

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 8 2024

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCUS ORLANDO ARMSTRONG,

Defendant - Appellant.

No. 23-466

D.C. No.

8:19-cr-00195-ODW-2

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Submitted March 25, 2024**
Pasadena, California

Before: RAWLINSON, LEE, and BRESS, Circuit Judges.

Marcus Orlando Armstrong appeals his 114-month sentence imposed following his guilty plea on two counts of payment of illegal remunerations in connection with a federal health care program. 42 U.S.C. § 1320a-7b(b)(2)(A).

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Armstrong and his co-defendants defrauded Tricare, a taxpayer-funded federal health care program for members of the U.S. military and their families. Armstrong later violated the terms of his pretrial release by selling his residence for \$3.6 million without prior court approval.

The parties and Probation agreed that Armstrong's Guidelines imprisonment range was 57 to 71 months and that he owed \$3,070,091.66 in restitution. At sentencing, Armstrong still owed \$447,932.09 in restitution on a 2003 fraud conviction for which his term of supervised release concluded in 2010. The district court imposed a sentence of 57 months on each count, to run consecutively. Armstrong contends that his sentence is procedurally erroneous and substantively unreasonable. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not procedurally err in imposing its 114-month consecutive sentence. Because Armstrong failed to raise any of his four claims of procedural error at sentencing, we review each for plain error. *United States v. Herrera*, 974 F.3d 1040, 1045 (9th Cir. 2020).

First, contrary to Armstrong's contention, the district court did not improperly consider his inability to pay restitution in meting out its sentence. In weighing the 18 U.S.C. § 3553(a) factors, the district court properly considered his recidivism, refusal to abide by his court-ordered restitution obligations and the terms of his supervised release, decision to sell his residence without court

approval, and use of the sale proceeds to pay off personal loans. *See United States v. Rangel*, 697 F.3d 795, 803 (9th Cir. 2012), *as amended* (a “sentencing court is empowered to consider whether the victims will receive restitution from the defendant in varying from the Sentencing Guidelines based on [the] 3553(a) factors”).

Second, Armstrong contends that the district court failed to provide advance notice of its intent to depart from the Guidelines by imposing consecutive sentences in violation of Fed. R. Crim. P. 32(h). This claim fails because the district court’s reliance upon the § 3553(a) factors rendered Armstrong’s above-Guidelines sentence a variance, not a departure requiring advance notice. *See Rangel*, 697 F.3d at 801 (“[The Rule 32(h)] notice requirement does not apply, however, to a ‘variance’ under § 3553(a).”) (citation omitted).¹

Third, the district court did not err in imposing a consecutive sentence beyond the “total punishment” under U.S.S.G. § 5G1.2. Armstrong premises his argument on pre-*United States v. Booker*, 543 U.S. 220 (2005) case law, which is of limited utility in construing the advisory Guidelines provision at issue. *See United States v. Lillard*, 57 F.4th 729, 738 (9th Cir. 2023). Post-*Booker*, this

¹ Armstrong stresses that the government characterized the imposition of consecutive sentences as an upward “departure.” But he has provided no authority indicating that counsel’s nomenclature during a colloquy at sentencing is relevant to ascertaining whether a district court imposed consecutive sentences pursuant to a variance under § 3553(a) or a departure, respectively.

circuit has held that “notwithstanding the Guidelines range, the district court may vary a sentence based on its consideration of the factors set forth in 18 U.S.C. § 3553(a).” *United States v. Wang*, 944 F.3d 1081, 1091 (9th Cir. 2019). And we have long “recognize[d] that ‘the district court retains discretion under 18 U.S.C. § 3584(a) to sentence either concurrently or consecutively despite the guidelines.’” *Id.* (citation omitted).

Fourth, Armstrong argues that his due process rights were violated because the district court mistakenly referenced his failure to pay any restitution in his 2003 case and relied on that error in issuing a 114-month sentence. While the district court at first was under that mistaken belief, the defense counsel later corrected the court, stating that Armstrong paid a portion of it. The district court later said that Armstrong “failed” to make payments, but then added he had failed to “complete” his restitution payments, which could suggest that the court was aware of the partial payment. Any error is not plain because Armstrong has not established that such asserted error affected his substantial rights. *See United States v. Christensen*, 732 F.3d 1094, 1105–06 (9th Cir. 2013). Armstrong has not shown a reasonable probability that he would have received a different sentence absent the alleged error. *See id.*²

² Armstrong has moved for this court to take judicial notice of the docket in his 2003 fraud case. This “court may take judicial notice of its own records in

2. Armstrong's 114-month sentence was not substantively unreasonable.

This court reviews the substantive reasonableness of a sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). In so doing, “we are to consider the totality of the circumstances” and “may not reverse just because we think a different sentence is appropriate.” *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The record indicates that the district court rationally and meaningfully considered the § 3553(a) factors in meting out its individualized sentence. The district court was not required to compare Armstrong’s sentence to sentences imposed in unrelated cases. *See United States v. Treadwell*, 593 F.3d 990, 1012 (9th Cir. 2010), *overruled in part on other grounds by United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020). Given the “due deference” we owe the district court’s determination “that the § 3553(a) factors, on a whole, justify the extent of the variance,” *Gall*, 552 U.S. at 51, Armstrong’s 114-month sentence was not substantively unreasonable.

AFFIRMED.

other cases, as well as the records of an inferior court in other cases.” *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). We grant the unopposed motion, but the outcome of this case remains unchanged.