

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

United States Court of Appeals
Fifth Circuit

FILED

May 28, 2020

Lyle W. Cayce
Clerk

No. 19-31007
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

GREGORY GRAFFEO, JR.,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:19-CR-190-1

Before BARKSDALE, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Gregory Graffeo, Jr., pleaded guilty to one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), and was sentenced to, *inter alia*, a within-Sentencing Guidelines sentence of 63-months' imprisonment. He challenges the substantive reasonableness of his sentence, asserting: it is greater than necessary to accomplish the goals of the sentencing factors under 18 U.S.C. § 3553(a); and a downward variance was warranted

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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because Guideline § 2G2.2 (possessing material involving the sexual exploitation of a minor) is inherently flawed.

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, 46, 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).

As stated, only substantive reasonableness is at issue. In that regard, our court applies a presumption of reasonableness to a within-Guidelines sentence. *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009) (citation omitted). “The presumption is rebutted only upon a showing that the 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.* (citation omitted).

Graffeo has not rebutted the presumption of reasonableness afforded his within-Guidelines sentence. His disagreement with how the district court weighed the § 3553(a) sentencing factors is insufficient. *See, e.g.*, *United States v. Heard*, 709 F.3d 413, 434–35 (5th Cir. 2013). Additionally, his assertion a downward variance was necessary because Guideline § 2G2.2 is inherently flawed lacks merit. *See United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011) (noting, when discussing a similar challenge to Guideline § 2G2.2, that our court “will not reject a Guidelines provision as ‘unreasonable’ or ‘irrational’

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simply because it is not based on empirical data and even if it leads to some disparities in sentencing”).

AFFIRMED.