

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-50431
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
March 18, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ELIEZER HERNANDEZ-GARCIA,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:17-CR-1158-1

Before JONES, HIGGINSON, and WILLET, Circuit Judges.

PER CURIAM:*

Eliezer Hernandez-Garcia appeals the sentence imposed following his guilty plea conviction for one count of illegal reentry following deportation in violation of 8 U.S.C. § 1326. He contends that the 48-month, above-guidelines sentence is substantively unreasonable because it is greater than necessary to satisfy the sentencing goals set forth in 18 U.S.C. § 3553(a). Hernandez-Garcia argues that the sentence is three times greater than the top of his 10- to 16-

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

No. 18-50431

month guidelines range, that the sentence overstates the seriousness of his history and characteristics, that the sentence is greater than necessary to afford adequate deterrence and protect the public, and that district court relied on improper factors when imposing the sentence. Hernandez-Garcia's objection to the sentence imposed was sufficient to preserve his arguments for appeal. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009).

We consider "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007). In reviewing a non-guidelines sentence for substantive reasonableness, we consider "the totality of the circumstances, including the extent of any variance from the Guidelines range." *United States v. Brantley*, 537 F.3d 347, 349 (5th Cir. 2008) (internal quotation marks and citation omitted). "A sentence is 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. Peltier*, 505 F.3d 389, 392 (5th Cir. 2007) (internal quotation marks and citation omitted).

The record reflects that the district court considered the advisory guidelines range, the statutory penalties, the § 3553(a) factors, the facts set forth in the presentence report, Hernandez-Garcia's arguments in mitigation of sentence, and the Government's request for an upward departure. The district court made an individualized assessment and concluded that the guidelines range did not adequately take into account the § 3553(a) factors, specifically, Hernandez-Garcia's history and characteristics, the need to promote respect for the law and impose a just sentence, and the need to deter future criminal conduct. Although Hernandez-Garcia's 48-month sentence is

No. 18-50431

32 months greater than the top of the 10- to 16-month guidelines range, we have upheld variances greater than the increase to his sentence. *See United States v. McElwee*, 646 F.3d 328, 336, 344-45 (5th Cir. 2011); *Brantley*, 537 F.3d at 348-50.

Hernandez-Garcia's arguments do not show a clear error of judgment on the district court's part in balancing the § 3553(a) factors; instead, they constitute a mere disagreement with the district court's weighing of those factors. Given the significant deference that is due to a district court's consideration of the § 3553(a) factors, Hernandez-Garcia has not demonstrated that the sentence is substantively unreasonable. *See Gall*, 552 U.S. at 50-53; *Brantley*, 537 F.3d at 349.

Hernandez-Garcia also contends that his sentence violates due process because it exceeds the statutory maximum punishment for the offense charged in the indictment. As he correctly concedes, this issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *United States v. Pineda-Arrellano*, 492 F.3d 624, 625-26 (5th Cir. 2007).

Accordingly, the district court's judgment is AFFIRMED.