

OCT 18 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES GARNER,

Defendant - Appellant.

No. 12-10403

D.C. No. 3:11-cr-00114-LRH-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted October 11, 2013
San Francisco, California

Before: WALLACE, M. SMITH, and IKUTA, Circuit Judges.

Garner appeals from his sentence for mail fraud, in violation of 18 U.S.C. § 1341, on the grounds that the sentence was procedurally flawed and substantively unreasonable. We have jurisdiction under 28 U.S.C. § 1291.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Even assuming the district court made the factual errors identified by Garner, it is clear that no prejudice resulted from such errors. The district court focused primarily on the evidence of Garner's recidivism, and imposed a sentence it deemed reasonable to deter future offenses. *Cf. United States v. Cruz-Gramajo*, 570 F.3d 1162, 1167 (9th Cir. 2009). Because the sentence was not based on false or unreliable information, no due process violation occurred. *See United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009). The district court reasonably concluded that the government had carried its burden of proving sentencing facts by a preponderance of the evidence, and its statements that Garner failed to rebut the evidence presented by the government did not shift the burden of proof to Garner.

Finally, the district court properly weighed the factors set out in 18 U.S.C. § 3553(a), and did not significantly overvalue the impact of Garner's immediate recidivism. The sentence imposed was therefore not substantively unreasonable. *See United States v. Carty*, 520 F.3d 984, 994 (9th Cir. 2008) (en banc).

AFFIRMED.