

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 06-3240

United States of America,

Appellee,

v.

Oscar Bradshaw, III, also known as
O.B.,

Appellant.

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Appeal from the United States
District Court for the
Eastern District of Arkansas.

[UNPUBLISHED]

Submitted: October 16, 2007
Filed: October 17, 2007

Before BYE, RILEY, and MELLOY, Circuit Judges.

PER CURIAM.

Oscar Bradshaw appeals the 33-month prison sentence the district court¹ imposed after he pleaded guilty to using a communication facility to facilitate delivery of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 843(b). In a brief filed under Anders v. California, 386 U.S. 738 (1967), Bradshaw's counsel challenges both the district court's denial of a downward departure based on an overstated criminal

¹The Honorable William R. Wilson, Jr., United States District Judge for the Eastern District of Arkansas.

history, and the overall reasonableness of Bradshaw's sentence. Counsel also moves to withdraw.

We conclude that the district court's decision not to depart downward is unreviewable because, as revealed by the court's comments at sentencing, the court was aware of its authority to depart but elected not to do so under the circumstances. See United States v. Morell, 429 F.3d 1161, 1164 (8th Cir. 2005) (discretionary denial of downward departure remains unreviewable after United States v. Booker, 543 U.S. 220 (2005)); United States v. Koons, 300 F.3d 985, 993-94 (8th Cir. 2002) (where district court recognized authority to depart but elected not to do so under circumstances, decision is unreviewable).

We further conclude that Bradshaw's 33-month prison sentence, representing a 4-month downward variance from the applicable Guidelines imprisonment range, is not unreasonable. Cf. United States v. Wadena, 470 F.3d 735, 737 (8th Cir. 2006) (appellate court reviews sentence, including any downward variance, for reasonableness, which requires reviewing court to ask whether district court abused its discretion). The record shows that the district court appropriately considered the 18 U.S.C. § 3553(a) factors. See Booker, 543 U.S. at 260-62 (§ 3553(a) will guide appellate courts in determining whether sentence is unreasonable). Moreover, nothing in the record suggests that the district court based Bradshaw's sentence on an improper or irrelevant factor, failed to consider a relevant factor, or made a clear error of judgment in weighing appropriate factors. See United States v. Haack, 403 F.3d 997, 1004 (8th Cir. 2005).

After reviewing the record independently under Penon v. Ohio, 488 U.S. 75, 80 (1988), we find no nonfrivolous issues. Accordingly, we grant counsel leave to withdraw, and we affirm.