

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-11695
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARIO CLIFFORD RIVERA,

a.k.a. Chuky,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:24-cr-80140-RS-1

Before ROSENBAUM, GRANT, and MARCUS, Circuit Judges.

PER CURIAM:

Mario Rivera appeals his 210-month sentence for conspiracy to distribute and possess with intent to distribute 400 grams or

more of fentanyl and for distribution of 400 or more grams of fentanyl. On appeal, Rivera argues that: (1) the district court erred by constructively amending his indictment at sentencing when it used a higher drug quantity of 1.2 kilograms of fentanyl than the quantity charged in the indictment, which was an element of the offense under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013); and (2) if we vacate and remand for resentencing on his constructive-amendment argument, he should be permitted on remand to raise arguments challenging the inclusion of certain past convictions in the calculation of his criminal history category. After thorough review, we affirm.

I.

We require litigants to raise all objections to a sentencing court's findings of fact, conclusions of law, and the manner in which a sentence is imposed at the initial sentencing hearing. *United States v. Canty*, 570 F.3d 1251, 1256 (11th Cir. 2009). Where a party fails to raise an objection to the presentence investigation report ("PSI"), we review the argument on appeal for plain error. *See United States v. Beckles*, 565 F.3d 832, 842 (11th Cir. 2009). To establish plain error, the defendant must show (1) an error, (2) that is plain, and (3) that affected his substantial rights. *United States v. Turner*, 474 F.3d 1265, 1276 (11th Cir. 2007). If the defendant satisfies these conditions, we may exercise our discretion to recognize the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

II.

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First, we are unpersuaded by Rivera’s claim that the district court erred by constructively amending his indictment. A district court may not constructively amend the indictment because a defendant may only be convicted of a crime charged in the indictment. *United States v. Madden*, 733 F.3d 1314, 1317–18 (11th Cir. 2013). Constructive amendment occurs when the essential elements of an indicted offense are altered to “broaden the possible bases for conviction beyond what is contained in the indictment.” *Id.* at 1318 (citation modified).

In *Apprendi*, the Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. Later, in *Alleyne*, the Supreme Court extended *Apprendi* by holding that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” 570 U.S. at 103. The district court may make findings of fact at sentencing based on evidence at trial, facts admitted by the defendant’s guilty plea, undisputed statements in the PSI, and evidence presented at the sentencing hearing. *United States v. Wilson*, 884 F.2d 1355, 1356 (11th Cir. 1989).

The Federal Rules of Criminal Procedure provide that “the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.” Fed. R. Crim. P. 7(c)(1). An indictment that tracks the language of the relevant statute is

sufficient so long as it provides a statement of facts and circumstances that give notice of the offense to the accused. *United States v. Walker*, 490 F.3d 1282, 1296 (11th Cir. 2007).

The statutory imprisonment range for possession with intent to distribute or distribution of 400 grams or more of a substance containing fentanyl is a mandatory minimum of 10 years' imprisonment to a possible maximum of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(vi). Section 2D1.1 of the Sentencing Guidelines establishes various potential base offense levels for possession with intent to distribute fentanyl, based on threshold quantities. *See generally* U.S.S.G. § 2D1.1(c). Relevant to this appeal, § 2D1.1(c)(5) establishes a base offense level of 30 for an offense involving between 400 grams and 1.2 kilograms of fentanyl, while § 2D1.1(c)(4) establishes a base offense level of 32 for the offense involving between 1.2 kilograms and 4 kilograms of fentanyl. *Id.* § 2D1.1(c)(4), (5).

Here, Rivera argues that the district court erred by sentencing him under § 2D1.1(c)(5) to a base offense level of 32, which corresponds with the 3,230 grams of fentanyl attributed to him at sentencing. Instead, he says, the district court was required to sentence him to a base offense level of 30, using the 400-grams-or-more drug quantity charged in his indictment. We disagree.

For starters, an offense involving 400 grams or more of fentanyl is the highest threshold quantity of fentanyl that can be charged and carries a statutory range of a mandatory minimum of

10 years' imprisonment to a possible maximum of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(vi). Thus, Rivera's indictment properly tracked the language of the statute he was being charged under, as was required. Fed. R. Crim. P. 7(c)(1); *see Walker*, 490 F.3d at 1296; *see* 21 U.S.C. § 841(b)(1)(A)(vi).

The district court then sentenced him within the statutory penalty range applicable to the offense charged by the grand jury and to which he pled guilty. At sentencing, the undisputed facts in the PSI established that Rivera possessed 3,230 grams of fentanyl, which corresponds with a base offense level of 32 for an offense involving between 1.5 kilograms and 4 kilograms of fentanyl. U.S.S.G. § 2D1.1(c)(4). By admitting as part of his guilty plea that his offense involved between 1.2 and 4 kilograms of fentanyl, Rivera allowed the district court to sentence him according to the Sentencing Guidelines at a particular point within the authorized statutory penalty range. *See Wilson*, 884 F.2d at 1356. So while it is true that drug quantity was an element of Rivera's offense under *Apprendi* and *Alleyne* -- since the 400-grams-or-more statutory threshold quantity in § 841(b)(1)(A)(vi) triggered a 10-year statutory minimum sentence and raised the applicable statutory maximum from 20 years' to life imprisonment -- it is also true that Rivera's ultimate sentence of 210 months fell within the range for the offense to which he pled guilty. *See Apprendi*, 530 U.S. at 466; *Alleyne*, 570 U.S. at 99; 21 U.S.C. § 841(b)(1)(A).

In short, the district court could permissibly consider at sentencing the higher quantity of 1.2 to 4 kilograms of fentanyl that

Rivera specifically admitted as part of his plea, so long as his sentence fell within the statutory range for the offense charged in the indictment. 21 U.S.C. § 841(b)(1)(A); U.S.S.G. § 2D1.1(c)(4). And because Rivera's sentence fell within the statutory range established by the drug quantity in his indictment, he cannot show that the district court erred by imposing a sentence within that range that was informed by the specific drug quantity to which he admitted in his guilty plea. *See Madden*, 733 F.3d at 1268–69.

III.

We are also unpersuaded by Rivera's claim challenging the inclusion of certain past convictions in the calculation of his criminal history category. Rivera admits that, if we do not grant him relief and remand for resentencing on his first claim -- and we are not doing so -- the instant claim is reviewed for plain error since his counsel withdrew his objection to it at sentencing. He also admits, and we agree, that he cannot show plain error.

The district court may rely on undisputed facts in the PSI when determining a sentence. *United States v. Bennett*, 472 F.3d 825, 832 (11th Cir. 2006) (per curiam). A failure to object to the facts of prior convictions included in the PSI is deemed an admission of those facts. *Id.* at 833–34. Failure to object to the district court's factual findings also precludes the argument on appeal that there was error in them. *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006).

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As we've noted, Rivera's counsel withdrew his objection at sentencing to the inclusion of certain past convictions in the calculation of Rivera's criminal history category. By doing so, his withdrawal is deemed an admission of the PSI's factual findings. *See Bennett*, 472 F.3d at 833–34. This means that the district court was entitled to rely on the undisputed facts of the PSI, including Rivera's 14 criminal-history points and criminal history category VI, in determining the appropriate sentence. Thus, as Rivera concedes, he cannot show that the district court plainly erred by sentencing him to 210 months' imprisonment based on the PSI's uncontested criminal history calculation. *Wade*, 458 F.3d at 1277.

AFFIRMED.