

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States v. Rachel Ann Thompson

No. 18-10405, United States Court of Appeals for the Fifth Circuit (March 18, 2019)

SUMMARY

The Fifth Circuit affirmed a 151-month sentence for conspiracy to possess methamphetamine, holding it lacked jurisdiction to review the denial of a downward departure absent evidence the district court mistakenly believed it lacked authority. The court also declined to issue advisory guidance on departure guidelines. Because Thompson did not object to reasonableness, plain error review applied, and her within-guidelines sentence carried a rebuttable presumption of reasonableness that she failed to overcome.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	BARKSDALE; DENNIS; SOUTHWICK
JURISDICTION	Federal
DECIDED	March 18, 2019
DOCKET	18-10405
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from criminal sentence after guilty plea
STANDARD OF REVIEW	For the denial of a downward departure, we lack jurisdiction unless the district court mistakenly believed it lacked authority. For substantive reasonableness, if preserved, abuse of discretion; if not preserved, plain error. Because Thompson did not object to reasonableness, plain error review applies.
PRECEDENTIAL VALUE	Unpublished
PARTIES	Rachel Ann Thompson v. United States of America

TOPICS

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

PRACTICE AREAS

- Criminal Law
- Sentencing

QUESTIONS PRESENTED

1. Whether the district court erred in denying the motions for downward departure and variance.
2. Whether the court should provide guidance to district courts concerning the application of the Sentencing Guidelines addressing departure sentences.
3. Whether the 151-month sentence is substantively unreasonable and greater than necessary to satisfy the §3553(a) factors.

HOLDINGS

1. We lack jurisdiction to review the denial of a downward departure under the Guidelines unless the denial was based on the district court's mistaken belief that it lacked the authority to depart. The record does not show such a belief, so we lack jurisdiction.
2. We do not issue advisory opinions.
3. The sentence is within the advisory Guidelines range and is entitled to a rebuttable presumption of reasonableness. Thompson failed to rebut the presumption, and the district court did not commit plain error.

FACTUAL BACKGROUND

Thompson pleaded guilty to conspiracy to possess with intent to distribute 500 grams or more of methamphetamine. The district court sentenced her to 151 months imprisonment, which was within the advisory Guidelines range. She moved for a downward departure and variance, citing mitigating factors, but the court denied the motions. The court expressed concern about Thompson's criminal history and concluded that a sentence at the top of the range was appropriate.

PROCEDURAL HISTORY

Thompson pleaded guilty to conspiracy to possess with intent to distribute 500 grams or more of methamphetamine. The district court sentenced her to 151 months imprisonment. She appealed, challenging the denial of motions for downward departure and variance, and arguing the sentence is substantively unreasonable.

DISPOSITION

affirmed

CASES CITED

- *Gall v. United States*, 552 U.S. 38, 48-51 (2007)
- *United States v. Delgado-Martinez*, 564 F.3d 750, 751-53 (5th Cir. 2009)
- *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008)
- *United States v. Jefferson*, 751 F.3d 314, 322-23 (5th Cir. 2014)
- *United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013)
- *Amar v. Whitley*, 100 F.3d 22, 23 (5th Cir. 1996)

- United States v. Broussard, 669 F.3d 537, 546 (5th Cir. 2012)
- Puckett v. United States, 556 U.S. 129, 135 (2009)
- United States v. Cooks, 589 F.3d 173, 186 (5th Cir. 2009)
- United States v. Rodriguez-Bernal, 783 F.3d 1002, 1008 (5th Cir. 2015)

OPINION

PER CURIAM.

Case: 18-10405 Document: 00514876609 Page: 1 Date Filed: 03/18/2019 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT United States Court of Appeals No. 18-10405 Fifth Circuit FILED Summary Calendar March 18, 2019 Lyle W. Cayce UNITED STATES OF AMERICA, Clerk Plaintiff - Appellee v. RACHEL ANN THOMPSON, also known as “Rachet Rachel”, Defendant - Appellant Appeal from the United States District Court for the Northern District of Texas USDC No. 4:17-CR-198-2 Before BARKSDALE, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM: * In contesting the 151-month prison term imposed following her guilty plea to conspiracy to possess, with intent to distribute, 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, Rachel Ann Thompson challenges the denial of her motions for a downward departure and variance sentence, and contends the district court gave inadequate consideration to the mitigating factors she presented in support of * 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. Case: 18-10405 Document: 00514876609 Page: 2 Date Filed: 03/18/2019 No. 18-10405 her motions.

In sum, she asserts the court imposed a substantively- unreasonable sentence that was greater than necessary to satisfy the 18 U.S.C. § 3553(a) sentencing factors. Further, she asks our court to provide district courts with guidance concerning the application of the Sentencing Guidelines addressing departure sentences and to explain when mitigating factors would support a downward-departure sentence.

Although post-Booker, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 48–51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse- of-discretion standard.

Id. at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed de novo; its

factual findings, only for clear error. E.g., *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). Thompson concedes there were no procedural errors.

We lack jurisdiction to review the denial of a downward departure under the Guidelines unless the denial was based on the district court's mistaken belief that it lacked the authority to depart. See *United States v. Jefferson*, 751 F.3d 314, 322–23 (5th Cir. 2014) (citing *United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013)).

The record does not show such a belief. Accordingly, we lack jurisdiction to consider this claim. As to Thompson's concomitant request that we provide district courts with guidance concerning the departure Guidelines, we do not issue advisory opinions. See, e.g., *Amar v. Whitley*, 100 F.3d 22, 23 (5th Cir. 1996). Next, considered, in the light of the factors Thompson raised in support of her motions for a downward departure and variance, is whether the 2 Case: 18-10405 Document: 00514876609 Page: 3 Date Filed: 03/18/2019 No. 18-10405 imposition of a 151-month prison term was substantively unreasonable, including being greater than necessary to satisfy the § 3553(a) factors.

Because Thompson did not object to the reasonableness of her sentence in district court, review is only for plain error. E.g., *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Thompson must show a forfeited plain (clear or obvious) error that affected her substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009).

If she does so, we have the discretion to correct the reversible plain error, but should do so only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”. *Id.* For the reasons presented below, Thompson fails to show the requisite clear or obvious error.

Because Thompson's sentence was within the advisory-Guidelines sentencing range, it is entitled to a rebuttable presumption of reasonableness. See *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). To rebut that presumption, Thompson must show her “sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors.” *Id.* The district court considered Thompson's arguments in mitigation, balanced them with the § 3553(a) factors, expressed concern about Thompson's criminal history, and concluded that a sentence at the top of the sentencing range was appropriate.

Thompson's contentions regarding the court's weighing of those factors are insufficient to rebut the presumption of reasonableness. See *id.*; *United States v. Rodriguez-Bernal*, 783 F.3d 1002, 1008 (5th Cir. 2015). Furthermore, our court will not reweigh the § 3553(a) factors and reverse a sentence, even if we reasonably could conclude that a 3 Case: 18-10405 Document: 00514876609 Page: 4 Date Filed: 03/18/2019 No. 18-10405 different sentence was appropriate.

See *Rodriguez-Bernal*, 783 F.3d at 1008; *Gall*, 552 U.S. at 51. AFFIRMED. 4

