

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

No. 19-10469
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
February 11, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

FRANCISCO JAVIER PONCE-MARES,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 4:18-CR-273-1

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Francisco Ponce-Mares was discovered by immigration authorities while

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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. 19-10469

in state custody. An immigration detainer was placed on him, but his prosecution for illegal reentry did not begin until about two years later, after he had served his state sentence. Following his guilty plea to illegal reentry, Ponce-Mares moved for a downward departure under the Commentary to U.S. Sentencing Guideline § 2L1.2. The district court denied departure and, varying upwardly from the advisory guideline range, imposed a 36-month sentence. Ponce-Mares appeals, contending that the sentence is substantively unreasonable because it did not give enough weight to the delay in the commencement of his federal prosecution.

Generally, we review the substantive reasonableness of a sentence under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). Although Ponce-Mares posits that an objection is not required to preserve the issue, our precedent permits the application of plain-error review where, as here, the defendant fails to object to substantive reasonableness after the sentence is imposed. *See United States v. Peltier*, 505 F.3d 389, 391–92 (5th Cir. 2007). Because Ponce-Mares’s substantive-reasonableness challenge fails even under the ordinary abuse-of-discretion standard, we apply the more lenient standard. *See United States v. Rodriguez*, 602 F.3d 346, 361 (5th Cir. 2010).

A non-guidelines sentence may be 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.” *Peltier*, 505 F.3d at 392 (internal quotation marks and citation omitted). 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), but “must give due deference to the

No. 19-10469

district court's decision that the [18 U.S.C.] § 3553(a) factors, on a whole, justify the extent of the variance.” *United States v. Broussard*, 669 F.3d 537, 551 (5th Cir. 2012) (internal quotation marks and citation omitted).

The district court considered and rejected Ponce-Mares’s arguments for leniency via a downward departure based on the government’s delay in commencing prosecution. The court then upwardly varied from the advisory range of 10 to 16 months and imposed 36 months. In determining that an upward variance was warranted, the court considered the guideline range, the arguments of the parties, the defendant’s allocution, the § 3553(a) factors, and recidivism. Moreover, although the sentence is 20 months above the top of the advisory range, this court has upheld larger upward increases. *See e.g., United States v. Rhine*, 637 F.3d 525, 528, 529–30 (5th Cir. 2011).

The record thus does not reflect that the district court failed to account for a factor that should have received significant weight, gave significant weight to an irrelevant or improper factor, or committed a clear error of judgment in balancing the § 3553(a) factors. *See Peltier*, 505 F.3d at 392; *Brantley*, 537 F.3d at 350. Finally, to the extent that Ponce-Mares contests the denial of a downward departure rather than the substantive reasonableness of his sentence, this court lacks jurisdiction to review the denial of a downward departure. *See United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013); *United States v. Lucas*, 516 F.3d 316, 350–51 (5th Cir. 2008).

AFFIRMED.