

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States v. McGee

No. 20-30586, United States Court of Appeals for the Fifth Circuit (May 18, 2021)

SUMMARY

****Key Legal Topics:**** Supervised release revocation; substantive reasonableness of upward variance; Sex Offender Registration and Notification Act (SORNA); plain error review. ****Holding:**** The Fifth Circuit affirmed a 24-month revocation sentence (above the 5–11 month guidelines range) as not plainly unreasonable, where the district court properly considered § 3553(a) factors including the defendant's history, deterrence, and public protection. The defendant's disagreement with the court's balancing of those factors did not establish an abuse of discretion.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Per Curiam; Haynes; Willett; Ho
JURISDICTION	Federal
DECIDED	May 18, 2021
DOCKET	20-30586
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from revocation of supervised release
STANDARD OF REVIEW	plainly unreasonable
PRECEDENTIAL VALUE	unpublished
PARTIES	Nobryan McGee v. United States of America

TOPICS

- criminal procedure
- sentencing
- standard of review
- appellate procedure

PRACTICE AREAS

- Criminal Law
- Appellate Practice

QUESTIONS PRESENTED

1. Whether the 24-month revocation sentence is substantively unreasonable.

HOLDINGS

1. The 24-month revocation sentence is not plainly unreasonable.

KEY QUOTATIONS

“A revocation sentence is substantively unreasonable if it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” (2)

“We review McGee's revocation sentence to determine whether it is 'plainly unreasonable.’” (2)

FACTUAL BACKGROUND

McGee was sentenced in 2013 for failing to register under the Sex Offender Registration and Notification Act, with a lifetime term of supervised release. His supervised release was revoked, and he received a 24-month sentence, above the advisory guidelines range of 5 to 11 months.

PROCEDURAL HISTORY

McGee's 2013 sentence for failing to register under SORNA included a lifetime term of supervised release. His supervised release was revoked, and he was sentenced to 24 months imprisonment, exceeding the guidelines range of 5-11 months. He appealed.

DISPOSITION

affirmed

CASES CITED

- United States v. Miller, 634 F.3d 841, 843 (5th Cir. 2011)
- United States v. Fuentes, 906 F.3d 322, 325 (5th Cir. 2018)
- United States v. Badgett, 957 F.3d 536, 541 (5th Cir.), cert. denied, 141 S. Ct. 827 (2020)
- United States v. Warren, 720 F.3d 321, 332 (5th Cir. 2013)
- United States v. Kippers, 685 F.3d 491, 500-01 (5th Cir. 2012)

CITED IN

- United States v. McGee, United States v. McGee, 2021 WL 1168980 (10th Cir. 2021)
- United States v. McGee, United States v. McGee, 992 F.3d 1035, 1045-1048 (10th Cir. 2021)
- United States v. McGee, United States v. McGee, 806 F. Supp. 3d 1264, 1269 [S.D. Ala.]

OPINION

PER CURIAM.

Case: 20-30586 Document: 00515867323 Page: 1 Date Filed: 05/18/2021 United States Court of Appeals for the Fifth Circuit United States Court of Appeals Fifth Circuit FILED May 18, 2021

No. 20-30586 Lyle W. Cayce Summary Calendar Clerk United States of America, Plaintiff—Appellee, versus Nobryan McGee, Defendant—Appellant. Appeal from the United States District Court for the Western District of Louisiana USDC No. 5:12-CR-292-1 Before Haynes, Willett, and Ho, Circuit Judges.

Per Curiam:* Nobryan McGee’s 2013 sentence for failing to register pursuant to the Sex Offender Registration and Notification Act included a lifetime term of supervised release. His supervised release now having been revoked, he * 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.

Case: 20-30586 Document: 00515867323 Page: 2 Date Filed: 05/18/2021 No. 20-30586 contends that the 24-month revocation sentence, which exceeds the guidelines range of five to 11 months, is substantively unreasonable.

We review McGee’s revocation sentence to determine whether it is “plainly unreasonable.” *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011). We review the substantive reasonableness of the sentence for an abuse of discretion, examining the totality of the circumstances. *United States v. Fuentes*, 906 F.3d 322, 325 (5th Cir. 2018). “A revocation sentence is substantively unreasonable if it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *United States v. Badgett*, 957 F.3d 536, 541 (5th Cir.) (internal quotation marks and citation omitted), cert. denied, 141 S. Ct.

827 (2020). “If a sentence is unreasonable, then we consider whether the error was obvious under existing law.” *Miller*, 634 F.3d at 843. In addition to the applicable guidelines range, the district court based the sentence, either explicitly or implicitly, upon several other 18 U.S.C. § 3553(a) factors, including McGee’s history and characteristics as a sex offender, the need to deter him from future violations, and the need to protect the public from his further crimes.

See § 3553(a)(1), (2)(B)-(C), and (4)(B). McGee’s argument that the district court should have afforded the guidelines range more weight amounts to nothing more than a disagreement with the district court’s balancing of the applicable § 3553(a) factors, which we will not reweigh. See *United States v. Warren*, 720 F.3d 321, 332 (5th Cir. 2013). Nor does the extent of the upward variance constitute an abuse of discretion.

See, e.g., *United States v. Kippers*, 685 F.3d 491, 500-01 (5th Cir. 2012). McGee fails to show that his revocation sentence is plainly unreasonable. See *Miller*, 634 F.3d at 843. AFFIRMED. 2