

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11634

D.C. Docket No. 3:16-cr-00111-TJC-PDB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(February 13, 2020)

Before WILSON and BRANCH, Circuit Judges, and RESTANI,* Judge.

PER CURIAM

* The Honorable Jane A. Restani, United States Judge, U.S. Court of International Trade, sitting by designation.

Anthony Johnson appeals his total 456-month sentence as procedurally and substantively unreasonable. Johnson, who represented himself at trial, was convicted by a jury of nine counts of bank fraud, in violation of 18 U.S.C. § 1344; nine counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1); three counts of mail fraud, in violation of 18 U.S.C. § 1341; and seven counts of falsely representing a social security number, in violation of 42 U.S.C. § 408(a)(7)(B). The district court sentenced Johnson to 240 months' imprisonment on the underlying fraud and false representation counts, and 24 months on each of the nine aggravated identity theft counts, to run consecutively to each other and to the 240-month sentence for a total of 456 months' imprisonment.

Johnson first argues that his sentences are procedurally unreasonable because the court applied an obstruction-of-justice enhancement to his offense level without supporting it with specific findings. Second, he contends that his sentences are procedurally unreasonable because the district court failed to properly consider the federal Sentencing Guidelines and corresponding commentary when it imposed consecutive sentences on the nine aggravated identity theft convictions. Finally, Johnson asserts that his sentences are substantively unreasonable because the district court essentially gave no weight to the guideline range of 50 to 71 months and failed to avoid unwarranted sentencing

disparities with similarly situated defendants. After considering the briefs and record, and with the benefit of a well-presented oral argument, we affirm Johnson's sentences.

I

We review the reasonableness of a district court's sentence for an abuse of discretion. *United States v. Traylor*, 827 F.3d 933, 935 (11th Cir. 2016) (per curiam). First, we review whether a sentencing court procedurally erred, such as by basing the sentence on clearly erroneous facts or failing to adequately explain the sentence. *Id.* at 936. Then, we look to "whether the sentence is substantively reasonable in light of the totality of the circumstances" and the 18 U.S.C. § 3553(a) factors. *Id.* "The party challenging the sentence bears the burden of showing that it is unreasonable." *Id.*

A district court's task is to impose a sentence that adequately reflects the seriousness of the offense, promotes respect for the law, provides just punishment for the offense, provides adequate deterrence, protects the public from further crimes of the defendant, and provides the defendant with needed education or treatment. 18 U.S.C. § 3553(a)(2). In doing so, the court must consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the guideline range, pertinent policy statements of the Sentencing Commission, the need to avoid unwarranted sentencing disparities,

and the need to provide restitution to victims. *Id.* § 3553(a). Additionally, the sentence shall be “sufficient, but not greater than necessary, to comply with the purposes” of § 3553(a)(2). *Id.*

II

Johnson argues that his total sentence is procedurally unreasonable because the district court imposed the obstruction-of-justice enhancement without making specific findings to support the enhancement, such as that he committed perjury or provided materially false information.¹ The Sentencing Guidelines provide a two-level increase to a defendant’s offense level if the defendant willfully obstructed or attempted to obstruct “the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction.” U.S.S.G. § 3C1.1. The Guidelines give a non-exhaustive list of examples of conduct that courts may consider obstructive, including suborning perjury or providing materially false information to a judge. *Id.* § 3C1.1, comment. (n.4)(B), (F).

Here, the district court expressly found that Johnson falsely asserted that his fraudulent conduct was not criminal and was intended to expose weaknesses in the

¹ We review a district court’s findings of fact supporting a sentencing enhancement for clear error and review whether a particular guideline enhancement applies to a given set of facts de novo. *United States v. Alberts*, 859 F.3d 979, 982 (11th Cir. 2017).

U.S. financial system; that the case involved national security concerns and, therefore, should be removed to the U.S. Foreign Intelligence Surveillance Court; and that he was working with other law enforcement agencies. Thus, the district court did make specific findings supporting the enhancement. Accordingly, Johnson's sentence was not procedurally unreasonable based on the imposition of the obstruction-of-justice enhancement.

III

Next, Johnson challenges his consecutive aggravated identity theft sentences. Johnson argues that the district court failed to consider the factors in U.S.S.G. § 5G1.2, failed to properly explain its decision to run the sentences consecutively, and failed to mention that the underlying offenses were groupable and that such sentences should generally run concurrently.

The aggravated identity theft statute requires a two-year sentence for each conviction, which must run consecutively to any other sentence imposed under a different statute. 18 U.S.C § 1028A(a)(1), (b)(2). However, sentences for multiple violations of § 1028A may, in the court's discretion, run concurrently, "provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission[.]" *Id.* § 1028A(b)(4).

The Application Notes to section 5G1.2 of the Guidelines² provide that, in deciding whether aggravated identity theft sentences should run concurrently or consecutively, the district court should consider the nature and seriousness of the underlying offenses, the purposes of § 3553(a), and whether the underlying offenses are groupable. U.S.S.G. § 5G1.2, comment. (n.2)(B). Application Note 2 states that, generally, multiple § 1028A counts should run concurrently when the underlying offenses are groupable under U.S.S.G. § 3D1.2.³ *Id.*

The district court did not err when it imposed consecutive sentences for aggravated identity theft. The record reflects that the district court did consider the factors listed in § 5G1.2. The court stated that it had discretion to run the sentences consecutively or concurrently, and that it decided to run them

² “Commentary and Application Notes to the Guidelines are binding on the courts unless they contradict the plain meaning of the text of the Guidelines.” *United States v. Wright*, 862 F.3d 1265, 1274 n.3 (11th Cir. 2017).

³ Section 3D1.2 provides:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
- (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. § 3D1.2.

consecutively in light of Johnson's extensive history of similar crimes. Further, the court addressed the § 3553(a) factors at length during the sentencing hearing. Thus, while the court did not specifically state that multiple identity theft counts generally warrant concurrent sentences when the underlying offenses are groupable, the record reflects that the district court was thorough and aware of the Guidelines and their commentary. Therefore, Johnson's total sentence was not procedurally unreasonable based on his consecutive aggravated identity theft sentences.

IV

Last, Johnson argues that his total sentence is substantively unreasonable because the district court essentially ignored the Guidelines. In support, he points to the district court's statements that the obstruction-of-justice enhancement had no impact on the sentence it imposed, that the guideline range was inadequate, and that it would still impose the same total sentence when his guideline range was reduced from 70–87 months to 57–71 months. Johnson also argues that the district court failed to avoid unwarranted sentencing disparities because his sentence far exceeded sentences for similarly situated defendants in other cases.

A district court abuses its discretion and imposes a substantively unreasonable sentence if it “(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or

irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.” *United States v. Irely*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc).

We will vacate a sentence as substantively unreasonable “if, but only if, we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.” *Id.* at 1190 (internal quotation mark omitted). We have repeatedly found that an above-guideline sentence is substantively reasonable where the court considered the § 3553(a) factors and the sentence was within the statutory maximum. *See United States v. Overstreet*, 713 F.3d 627, 636–40 (11th Cir. 2013) (affirming a 420-month sentence where the guideline range was 180–210 months and the statutory maximum was life); *United States v. Early*, 686 F.3d 1219, 1222 (11th Cir. 2012) (affirming a 210-month sentence where the guideline range was 78–97 months and the statutory maximum was 900 months).

Here, the district court thoroughly discussed the relevant § 3553(a) factors, the sentence was within the statutory maximum, and the court justified the above-guideline sentence with Johnson’s significant criminal history and repeated violations of supervised release. Moreover, given Johnson’s remarkably extensive criminal history, he has not pointed to any similarly situated defendants. Accordingly, we are not left with “the definite and firm conviction that the district

court committed a clear error of judgment,” *see Irey*, 612 F.3d at 1190, and conclude that Johnson’s total sentence is not substantively unreasonable.

AFFIRMED.