United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 27, 2023
Lyle W. Cayce
Clerk

No. 21-51232

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ERICK LEON POND,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:21-CR-226-1

Before DAVIS, HAYNES, and GRAVES, *Circuit Judges*.

PER CURIAM:*

Defendant-Appellant Erick Pond pleaded guilty to conspiracy to transport illegal noncitizens. The district court sentenced Pond to twelve months in prison after denying him a reduction of his offense level for acceptance of responsibility in the calculation of his sentencing guidelines. This appeal challenges that decision. For the following reasons, we AFFIRM.

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

I. Factual & Procedural Background

In January 2021, a United States Border Patrol agent stopped Pond while he was driving after observing Pond's vehicle drifting across the road and crossing the center lane. The agent saw a man lying down in the back seat of Pond's car. When the agent asked Pond about the man, Pond responded that he did not know him and had picked him up on the side of a highway. The agent placed Pond in handcuffs and questioned the man in the back of the car, which revealed that the man was a Honduran national who did not have legal permission to be in the United States. Thereafter, Pond was taken into custody and transported to a Border Patrol station for processing.

At the station, Border Patrol agents advised Pond of his constitutional rights, and he agreed to give a post-arrest statement without an attorney present. Pond explained that he had traveled from Gonzales, Texas, to Eagle Pass, Texas, earlier that day to pick up an illegal noncitizen and take him back to Gonzales. Pond indicated that he was to be paid $350 by an individual who facilitated this endeavor.

The Government charged Pond with one count of conspiracy to transport an illegal noncitizen for financial gain in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v)(I) and (B)(i). He pleaded guilty without a plea agreement. Pond also stipulated to the factual basis for the underlying offense.

A probation officer prepared a presentence investigation report ("PSR"), which recommended a total offense level of twelve and a criminal history category of I. The PSR determined that the maximum term of imprisonment was ten years and proposed a Sentencing Guidelines imprisonment range of ten to sixteen months. In addition, the PSR addressed the topic of a downward adjustment for acceptance of responsibility,

concluding that the statement Pond had provided with respect to his involvement in the underlying offense was simply the equivalent of a repeat of the language of the indictment and failed to meet the requirements for a downward adjustment under the Guidelines. This statement read, in full:

> On or about January 14, 2021, I knowingly and intentionally conspired and agreed with others to transport and move, and attempt to transport and move, by means of transportation or otherwise, a[] [noncitizen] who entered and remained in the United States in violation of the law, knowing and in reckless disregard of the fact said [noncitizen] came to, entered, and remained in the United States in violation of law, and in furtherance of such violation of law. I intended to further his illegal presence. I picked up the people in Eagle Pass, and intended to take them to Gonzales, Texas. I knew this person had come into the United States illegally and I intended to take him further into the United States. This occurred in the Western District of Texas. I committed all of the foregoing acts willfully, intentionally, and knowingly and I accept responsibility for my actions. I am so sorry for my actions. I apologize to the Honorable Court and the Government. I will never do this again.

Based on this statement, the PSR determined Pond had "not clearly demonstrated acceptance of responsibility for the offense," and that a downward adjustment was not warranted. Pond objected to this determination, arguing that he was entitled to the downward adjustment because he pleaded guilty, admitted to the illegal conduct, and submitted a statement to the probation officer about his acceptance of responsibility. The probation officer did not revise the PSR.

Pond renewed his objection at his sentencing hearing. The district court posited that the first few sentences sounded like Pond was simply reading the indictment, to which Pond agreed. The district court also stated that the last few sentences of Pond's statement likely would have been

sufficient to warrant the downward adjustment, as they sounded more like what Pond would say, but they lacked an admission in his own words of the conspiracy to which Pond pleaded guilty. The district court characterized counsel's involvement in preparing Pond's statement as akin to words being put in his mouth. To that end, Pond averred that he had written a personal statement, but he was told that a "standard" statement would be submitted to the court instead. The district court further highlighted that entrance of a guilty plea does not necessarily mean a downward adjustment is warranted. The district court also expressed that its treatment of Pond's statement for downward adjustment purposes was reflective of a requirement under the Guidelines for a defendant, rather than a defendant's attorney, to admit to their offense and express remorse.

Nonetheless, the district court acknowledged Pond's admission to agents that he was participating in a conspiracy and reviewed the personal letter he had written regarding acceptance of responsibility.[1] The district court then concluded that it would not adjust the Guidelines recommendation but would instead consider Pond's statement as a mitigating factor during sentencing. That is, Pond would receive credit in the district judge's sentencing, but not under the Guidelines calculation. The district court accordingly adopted the PSR's recommendation and imposed a twelve-month term of imprisonment. It noted that if the downward adjustment were to have been granted, imprisonment would range from six to twelve months instead. Considering what happened in this case, the

[1] In this "personal statement," Pond noted that Border Patrol had explained to him "that the man [he] picked up could have been a bomber or killer or rappest [sic] or any number of things," and, having previously "thought that [he] was helping someone have a better life," he apologized "to [his] country and this court from the bottom of [his] heart for [his] careless disregard for peoples [sic] safety for what [he] did."

district court reasoned that the sentence it was imposing would fall within either Guidelines range and was appropriate thereto.

Pond appealed his sentence.

II. Standard of Review

Typically, we review de novo a district court's application or interpretation of the Guidelines and assess for clear error its factual findings. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). "Whether a defendant is entitled to a downward adjustment for acceptance of responsibility is . . . a factual determination." *United States v. Anderson*, 174 F.3d 515, 525 (5th Cir. 1999). However, considering the district court's "unique position to assess the defendant's acceptance of responsibility and true remorse," we review a "determination of acceptance of responsibility with even more deference tha[n] is due under a clearly erroneous standard." *United States v. Angeles-Mendoza*, 407 F.3d 742, 753 (5th Cir. 2005); *see* U.S.S.G. § 3E1.1 cmt. n.5. To that end, "[w]e will affirm a sentencing court's decision not to award a reduction under U.S.S.G. § 3E1.1 unless it is without foundation." *Anderson*, 174 F.3d at 525 (internal quotation marks and citation omitted). "The defendant bears the burden of proving that he is entitled to a downward adjustment." *United States v. Thomas*, 120 F.3d 564, 574–75 (5th Cir. 1997).

III. Discussion

Under § 3E1.1(a) of the Guidelines, a defendant may receive a two-offense level downward adjustment if he "clearly demonstrates acceptance of responsibility for his offense." That is, "[i]f a defendant enters a guilty plea prior to trial, truthfully admits the conduct comprising the offense, and admits, or at least does not falsely deny, any additional relevant conduct for which he is accountable, the court may find significant evidence of the

defendant's acceptance of responsibility." *United States v. Medina-Anicacio*, 325 F.3d 638, 648 (5th Cir. 2003); *see* U.S.S.G. § 3E1.1 cmt. n.1.

While the Guidelines provide for an adjustment based on a finding of "significant evidence of acceptance of responsibility," defendants who plead guilty are "not entitled to an adjustment under this section as a matter of right." U.S.S.G. § 3E1.1 cmt. n.3; *see United States v. Hinojosa-Almance*, 977 F.3d 407, 410 (5th Cir. 2020). Rather, evidence of acceptance of responsibility "may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." U.S.S.G. § 3E1.1 cmt. n.3.

Here, Pond pleaded guilty to conspiracy, and, in addition to the statement he submitted for purposes of the PSR, he voluntarily gave a post-arrest statement to Border Patrol, wrote a personal statement, and acknowledged his involvement in the underlying offense at his sentencing hearing. However, Pond is not "entitled" to a downward adjustment simply because of his guilty plea or admissions. *Hinojosa-Almance*, 977 F.3d at 410 (quotation omitted); *see United States v. King*, No. 21-50543, 2022 WL 1101736, at *1 (5th Cir. Apr. 13, 2022) (per curiam), *cert. denied*, 143 S. Ct. 233 (2022).[2] The district court was entitled to assess whether Pond's conduct was "inconsistent with [his] acceptance of responsibility," U.S.S.G. § 3E1.1 cmt. n.3, and, as we have previously stated, "merely *going through the motions of contrition* does not oblige a district court to grant an unrepentant criminal the two-step reduction," *United States v. Brigman*, 953 F.2d 906, 909 (5th Cir. 1992) (per curiam) (emphasis added); *see United States v. Guerrero*, 768 F.3d 351, 365 (5th Cir. 2014). Pond admitted that his statement

[2] Although *King* and related unpublished opinions cited herein "[are] not controlling precedent," they "may be [cited as] persuasive authority." *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (citing 5TH CIR. R. 47.5.4).

for the PSR regarding acceptance of responsibility was, at least as to part of the admission, a "standard" recitation of the indictment that was not written by himself, which suggests he may have been "going through the motions of contrition."[3] *Brigman*, 953 F.2d at 909.

The burden falls on the defendant to "convince the trial judge," through "[h]is statements and actions, both before and during the sentencing hearing," that his "remorse and acceptance of responsibility are sincere." *United States v. Alfaro*, 919 F.2d 962, 968 (5th Cir. 1990); *see also Medina-Anicacio*, 325 F.3d at 648 ("A reduction in sentence for acceptance of responsibility requires a showing of *sincere contrition* on the defendant's behalf." (emphasis added) (quotation omitted)). While this is a close case, there is, at minimum, an arguable link between the district court's treatment of Pond's statement regarding acceptance of responsibility and the permissible inquiry into whether a defendant has demonstrated sincere contrition. As the district court stated, it was looking for an "express[ion] [of] remorse" by Pond that was "defendant-oriented," rather than "attorney statement-oriented," which accords with our precedent regarding the sentencing court's role in confirming that a defendant's contrition is sincere. *See generally Alfaro*, 919 F.2d at 968.

As we have noted above, we apply "even more deference tha[n] is due under a clearly erroneous standard" to the district court's determination

[3] The inconsistencies in Pond's statement reinforce the notion that he may have been going through the motions of showing contrition. The statement first indicates that Pond was "pick[ing] up *the people* in Eagle Pass and intend[ing] to take *them* to Gonzale[s]," but it immediately thereafter states that Pond "knew *this person* had come into the United States illegally" and discusses his plan "to take *him* further into the United States." As Pond stipulated, he was arrested with *one* noncitizen in his car, not multiple noncitizens. Regardless, though, these inconsistencies support a conclusion that Pond may have been going through the motions.

regarding Pond's acceptance of responsibility. *Angeles-Mendoza*, 407 F.3d at 753. Under this "extremely deferential" standard, *id.*, we ask whether there was any "foundation" for the district court's denial of Pond's downward adjustment, *Anderson*, 174 F.3d at 525. Upon review of the record, while we might have addressed this differently if we were in the district judge role, we cannot say that the district court was *entirely* lacking a "foundation" for its decision. *See id.*; *see also United States v. Amezquita-Munoz*, 675 F. App'x 485, 486–87 (5th Cir. 2017) (per curiam); *United States v. Rainey*, 539 F. App'x 556, 559 (5th Cir. 2013) (per curiam). Therefore, we affirm the district court's denial of Pond's acceptance of responsibility reduction. *Anderson*, 174 F.3d at 525.

IV. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.[4]

[4] While we affirm the district court's denial of the acceptance of responsibility reduction, we note that the sentencing hearing supports that the district court did consider Pond's pleas and admissions and did conclude that the sentence would be the same under either guideline. As such, any error would be harmless. *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017). Given our affirmance, we do not address Pond's request to remand to a different district judge.