IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 8, 2020

Lyle W. Cayce
Clerk

No. 19-50805
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GILBERTO CAPETILLO,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:07-CR-667-1

Before WIENER, COSTA, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Gilberto Capetillo argues on appeal that his 18-month revocation sentence, which is above the range recommended by the Sentencing Guidelines' policy statements, is plainly unreasonable because the district court improperly relied on the factors set forth in 18 U.S.C. § 3553(a)(2)(A) in selecting its sentence. He further argues that his sentence is substantively unreasonable because the court gave significant weight to impermissible

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

factors and improperly balanced permissible factors. This court reviews a challenge to a revocation sentence under a "plainly unreasonable" standard. *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011).

Capetillo claims that, contrary to *Miller*, the seriousness of the underlying revocation offense, the need to promote respect for the law, as well as the need to provide just punishment for the offense were dominant factors in the court's sentencing decision. The record shows, however, that the district court merely mentioned those factors when considering the Chapter 7 policy statements from the Guidelines. Before imposing the 18-month revocation sentence, the district court stated that it had "considered the policy statements contained within Chapter Seven of the Sentencing Guidelines Manual." The court found "their application to be inadequate" because "[t]hey do not reflect the seriousness of the allegations, deter future criminal conduct, promote respect for the law, or . . . impose a just sentence." The court explained that Capetillo was "basically doing the same stuff over again" and expressed concern that a within-range sentence would not "get [his] attention."

As the Government notes, the comments made by the court were consistent with the permissible factors of deterrence and protection of the public from further crimes of the defendant. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(B)-(C). Capetillo had twice violated his supervised release by failing to abstain from alcohol and had even been arrested for driving while intoxicated. Moreover, the district court's observation that Capetillo was "basically doing the same stuff over again," reflects consideration of Capetillo's history and characteristics, his recidivism, and the nature and circumstances of his supervised release violations, which are all permissible factors for the court to consider in selecting a revocation sentence, *see* 18 U.S.C. § 3583(e); *see also Miller*, 634 F.3d at 844. Capetillo has not shown that the district court relied

on an impermissible consideration as a dominant factor in imposing its revocation sentence. *See United States v. Walker*, 742 F.3d 614, 616 (5th Cir. 2014).

Capetillo has also failed to show that his revocation sentence is substantively unreasonable. The court's statements, in their entirety, do not necessarily reflect, as Capetillo argues, an overreliance on the need to punish him for the underlying revocation offense or an improper emphasis on the § 3553(a)(2)(A) factors. This court has routinely upheld revocation sentences exceeding the policy statement range when the district court cites reasons for doing so. *See United States v. Warren*, 720 F.3d 321, 332 (5th Cir. 2013). The district court did so here, and its assessment of the relevant sentencing considerations was not unreasonable.

The judgment of the district court is AFFIRMED.