPENDIX C

U.S.S.G. §3E1.1 (2018)

PART E – ACCEPTANCE OF RESPONSIBILITY

§3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
 - (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;
 - (B) voluntary termination or withdrawal from criminal conduct or associations;
 - (C) voluntary payment of restitution prior to adjudication of guilt;
 - (D) voluntary surrender to authorities promptly after commission of the offense;
 - (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
 - (F) voluntary resignation from the office or position held during the commission of the offense;
 - (G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and
 - (H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.
3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.
4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.
5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.
6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Public Law 108–21. The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for

§3E1.1

his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 46); November 1, 1989 (amendment 258); November 1, 1990 (amendment 351); November 1, 1992 (amendment 459); April 30, 2003 (amendment 649); November 1, 2010 (amendments 746 and 747); November 1, 2013 (amendment 775); November 1, 2018 (amendment 810).
------------------------	---