IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-10073
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
September 25, 2017
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PHILLIP SCHENCK,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:15-CR-152-7

Before DAVIS, CLEMENT, and COSTA, Circuit Judges.

PER CURIAM:*

Phillip Schenck appeals the 480-month within-guidelines sentence and four-year term of supervised release he received following his guilty plea to conspiracy to possess with intent to distribute a controlled substance. Schenck argues that (1) the district court erred in denying a three-level reduction for acceptance of responsibility, (2) the district court erred in assessing a two-level enhancement for maintaining a drug premises, pursuant to U.S.S.G.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

§ 2D.1.(b)(12), and (3) his sentence is greater than necessary to meet the sentencing goals of 18 U.S.C. § 3553(a) because the district court did not consider his mitigation arguments. Schenck has also filed a pro se motion for the appointment of substitute appellate counsel.

A defendant may receive a two-level reduction pursuant to U.S.S.G. § 3E1.1(a) if he "clearly demonstrates acceptance of responsibility for his offense." We "will affirm a sentencing court's decision not to award a reduction . . . unless it is without foundation, a standard of review more deferential than the clearly erroneous standard." *United States v. Juarez-Duarte*, 513 F.3d 204, 211 (5th Cir. 2008) (internal quotation marks and citation omitted). The record reveals that despite pleading guilty and truthfully admitting to some relevant conduct, Schenck acted in a manner not consistent with acceptance of responsibility by attempting to falsely deny material relevant conduct—such as by refuting claims that he conducted business with certain coconspirators and other sources of his drug supply, objecting to being held accountable for two firearms, and objecting to the drug quantity attributable to him–without providing any evidentiary support. *See* U.S.S.G. § 3E1.1, comment. (n.1(A)). Accordingly, Schenck is unable to demonstrate that the district court's denial of acceptance of responsibility was "without foundation." *Juarez-Duarte*, 513 F.3d at 211; *see also United States v. Medina-Anicacio*, 325 F.3d 638, 648 (5th Cir. 2003) (affirming denial of acceptance of responsibility reduction when Medina's statements did not evince sincere remorse but attempted to mitigate his conduct).

Nor does Schenck show that the district court used the threat of denying acceptance of responsibility to coerce him into withdrawing his objections. At no time did the district court tell Schenck that he must withdraw his objections in order to receive a reduction for accepting responsibility. In addition to warning Schenck about the penalties for false testimony when he was thinking about testifying, the district court also expressed concern that Schenck was frivolously denying relevant conduct and explained this could be a "reason" to deny an acceptance reduction. But it did not ask him to withdraw the objections. Instead, the court continued listening to the objections and noted it would "see" whether the denials affected the reduction. Even after it later indicated it had likely decided not to grant acceptance, the district court continued to consider the remaining objections without attempting to get Schenck to withdraw them. We have rejected a coercion argument in similar circumstances. *See United States v. Medina*, 432 F. App'x 349, 352 (5th Cir. 2011).

The district court's "application of § 2D1.1(b)(12) is a factual finding reviewed for clear error," *United States v. Haines*, 803 F.3d 713, 744 (5th Cir. 2015), *cert. denied,* 137 S. Ct. 2107 (2017). Section 2D1.1(b)(12) authorizes a two-level enhancement if the defendant "maintained a premises for the purpose of manufacturing or distributing a controlled substance." For the § 2D1.1(b)(12) enhancement to apply, the drug-related activity "need not be the sole purpose for which the premises was maintained." *Haines*, 803 F.3d at 744 (quoting § 2D1.1(b)(12), comment. (n.17)). Schenck presented no evidence to rebut the assertions in the adopted presentence report (PSR) that a principal purpose of the premises was drug distribution. The PSR reached that conclusion based on the presence of meth in Schenck's residence when he was arrested which corroborated other evidence showing that Schenck obtained four ounces of meth on a weekly basis and stored it at his home before selling it. In light of the unrebutted PSR, *see United States v. Alaniz*, 726 F.3d 586, 619 (5th Cir. 2013), the district court's application of the enhancement was not clearly erroneous. *See Haines*, 803 F.3d at 744.

Because Schenck did not challenge the substantive reasonableness of his sentence in the district court, we review for plain error only. *See United States v. Peltier*, 505 F.3d 389, 392 (5th Cir. 2007). The record reflects that the district court expressly considered the relevant § 3553(a) factors as well as Schenck's arguments for mitigating his sentence but implicitly overruled those arguments and concluded that a within-guidelines sentence was appropriate. *See United States v. Rodriguez*, 523 F.3d 519, 525 (5th Cir. 2008). Accordingly, we decline Schenck's invitation to reweigh the § 3553(a) factors because "the sentencing judge is in a superior position to find facts and judge their import under § 3553(a) with respect to a particular defendant." *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008). Schenck's general disagreement with the propriety of his sentence and the district court's weighing of the § 3553(a) factors is insufficient to rebut the presumption of reasonableness that attaches to his within-guidelines sentence. *See United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010); *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 766 (5th Cir. 2008). Schenck has not demonstrated error, plain or otherwise, in the imposition of his within-guidelines prison term. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *Peltier*, 505 F.3d at 392.

Accordingly, the judgment of the district court is AFFIRMED. Schenck's motion to dismiss his current appellate counsel and appoint substitute counsel should be DENIED as untimely. *Cf. United States v. Wagner*, 158 F.3d 901, 902-03 (5th Cir. 1998); *United States v. Rincon-Rincon,* 668 F. App'x 606, 607 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 822 (2017).

United States District Court
Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §

v. § Case Number: 4:15-CR-152-A(07)

PHILLIP SCHENCK §

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Shawn Smith. The defendant, PHILLIP SCHENCK, was represented by Christopher K. Woodward.

The defendant pleaded guilty on August 7, 2015 to the one count indictment filed on June 10, 2015. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

Title & Section / Nature of Offense	Date Offense Concluded	Count
21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(B) Conspiracy to Possess with Intent to Distribute a Controlled Substance	05/18/2015	1

As pronounced and imposed on January 15, 2016, the defendant is sentenced as provided in the 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 480 months.

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 four (4) years and that while on supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not commit another federal, state, or local crime.

2. The defendant shall not possess illegal controlled substances.

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 or her 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 or her 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 15th day of January, 2016.

JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

____
____
____

Defendant delivered on ______________, 2016 to ______________________________
at ____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By ________________________________
Deputy United States Marshal