

United States Court of Appeals for the Fifth Circuit

No. 23-60487
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 3, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JESSIE EDWARD WINTERS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:22-CR-64-1

Before BARKSDALE, ENGELHARDT, and WILSON, *Circuit Judges.*

PER CURIAM:*

Jessie Edward Winters contests the within-Guidelines 210-months' sentence imposed following his guilty-plea conviction for distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2), (b)(1). He contends the sentence is procedurally unreasonable because the district court did not appreciate its discretion to vary from the Guidelines.

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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Although post-*Booker*, the Sentencing 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).

Because Winters did not preserve this issue in district court, review is only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Winters must show a forfeited plain error (clear-or-obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct the reversible plain error, but generally should do so only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”. *Id.* (citation omitted).

In not granting Winters’ request for a downward variance, the district court did not make any explicit statements showing an erroneous belief that it did not have discretion to vary below the Guidelines. *But see United States v. Clay*, 787 F.3d 328, 330–32 (5th Cir. 2015) (“The district court did not recognize its discretion to vary from the guidelines range.”). On the other hand, the court noted: the Guidelines sentencing range was advisory; it found no reason to depart from that range; and it considered: the 18 U.S.C. § 3553(a) sentencing factors, the statutory penalties, and the parties’

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assertions. In short, Winters fails to show the requisite clear-or-obvious error. *See Puckett*, 556 U.S. at 135.

AFFIRMED.