

10-1401-cr
United States v. Perez-Frias

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2010

6
7
8 (Submitted: March 22, 2011 Decided: March 31, 2011)

9
10 Docket No. 10-1401-cr

11
12 - - - - -X

13
14 UNITED STATES OF AMERICA,

15
16 Appellee,

17
18 -v.-

19
20 PEDRO RUBEN PEREZ-FRIAS,

21
22 Defendant-Appellant.

23
24 - - - - -X

25
26 Before: JACOBS, Chief Judge, CALABRESI and
27 LOHIER, Circuit Judges.

28
29 Defendant-Appellant Pedro Ruben Perez-Frias appeals
30 from an April 13, 2010 judgment of the United States
31 District Court for the Southern District of New York (Chin,
32 J.) entered following a plea of guilty to illegal reentry in
33 violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2). Perez-
34 Frias challenges the sentence of 42 months' imprisonment on
35 the ground of substantive unreasonableness. We affirm.
36

1 Darrell B. Fields, Federal
2 Defenders of New York, Inc.,
3 Appeals Bureau, New York, New
4 York, for Defendant-Appellant.
5

6 Kan M. Nawaday, Assistant United
7 States Attorney (David Raskin,
8 Assistant United States
9 Attorney, on the brief), on
10 behalf of Preet Bharara, United
11 States Attorney for the Southern
12 District of New York, New York,
13 New York, for Appellee.
14

15
16 PER CURIAM:
17

18 Defendant Pedro Ruben Perez-Frias ("Perez-Frias")
19 pleaded guilty to one count of illegally reentering the
20 United States without permission after having been deported
21 following a conviction for the commission of an aggravated
22 felony, in violation of 8 U.S.C. § 1326(a) and (b)(2). The
23 United States District Court for the Southern District of
24 New York (Chin, J.) sentenced Perez-Frias principally to 42
25 months' imprisonment. Perez-Frias challenges only the
26 substantive reasonableness of his sentence, arguing [1] that
27 the district court's sentence was unduly harsh in view of
28 the 18 U.S.C. § 3553(a) factors and [2] that the 16-level
29 enhancement applicable to reentrants with certain prior
30 convictions (a) is not based on review of past sentencing
31 practices and empirical studies, (b) is overly harsh

1 compared to Guidelines applicable to more serious crimes,
2 and (c) is greater than necessary in view of districts that
3 have "fast track" programs. We affirm.
4

5 **I**

6 Perez-Frias, a citizen of the Dominican Republic,
7 immigrated to the United States in 1977. On or about
8 December 12, 1995, at age 27, Perez-Frias was convicted in
9 New York State Supreme Court, New York County, of
10 manslaughter in the first degree, resulting in a sentence of
11 7 to 21 years' imprisonment. The relevant facts underlying
12 his conviction are as follows: Perez-Frias was dealing
13 marijuana, told a group of friends that he was having a
14 dispute with a rival seller, and inspired the murder of the
15 rival by telling his friends about his grievance, though
16 Perez-Frias was not otherwise involved in the killing. On
17 or about June 2, 2008, Perez-Frias was released on parole
18 into the custody of immigration authorities, and immediately
19 deported to the Dominican Republic.

20 In August 2009, Perez-Frias illegally reentered the
21 United States. Within two months, on October 1, 2009, he
22 was arrested in Manhattan for possession of marijuana.

1 In December 2009, Perez-Frias was transferred from
2 state to federal custody, and charged in a single-count
3 indictment with illegal reentry without permission after
4 having been deported following a conviction for an
5 aggravated felony, in violation of 8 U.S.C. § 1326(a) and
6 (b)(2). On January 27, 2010, Perez-Frias pleaded guilty.
7 Prior to the plea, the Government provided Perez-Frias with
8 a letter pursuant to United States v. Pimentel, 932 F.2d
9 1029, 1034 (2d Cir. 1991), outlining its view of how the
10 U.S. Sentencing Guidelines ("Guidelines") would apply to
11 Perez-Frias. The Government calculated an offense level of
12 21 and a Criminal History Category of III, yielding a
13 Guidelines range of 46 to 57 months' imprisonment. At the
14 plea proceeding, Judge Chin conducted a thorough allocution,
15 the adequacy of which is not challenged on appeal.

16 The parties appeared before Judge Chin for sentencing
17 on April 7, 2010. The Presentence Report ("PSR") concurred
18 in the Government's Guidelines calculation and recommended a
19 bottom-of-the-range sentence of 46 months.

20 Perez-Frias did not challenge the Guidelines
21 calculation in the district court (and does not do so on
22 appeal). Instead, Perez-Frias's sentencing submission

1 contended that the applicable Guidelines range was greater
2 than necessary to comply with the purposes of § 3553(a) and
3 argued for a non-Guidelines sentence. Perez-Frias also
4 asked for a reduction corresponding to the number of months
5 he had been in federal custody--from December 2009 up to the
6 date of sentencing--even though that time was not subject to
7 credit on his federal sentence because Perez-Frias was in
8 federal custody under a writ of habeas corpus ad
9 prosequendum from New York State custody. The Government
10 requested that the District Court impose a within-Guidelines
11 sentence of 46 to 57 months.

12 Before sentencing, Judge Chin confirmed that he had
13 considered the parties' written submissions and statements
14 in court, as well as the statutory factors. In fashioning a
15 sentence, Judge Chin focused on the fact that Perez-Frias
16 reentered soon after being deported and that he promptly
17 recidivated, engaging in the same drug activity that led to
18 his manslaughter conviction and ultimate deportation. Even
19 so, Judge Chin was prepared to give Perez-Frias a
20 bottom-of-the-range sentence of 46 months. Moreover, at the
21 defense's request (and over the Government's objection) the
22 District Court awarded Perez-Frias "credit" for his four

1 months in federal custody and imposed a below-Guidelines
2 sentence of 42 months.

3
4 **II**

5 "Assuming that the district court's sentencing decision
6 is procedurally sound, the appellate court should then
7 consider the substantive reasonableness of the sentence
8 imposed under an abuse-of-discretion standard." Gall v.
9 United States, 552 U.S. 38, 51 (2007). "[W]hen conducting
10 substantive review, we take into account the totality of the
11 circumstances, giving due deference to the sentencing
12 judge's exercise of discretion, and bearing in mind the
13 institutional advantages of district courts." United States
14 v. Cavera, 550 F.3d 180, 190 (2d Cir. 2008) (in banc).
15 "[W]e will not substitute our own judgment for the district
16 court's on the question of what is sufficient to meet the
17 § 3553(a) considerations in any particular case. See United
18 States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006). We
19 will instead set aside a district court's substantive
20 determination only in exceptional cases where the trial
21 court's decision 'cannot be located within the range of
22 permissible decisions.'" Cavera, 550 F.3d at 189 (quoting

1 United States v. Rigas, 490 F.3d 208, 238 (2d Cir. 2007).

2 “Generally, ‘[i]f the ultimate sentence is reasonable and
3 the sentencing judge did not commit procedural error in
4 imposing that sentence, we will not second guess the weight
5 (or lack thereof) that the judge accorded to a given factor
6 or to a specific argument made pursuant to that factor.’”

7 United States v. Pope, 554 F.3d 240, 246-47 (2d Cir. 2009)
8 (alteration in original) (quoting Fernandez, 443 F.3d at
9 34).

11 **III**

12 **A**

13 The district court imposed a below-Guidelines sentence
14 of 42 months’ imprisonment. “[I]n the overwhelming majority
15 of cases, a Guidelines sentence will fall comfortably within
16 the broad range of sentences that would be reasonable in the
17 particular circumstances.” Fernandez, 443 F.3d at 27. It
18 is therefore difficult to find that a below-Guidelines
19 sentence is unreasonable. See Kimbrough v. United States,
20 552 U.S. 85, 109 (2007) (“We have . . . recognized that, in
21 the ordinary case, the Commission’s recommendation of a
22 sentencing range will ‘reflect a rough approximation of

1 sentences that might achieve § 3553(a)'s objectives.'"
2 (quoting Rita v. United States, 551 U.S. 338, 350 (2007))).

3 The district court considered Perez-Frias's history and
4 personal characteristics; and the sentence was based on:
5 (1) the seriousness of Perez-Frias's prior conviction
6 (manslaughter), (2) his rapid reentry after deportation, and
7 (3) his arrest soon afterward for conduct that (like the
8 manslaughter offense) stemmed from his involvement with
9 marijuana. The district court's assessment of the "nature
10 and circumstances of the offense" and the "history and
11 characteristics of the defendant," 18 U.S.C. § 3553(a),
12 supported the decision to sentence Perez-Frias no further
13 below the bottom of the Guidelines range.

14 **B**

15 Perez-Frias argues that the 16-level Guideline
16 enhancement for reentry is deficient because the Commission
17 arrived at it without reference to specific empirical data.
18 In support, Perez-Frias cites the Supreme Court's decision
19 in Kimbrough, 552 U.S. at 109, holding that district judges
20 are entitled to conclude that the crack cocaine Guideline
21 was greater than necessary to meet the standards of
22 § 3553(a) if they believe the Guideline "do[es] not

1 exemplify the Commission's exercise of its characteristic
2 institutional role"; and our recent decision in United
3 States v. Dorvee, 616 F.3d 174, 184 (2d Cir. 2010), holding
4 that "the Commission did not use [an] empirical approach in
5 formulating the Guidelines for child pornography" and
6 instead amended the Guidelines at the direction of Congress.

7 However, the absence of empirical support is not the
8 relevant flaw we identified in Dorvee. We criticized the
9 child pornography Guideline in Dorvee because Congress
10 ignored the Commission and directly amended the Guideline,
11 which had the effect of "eviscerat[ing] the fundamental
12 statutory requirement in § 3553(a) that district courts
13 consider 'the nature and circumstances of the offense and
14 the history and characteristics of the defendant.'" See 616
15 F.3d at 184-86, 187. There is no such flaw in the reentry
16 Guideline. Congress did not bypass the usual procedure for
17 amending the Guidelines with respect to illegal reentry
18 cases. To the contrary, the 16-level enhancement in § 2L1.2
19 was based on the Commission's own "determin[ation] that
20 these increased offense levels are appropriate to reflect
21 the serious nature of these offenses." U.S.S.G. Appx. C
22 (amend. 375, Reason for Amendment"). Moreover, as discussed

1 above in Point III.A, the district court considered the
2 required § 3553(a) factors to arrive at Perez-Frias's
3 sentence. Accordingly, Perez-Frias's challenge to U.S.S.G.
4 § 2L1.2 is without merit.

5 **C**

6 Perez-Frias deploys an argument that has been raised by
7 many defendants sentenced for illegal reentry: because the
8 illegal reentry is itself a nonviolent act, the 16-level
9 enhancement is unduly harsh. We join our sister Circuits
10 that have considered and rejected this argument. "The
11 applicable Guidelines range here is not rendered
12 unreasonable simply because § 2L1.2 establishes a base
13 offense level for a nonviolent offense that is equal to or
14 greater than that of certain violent offenses. Congress
15 'has the power to define a crime and set its punishments.'" United States v. Lopez-Reyes, 589 F.3d 667, 672 (3d Cir.
16 2009) (quoting United States v. MacEwan, 445 F.3d 237, 252
17 (3d Cir. 2006)); see also United States v. Ramirez-Garcia,
18 269 F.3d 945, 947-48 (9th Cir. 2001) (explaining that
19 § 2L1.2 properly implements Congress's desire "to enhance
20 the penalties for aliens with prior convictions in order to
21 deter others[]" by increasing the "sentencing range for
22 aliens with prior convictions").
23

D

Perez-Frias contends that his sentence is unreasonable because much lower sentences have been shown to be sufficient but not greater than necessary under § 3553(a) in districts with so-called fast-track programs. We rejected that argument in United States v. Hendry, 522 F.3d 239, 242 (2d Cir. 2008) (per curiam), which concluded that defendants in fast-track districts are not similarly situated to defendants in non-fast-track districts, so that "sentences in fast-track districts cannot be compared with sentences in non-fast-track districts in order to demonstrate that the latter are longer than necessary."

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.