

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3088

September Term, 2019

FILED ON: February 4, 2020

UNITED STATES OF AMERICA,
APPELLEE

v.

HARRY KEELS,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cr-00234-5)

Before: GARLAND, *Chief Judge*, GRIFFITH, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and the briefs and oral arguments of the parties. 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 set out below, it is

ORDERED and **ADJUDGED** that the decision of the district court be **AFFIRMED**.

On February 8, 2018, a federal grand jury indicted Harry Keels for conspiracy to distribute and possess with intent to distribute cocaine base, a violation of 21 U.S.C. §§ 841 and 846. Keels pleaded guilty, admitting that he sought to acquire and distribute cocaine from a co-conspirator. Given Keels’s criminal history and the nature of his offense, the United States Sentencing Guidelines recommended a sentence of thirty to thirty-seven months’ imprisonment. The district court imposed an above-Guidelines sentence of sixty months.

A sentencing judge has “legal authority to impose a sentence outside the [Guidelines] range either because he or she ‘departs’ from the range (as is permitted by certain Guidelines rules) or because he or she chooses to ‘vary’ from the Guidelines by not applying them at all.” *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963 (2018). In this case, the district court invoked both

sources of legal authority to impose Keels's above-Guidelines sentence. First, the district court departed upward from the Guidelines range. *See* U.S.S.G. § 4A1.3(a)(1). Second, and “regardless of the propriety of the departure,” the district court varied upward based on the sentencing factors in 18 U.S.C. § 3553(a). J.A. 116.

Keels timely appealed his sentence, and we have jurisdiction under 18 U.S.C. § 3742(a). We review the “reasonableness” of a sentence in two steps. *United States v. Flores*, 912 F.3d 613, 618 (D.C. Cir. 2019). First, we ask whether the district court “committed significant procedural error.” *Id.* Among other things, procedural errors include the failure “to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Gall v. United States*, 552 U.S. 38, 51 (2007). Second, only if we find no procedural error, we consider “whether the sentence was objectively reasonable given the sentencing factors outlined in 18 U.S.C. § 3553(a).” *Flores*, 912 F.3d at 618.

On appeal, Keels argues only that the district court committed procedural errors; he does not challenge the objective reasonableness of his sentence. *See* Oral Arg. Tr. 21:16-22. Specifically, Keels argues that the district court (1) failed to adequately explain the upward variance and (2) committed various other procedural errors in departing upward. He concedes that he failed to preserve his objection to the district court's explanation of the variance, which we should thus review for plain error. *See id.* at 3:21-25.

We hold that the district court adequately explained the upward variance. To justify such a variance, “the district court . . . must state the specific reason why the defendant's conduct was more harmful or egregious than the typical case represented by the relevant Sentencing Guidelines range.” *United States v. Brown*, 892 F.3d 385, 404 (D.C. Cir. 2018) (internal quotation marks omitted). In this case, the district court gave “specific reason[s]” why Keels's criminal conduct differed from a “typical case.” *Id.* The district court noted that “in 2006 [Keels was] convicted twice of attempted possession with intent to distribute crack cocaine”—crimes similar to his cocaine-distribution offense in this case. J.A. 113. In *United States v. Molina*, we held that “offense similarity is a permissible basis for [sentence] enhancement.” 952 F.2d 514, 519 (D.C. Cir. 1992). Although the Guidelines consider prior convictions, they do *not* account for “the presence of similarity between a defendant's current and past crimes.” *Id.* (emphasis omitted). Here, Keels's repeated cocaine-distribution convictions distinguish him from the typical case under the Guidelines, and the district court could reasonably conclude that this pattern “demonstrated the need for greater sanctions to deter [Keels] from committing that same crime again.” *Id.* (internal quotation marks omitted); *see also United States v. Ransom*, 756 F.3d 770, 774 (D.C. Cir. 2014).

The district court also noted that Keels had been “involved in one way or the other in the drug trade” for “almost two decades.” J.A. 112. Specifically, Keels had prior convictions for possession of marijuana and for possession of phencyclidine (PCP) in 2001 and 2003, respectively. The Guidelines range did not account for these convictions, which are too outdated to be included in his criminal history score. *See* U.S.S.G. § 4A1.2(e). These possession convictions likewise distinguish Keels from a typical defendant within the Guidelines range, and the district court could reasonably conclude that these convictions indicated that Keels was more likely to commit the

same crime again. *See United States v. Bridges*, 175 F.3d 1062, 1069-74 (D.C. Cir. 1999) (authorizing an upward departure based on the similarity of outdated convictions). Altogether, we cannot say that the district court plainly erred in its decision to vary upwards and impose an above-Guidelines sentence.

Because we uphold the district court's upward variance, we need not address Keels's challenge to the departure. *See United States v. Simpson*, 430 F.3d 1177, 1185 (D.C. Cir. 2005) ("If the [district court's] alternative rationale is sufficient to support th[e] judgment, the judgment must be upheld.").

For the foregoing reasons, we affirm the district court's judgment imposing an above-Guidelines sentence of sixty months' imprisonment.

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 rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk