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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUSTIN ANDREW WILKE, Defendant-Appellant.	Nos. 21-30228 D.C. No. 3:19-cr-05364-BHS-1 MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued September 1, 2022
Seattle, Washington

Before: MCKEOWN and GOULD, Circuit Judges, and RAKOFF,** District Judge.

Justin Wilke appeals a 20-month sentence imposed following his conviction for six counts relating to unlawful logging. Wilke was charged with eight counts, the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

first six of which related to the logging itself, while counts 7 and 8 related to Wilke's alleged role in starting a forest fire. At trial, Wilke's lawyer announced in his opening statement that Wilke did not contest his guilt as to counts 1-6, but contested guilt only as to counts 7 and 8. He did not, however, plead guilty to counts 1-6 or otherwise stipulate to facts that would have relieved the Government of its burden of proving his guilt as to those counts beyond a reasonable doubt. The jury then convicted Wilke of counts 1-6 and acquitted him of counts 7 and 8. At sentencing, Wilke requested but was denied a 2-point downward adjustment for acceptance of responsibility under USSG § 3.E1.1(a) of the Sentencing Guidelines.

Wilke contends that the district court erred by denying him the adjustment solely because of the time and money the Government spent before and at trial. According to Wilke, § 3.E1.1(a) of the Guidelines focuses only on whether, in its words, "the defendant clearly demonstrates acceptance of responsibility for his offense," not on whether he saves Government resources. Saving the Government resources is, rather, the basis for a separate 1-point reduction under § 3E1.1(b).

Whether USSG § 3.E1.1(a) permits consideration of the Government's expenditure of resources is a legal question this Court reviews de novo. *United States v. Dixon*, 984 F.3d 814, 818 (9th Cir. 2020). We conclude that it does not. We are persuaded by the Sixth Circuit's reasoning in *United States v. Hollis*, 823 F.3d 1045 (6th Cir. 2016), where it determined that USSG § 3.E1.1(a) is "[b]y its plain terms .

. . focused only on whether the defendant 'clearly demonstrates acceptance of responsibility,' while subsection (b) . . . is focused only on whether the defendant[] . . . permit[s] the government to avoid preparing for trial and permit[s] the government and the court to allocate their resources efficiently." *Id.* at 1048 (quotations omitted). Considering the Government's expenditure of resources under subsection (a) risks rendering "parts of § 3E1.1(b) superfluous," because "[i]f waste of government resources could be a basis for denying the two-level decrease under subsection (a), then there would never be a situation where a defendant would qualify for the decrease under subsection (a) but then be denied the additional decrease under subsection (b) for the reason that his or her late-in-time guilty plea caused the government to waste resources preparing for trial." *Id.*

Of course, district courts may consider a defendant's timeliness in determining whether to apply a 2-point reduction under USSG § 3E1.1(a). "[T]he timeliness of the defendant's conduct in manifesting the acceptance of responsibility" may prove relevant to deciding the factual question of whether a particular defendant has truly expressed contrition. USSG § 3E.1.1 cmt. n.1(H). *See also United States v. Hernandez*, 894 F.3d 1104, 1110 (9th Cir. 2018) (emphasizing that "the district court may deny a sentencing reduction because of a lack of contrition," although the court "may not deny the reduction because of th[e] choice [to go to trial] in spite of other manifestations of sincere contrition.").

The Government emphasizes many facts in the record that could support the inference that Wilke was not sincerely contrite, and the district court might reasonably have so found as a factual matter. But instead, the district court denied an adjustment solely because, in its own words, "[b]y the time the defense conceded culpability at the beginning of the trial, the Government had been required to prepare for trial on all counts," and for that reason alone, Wilke's acceptance of responsibility "wasn't timely."[1] As such, we conclude that the district court applied the wrong legal standard in determining whether to award Wilke a downward adjustment under USSG § 3E1.1(a). That error requires remand for resentencing under the right standard.[2]

For the sake of clarity on remand, we note we disagree with Wilke's two remaining arguments. He contends that the district court erred in deciding whether

[1] Indeed, the district court gave Wilke at least some credit for contrition in weighing the 18 U.S.C. § 3553(a) factors, further supporting the inference that its determination as to the § 3E1.1(a) adjustment was based solely on whether Wilke saved the Government resources.

[2] Though Wilke received a below-guidelines sentence, "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016). Nor is the issue moot, even though Wilke was recently released from federal custody, as his sentence carried a 3-year term of supervised release. *See United States v. Verdin*, 243 F.3d 1174, 1178-79 (9th Cir. 2001) (reasoning that an appeal of a sentence does not become moot upon the defendant's release when the defendant remains on supervised release).

Wilke qualified for a § 3E1.1(a) adjustment without first hearing Wilke's allocution. But while we have held that a district court ***may*** hear a defendant's allocution before deciding whether to award a § 3E1.1(a) adjustment, we have never held that a district court ***must*** do so. *United States v. Green*, 940 F.3d 1038, 1043-44 (9th Cir. 2019). Finally, while Wilke contends the district court improperly declined to consider various pre-trial communications in determining whether Wilke had accepted responsibility, the district court did consider those communications and reasonably concluded as a factual matter that they did not clearly demonstrate Wilke's acceptance of responsibility before trial.

For the foregoing reasons we vacate Wilke's sentence and remand for resentencing under the correct standard.

REVERSED AND REMANDED.