United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-3052 **September Term, 2016**

FILED ON: APRIL 25, 2017

UNITED STATES OF AMERICA,
APPELLEE

v.

EDWARD DACY,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cr-00153-1)

Before: TATEL and WILKINS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the District Court's judgment be affirmed.

A jury convicted appellant Edward Dacy of conspiracy and related crimes arising from fraudulent real estate transactions. The district court sentenced Dacy to 72 months' imprisonment and 60 months' supervised release. In his appeal, Dacy contends that the district court (1) improperly granted a motion *in limine* permitting the Government to impeach Dacy with evidence of a prior conviction; (2) erred in denying Dacy's motions for a judgment of acquittal; and (3) committed both procedural and substantive errors at sentencing. We affirm the judgment of the district court in all respects.

At trial, the Government sought to prove that Dacy joined with others to defraud mortgage lenders by obtaining mortgage loans on residential properties in Washington, D.C. and Maryland using straw buyers, false applications and supporting documents, and fraudulent settlements. At the center of the purported scheme were co-conspirators Frank Davis and Frederick Robinson, who sold properties using straw buyers while pocketing the proceeds. Although the straw buyers were listed on loan applications as borrowers, they did not pay the

required money at settlement, pay the mortgage, or maintain the properties, and the loans themselves were often secured using falsified documents and inflated claims concerning applicants' incomes and assets. According to the Government, Dacy knowingly participated in this scheme in his role as "settlement agent"—the person who coordinates the closing of a property transaction, by, for instance, ensuring that the pertinent documents are signed and transferred and that funds are distributed.

Following the close of the Government's case-in-chief, Dacy moved for a judgment of acquittal, which the court denied. Ultimately, the jury found Dacy guilty of conspiracy, 18 U.S.C. § 371, five counts of bank fraud and aiding and abetting, *id.* §§ 2, 1344, and four counts of mail fraud affecting a financial institution, *id.* § 1341, but acquitted him of charges related to wire fraud, *id.* §§ 2, 1343. The district court sentenced Dacy to a below-guidelines sentence of 60 months' imprisonment for conspiracy and a concurrent 72-month term of imprisonment on each count of bank and mail fraud. The court also imposed 36-month terms of supervised release on the conspiracy and mail-fraud counts, and 60-month terms of supervised release on the bank-fraud counts, all of which were concurrent.

Dacy's primary claim is that the district court improperly granted a Government motion *in limine* under Federal Rule of Evidence 609(b) to permit it to impeach Dacy with evidence of a decades-old conviction. According to Dacy, the court's erroneous ruling forced him to disclose the prejudicial fact of his prior conviction on direct examination—before the Government had a chance to impeach him with it during his cross-examination—so as to avoid the jury learning of the conviction for the first time on cross-examination and thereby inferring that Dacy had something to hide. Under *Ohler v. United States*, 529 U.S. 753 (2000), however, a defendant who preemptively introduces evidence of a prior conviction on direct examination waives any challenge to the admission of such evidence on appeal. This is so, the Supreme Court made clear, even if a defendant introduces the evidence only *after* unsuccessfully opposing a Government motion to allow impeachment with the prior conviction. Accordingly, Dacy's challenge is waived.

Dacy next argues that the district court erred in denying his motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. This claim too fails. "When assessing the sufficiency of the evidence, we ask 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Boyd*, 803 F.3d 690, 692 (D.C. Cir. 2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In making this determination" we "draw[] no distinction between direct and circumstantial evidence, and giv[e] full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact." *United States v. Dykes*, 406 F.3d 717, 721 (D.C. Cir. 2005) (citation and internal quotation marks omitted).

In arguing that the district court wrongly denied his motion for acquittal, Dacy zeroes in on a common element of the offenses for which he was convicted: knowing participation in a scheme to defraud. According to Dacy, "the Government failed to prove that he joined the

charged conspiracy and [that] he had a specific intent to defraud." Appellant Br. 41–42. While Dacy does not dispute that Davis and Robinson created a fraudulent scheme, he argues that the Government's case—reliant as it was on the testimony of cooperating witnesses, "each with plea agreements hoping for a lightened sentence"—failed to establish that Dacy *knew* Robinson and Davis were up to no good. *Id.* at 42. In particular, although Davis and Robinson both testified and "claimed Dacy knew of their scheme," they are "two repeat losers, felons who were given very lenient sentences in return for cooperation" and "[t]heir testimony should have been accorded great suspicion." *Id.* at 43. Perhaps so, but in assessing sufficiency of the evidence, we leave it to juries to "determine credibility" as they "weigh the evidence." *Dykes*, 406 F.3d at 721.

A review of the evidence presented at trial confirms that a rational trier of fact could have found that Dacy knowingly participated in Davis and Robinson's scheme. Davis testified that he worked with Dacy on every one of the fraudulent settlements in question, that he spoke to Dacy "[m]ultiple times a day during the processing of [each] transaction," and that the two would go "over the lender's closing instructions to see what" was "needed." Robinson testified that he and Dacy "would have conversations about just the overall transaction in terms of you know it not being the way it is [sic] should be or the way a normal transaction would go," he stated that Dacy was "in on the scheme," and remarked that "[i]f we didn't have Mr. Dacy we wouldn't have been able to do what we did." Robinson further testified that Dacy advised him on how to falsify his intent to use a property as a primary residence in order to secure a loan. A loan officer who participated in the scheme and testified at trial, Howard Tutman, stated that Davis told him not to be concerned that a loan would be rejected by the settlement company because "the settlement attorney was with us." Rather than exhaustively review the other evidence presented at trial, we think this snapshot makes clear that a rational juror could have found that Dacy knowingly participated in the fraudulent scheme. For this reason, Dacy's sufficiency of the evidence claim fails.

Next, Dacy argues that the district court committed both procedural and substantive errors at sentencing. At the sentencing hearing, the Government sought a 121-month period of incarceration—the bottom of the applicable guidelines range—citing, among other factors, Dacy's prior offenses, his decision to join Davis and Robinson's scheme at age 62, the seriousness of his offense (considering how this and related activity contributed to the recent housing crisis), and the need for deterrence. Dacy, for his part, made various arguments in support of a request for one year incarceration and one year home confinement. Dacy contended that the Federal Bureau of Prisons lacks the resources necessary to adequately house and care for a man of his advanced age—77 at the time of sentencing—and physical ailments. Dacy noted that he had undergone one knee replacement, that a similar procedure was recommended on his other knee, and that he has heart disease and chronic lower back pain. He cited a study from the Department of Justice to suggest that the BOP lacks appropriate staff resources to address the needs of its aging population. In addition, he argued that his advanced age suggests that he poses no danger to the community and reduces the need for specific deterrence, and that more than 25 years had passed since the conduct that led to his prior offense.

The district court adopted the presentence investigation report and the applicable

guideline calculation resulting in a range of 121-151 months' incarceration. In explaining the ultimate sentence imposed—a below-guidelines sentence of 72 months' imprisonment and 60 months' supervised release—the judge offered a rationale for his determination, including the variance below guidelines. He stated that he had "taken into account Mr. Dacy's age and also the fact that he does have some physical health issues that will make his period of incarceration conceivably more difficult than somebody who does not have those same physical maladies." He noted the need for proportionality among Dacy's coconspirators; he said that Dacy's criminal history, especially because it related to fraud, was salient; he cast the seriousness of Dacy's conduct in light of the "overall collapse of our real estate market"; and suggested that Dacy's training as a lawyer should have made him more respectful of the law.

First, Dacy's procedural claims. Where, as here, "a defendant fails to timely raise a procedural reasonableness objection at sentencing, this Court reviews for plain error." *United States v. Bigley*, 786 F.3d 11, 13 (D.C. Cir. 2015) (per curiam). "Under the plain-error standard, [a defendant] must demonstrate that the district court (1) committed error; (2) that is plain or obvious; (3) that affects his substantial rights; and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Hunt*, 843 F.3d 1022, 1029 (D.C. Cir. 2016) (citation and internal quotation marks omitted).

Dacy argues that the district court "fail[ed] to adequately explain the chosen sentence," *Gall v. United States*, 552 U.S. 38, 51 (2007), because it "failed to address Dacy's legitimate concerns about the BOP's ability to provide needed care over an extended period of time for an infirm geriatric offender," Appellant Br. 51. A sentencing judge must "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). "This provision requires that the court provide a 'reasoned basis' for its decision and consider all 'nonfrivolous reasons' asserted for an alternative sentence." *United States v. Locke*, 664 F.3d 353, 357 (D.C. Cir. 2011) (citation omitted). That said, the judge need not give "a full opinion in every case" or "address expressly each and every argument advanced by the defendant." *Id.* at 357 (citation omitted). "In fact, so long as the judge provides 'a reasoned basis for exercising his own legal decisionmaking authority,' we generally presume that he adequately considered the arguments and will uphold the sentence if it is otherwise reasonable." *Id.* at 358 (citation omitted).

Dacy has offered little to rebut this presumption. The record of his sentencing suggests that the district court considered the arguments made. The court expressly noted that it had considered Dacy's age and physical condition, and the remainder of the court's explanation represents a reasoned basis for its decision. Indeed, the court appears to have based its below-guidelines sentence in part on the appellant's age and health. Although the court declined to expressly discuss the BOP's capacity to care for an elderly or infirm inmate, this hardly rises to the level of plain error. To the extent Dacy also claims that the district court erred in declining to consider whether his term of supervised release was inappropriate because it would have the collateral effect of depriving him of Medicare, Appellant Br. 57, Dacy failed to make this argument at sentencing, and the district court cannot, therefore, be faulted for its silence.

Next, Dacy contends that his sentence was substantively unreasonable given his advanced

age, poor health, the BOP's inability to provide adequate care, and alleged disparities between his sentence and those received by other defendants over age 75 sentenced for fraud. Appellant Br. 49.

"We review the substantive reasonableness of a sentence under the abuse of discretion standard even when no objection was raised in the district court." *United States v. Melgar-Hernandez*, 832 F.3d 261, 267 (D.C. Cir. 2016) (citation and internal quotation marks omitted). Where an appellant argues that his sentence is substantively unreasonable in light of "the same mitigating factors he raised at sentencing," we generally "defer to the district court's judgment when . . . it has presented a reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 267–68 (citation and internal quotation marks omitted). As we have already stated, the district court gave just such a reasoned explanation for the sentence here. Moreover, "[b]ecause it is well established that sentences that fall within the Guidelines range are entitled to a presumption of reasonableness, it is hard to imagine how we could find [a] below-Guidelines sentence[]" like the one Dacy received "to be unreasonably high." *United States v. Jones*, 744 F.3d 1362, 1368 (D.C. Cir. 2014) (citations and internal quotation marks omitted).

Finally, Dacy contends that his sentence is out of line with other elderly offenders who have been sentenced for fraud offenses, but the data he cites bears no indication that these other offenders are similarly situated—indeed, the loss amounts and applicable guideline ranges for each offender vary widely. Appellant Br. 49. And, as we have noted elsewhere, disparities that track varied guideline ranges stem from the fact that guideline ranges reflect the individual characteristics of each defendant. *Melgar-Hernandez*, 832 F.3d at 268; *see Jones*, 744 F.3d at 1368. Even taking Dacy's data on its own terms, he argues that the eight offenders (including Dacy) over the age of 75 who went to trial for fraud offenses received sentences of 0, 2, 51, 60, 72, 84, and 327 months, respectively—and Dacy's own sentence of 72 months falls comfortably in the middle of that range. Appellant Br. 48.

As with Dacy's other claims, the district court did not err in its sentencing determination.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk