

United States Court of Appeals for the Fifth Circuit

No. 19-11231
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

July 30, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff — Appellee,

versus

ALFORD DONTA TARPLEY,

Defendant — Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-146-1

Before JOLLY, ELROD, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Alford Donta Tarpley challenges the 100-month sentence imposed by the district court following his guilty-plea conviction of felon in possession of a firearm. He contends that the sentence, which constitutes an upward

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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variance from the guidelines range of 46-57 months of imprisonment, is procedurally and substantively unreasonable.

We review criminal sentences, including those based on variances, for reasonableness. *Gall v. United States*, 552 U.S. 38, 49-51 (2007). First, we determine whether the district court committed any “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [or] selecting a sentence based on clearly erroneous facts.” *Id.* at 51. If the sentence is procedurally sound, we will “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard . . . tak[ing] into account the totality of the circumstances.” *Id.*

Although Tarpley objected to the procedural reasonableness of the district court’s imposition of an above-guidelines sentence based upon his juvenile history, at no point did he contend that the descriptions of his juvenile criminal conduct contained in the presentence report were unreliable or that the district had procedurally erred by sentencing him based on clearly erroneous facts. *See Gall*, 552 U.S. at 51. We therefore review for plain error his contention that the district court improperly based his sentence, in part, upon incorrect factual findings regarding his juvenile record. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). As Tarpley does not even attempt to show plain error, his challenge fails. *See id.*

We also review for plain error Tarpley’s unpreserved argument that the district court miscalculated the guidelines range by holding that his conviction for robbery causing bodily injury under Texas Penal Code § 29.02(a)(1) constituted a crime of violence for purposes of U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1). *See id.* Tarpley correctly concedes that his argument is foreclosed by *United States v. Burris*, 920 F.3d 942, 948-52 (5th Cir. 2019), *petition for cert. filed* (U.S. Oct. 3, 2019) (No. 19-6186), in

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which we held that a conviction under § 29.02(a)(1) categorically requires the use of physical force.

Finally, Tarpley contends that his sentence is substantively unreasonable because the district court gave significant weight to an improper factor by citing certain juvenile conduct, which he characterizes as minor, as part of the basis for his sentence. *See United States v. Diehl*, 775 F.3d 714, 724 (5th Cir. 2015). However, a district court may consider a defendant's criminal history, including his juvenile conduct, in imposing a non-Guidelines sentence. *United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006).

AFFIRMED.