FILED
United States Court of Appeals
Tenth Circuit

May 5, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAIN JUSTIN ADAMS,

Defendant - Appellant.

No. 22-2071
(D.C. No. 5:18-CR-03413-KG-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **MURPHY**, and **ROSSMAN**, Circuit Judges.

A jury convicted Dain Justin Adams of five counts of child-pornography offenses. The total statutory maximum sentence was 110 years' imprisonment. The advisory sentencing range recommended by the U.S. Sentencing Guidelines was life imprisonment. The district court sentenced Adams to 110 years' imprisonment. Adams now appeals that sentence as substantively unreasonable.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm.

BACKGROUND

A jury found Adams guilty of five child-pornography offenses.[1] The Presentence Report spells out Adams's conduct. He possessed seventy-eight images and ten videos that depicted child pornography. The children were under eight years old. Adams also possessed dozens of pornographic files that could no longer be opened but depicted four- and five-year-old children. In May 2018, Adams shared four videos and one image of child pornography with others through a file-sharing program. The children in those files ranged from eight to thirteen years old.

The Presentence Report also details that Adams urged a female acquaintance to sexually assault her four-year-old son. Officers searching Adams's home found the woman's phone, which contained two videos depicting her masturbating her four-year-old son and performing oral sex on him. Forensic examiners later determined that Adams had viewed and digitally

[1] The jury found Adams guilty of possession of visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2), and 2256; conspiracy to produce visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. §§ 2251(a), (e), and 2256; receipt of visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. §§ 2252A(a)(2), (b)(1), and 2256; and two counts of distribution of visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. §§ 2252A(a)(2), (b)(1), and 2256.

edited the videos. And the woman, who testified at Adams's trial, recounted how she had sexually assaulted her son at Adams's behest. She also testified that Adams urged her to make similar videos with her two-year-old daughter and a nine-year-old cousin.

At sentencing, the U.S. Probation Office calculated a total offense level of 43 and a criminal-history category of I. That resulted in an advisory sentencing range of life imprisonment under the 2018 U.S. Sentencing Guidelines. The statutes of conviction totaled 110 years,[2] so the Probation Office recommended that sentence. *See* U.S. Sent'g Guidelines Manual § 5G1.2(d) (U.S. Sent'g Comm'n 2018) ("If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.").

The district court agreed with the Probation Office's recommendation and sentenced Adams to 110 years' imprisonment. At the sentencing hearing, the district court considered the § 3553(a) factors, including Adams's personal characteristics, the seriousness of the offense, deterrence, and unwarranted sentencing disparities. The district court considered that Adams, while

[2] Specifically, 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) carry a twenty-year maximum, 18 U.S.C. § 2251(a) and (e) carry a thirty-year maximum, and 18 U.S.C. § 2252A(a)(2) and (b)(1) carry a twenty-year maximum.

babysitting, molested a five-year-old child and also that he reported he had been sexually abused at a young age. It remarked that "nobody can dispute that what we're talking about is something very serious, the victimization of kids, very young prepubescent minors." The district court also surveyed similar cases and found sentences of 110 years, 120 years, and 200 years. And the district court expressed that Adams would likely recidivate, commenting that he "would continue to victimize and molest young children well into [his] senior years."

The district court later issued its sentencing judgment. That order provided: "A term of 240 months is imposed as to each of Counts SSSS1, SSSS3, and SSSS6 and SSSS6. A term of 360 months is imposed as to Count SSSS2; said terms shall run consecutively for a total term of 1,320 months."

Adams timely appealed his sentence.

STANDARD OF REVIEW

Adams contends that this sentence was substantively unreasonable. "[S]ubstantive reasonableness review broadly looks to whether the district court abused its discretion in weighing permissible § 3553(a) factors in light of the totality of the circumstances." *United States v. Sayad*, 589 F.3d 1110, 1118 (10th Cir. 2009) (internal quotation marks and citation omitted). We review the substantive reasonableness of "all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). "Under this

standard, we will 'deem a sentence unreasonable only if it is arbitrary, capricious, whimsical, or manifestly unreasonable.'" *United States v. Lente*, 759 F.3d 1149, 1158 (10th Cir. 2014) (quoting *United States v. Gantt*, 679 F.3d 1240, 1249 (10th Cir. 2012)).

DISCUSSION

Adams advances two arguments to show why his sentence was substantively unreasonable. First, he contends that "the district court did not properly weigh the mitigating circumstances of the defendant's personal history." Second, he argues that "the district court should have imposed a purpose driven sentence in lieu of a guideline sentence." We reject both arguments.

Adams first argues that the district court abused its discretion by giving too little weight to his own history of sexual abuse as a child. The Presentence Report recounts that history:

> [Adams] also disclosed he was the victim of molestation when [he] was age 5. The family babysitter had him put his hand down her pants and touch her vagina. She then took off her pants and underwear and told him to lick her vagina, which he did. He told his mother about the incident when they returned home. He does not know what happened to the babysitter. . . . Adams also disclosed that from approximately the first to third grade he saw a speech therapist two to three times a week. Sometime during the third grade, the speech therapist was arrested [and] charged with molesting little boys. It wasn't until later that [Adams] thought about the arrest and remembered that during each visit, the therapist would have him sit on his lap. Adams could feel the man's erection through his pants. At the time, Adams stated he was too young to realize what was happening. He denies he was touched in any way by the therapist and he never told his parents about what happened.

Adams concedes that "the mitigating factor of a defendant being a victim of childhood sexual abuse is not truly addressed in the sentencing guidelines" but contends that district courts should "make a concentrated effort to incorporate this fact" into their § 3553(a) analyses.

The district court imposed a substantively reasonable sentence. We begin by presuming substantive reasonableness because the district court sentenced Adams to a within-Guidelines sentence. *United States v. Lewis*, 594 F.3d 1270, 1275, 1277 (10th Cir. 2010) (330-year within-Guidelines sentence presumed reasonable). Nothing rebuts that presumption. Sentencing courts must balance the § 3553(a) factors and may not accord dispositive weight to any one factor. *United States v. Walker*, 844 F.3d 1253, 1259 (10th Cir. 2017) (citations omitted). The district court followed this command. It considered Adams's history of sexual abuse, acknowledging that Adams had a "history of sexual abuse and victimization" while "under the care of a babysitter." And the district court commented that Adams's history of sexual abuse was "very similar" to his sexual assault of a five-year-old child while Adams was himself a babysitter. In other words, the district court considered Adams's history of sexual abuse and weighed that history against other events from his past. The district court also considered the other § 3553(a) factors, including the seriousness of the crimes, deterrence, and avoiding unwarranted sentence disparities. The district court did not abuse its discretion in sentencing Adams to 110 years' imprisonment. *See United States v. Pyles*, 862 F.3d 82, 94 (D.C.

Cir. 2017) (concluding that, "[w]hile an explicit response to the sexual abuse argument would have been advisable, the context shows that the argument was considered" as a mitigating factor).

Nor does Adams's other argument persuade us that the district court imposed a substantively unreasonable sentence. Adams contends that "[t]he child pornography guidelines are inherently flawed and they provided for an unjust sentence." For support, Adams relies on an out-of-circuit case, *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010). *Dorvee*, according to Adams, supports his view that the child-pornography guidelines are "not the product of the Sentencing Commission's usual institutional competence, expertise and study." And as Adams sees it, when directing the Sentencing Commission to promulgate child-pornography guidelines, "Congress did not use [an] empirical approach" and instead chose "politically based" directives.[3]

Our precedent forecloses Adams's argument. In *United States v. Grigsby*, we considered a challenge to one of the child-pornography guidelines, § 2G2.1. 749 F.3d 908, 910 (10th Cir. 2014). Relying on *Dorvee*, the defendant there

[3] Adams suggests that we approved of *Dorvee* because we "relayed" its reasoning in our decision in *United States v. Regan*, 627 F.3d 1348, 1353 (10th Cir. 2010). But in *Regan*, we simply quoted several out-of-circuit district-court cases, commenting on the *defendant's position* (not ours) that the child-pornography guidelines conflicted with the § 3553(a) factors. 627 F.3d at 1353. We then refused to entertain that argument because the defendant "did not raise" the out-of-circuit authority to the district court below, and "none of the cases . . . were binding precedent on the district court." *Id.* at 1354. We did not endorse *Dorvee*.

argued that "the district court should have foregone any consideration of § 2G2.1" because of that guideline's empirical flaws. *Id.* We rejected that argument, siding with the Fifth Circuit's reasoning:

> Empirically based or not, the Guidelines remain the Guidelines. . . . The Supreme Court made clear in *Kimbrough v. United States* that "a district judge must include the Guidelines range in the array of factors warranting consideration," even if the Commission did not use an empirical approach in developing sentences for the particular offense. Accordingly, we will not reject a Guidelines provision as "unreasonable" or "irrational" simply because it is not based on empirical data.

Id. at 911 (quoting *United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011)). And we noted that "we will not second-guess" a district court's choice not to vary downward from a within-Guidelines sentence based on the child-pornography guidelines. *Id.* (citation omitted).

We considered a similar argument in *United States v. Franklin*, 785 F.3d 1365 (10th Cir. 2015). There, the defendant argued that "we should carve out an exception for the applicable guideline (2G2.2) because it lacks an empirical basis and is overly harsh." *Id.* at 1370. We concluded that "a guideline range deserves consideration whether it is '[e]mpirically based or not.'" *Id.* (quoting *Grigsby*, 749 F.3d at 910-11). And we rejected the defendant's argument that the child-pornography guidelines were too harsh. *Id.* at 1370-71. We relied on the careful findings of the district court, which noted (as here) that "the images [downloaded by the defendant] showed child molestation, intercourse with children, and inappropriate sexual activity with prepubescent minors," that the

defendant's "compilation of child pornography resulted in continued danger, fear, trauma, anxiety, and stress to the children being depicted," and that "there was a need to prevent [the defendant] from committing further crimes." *Id.* at 1371.

Grigsby and *Franklin* foreclose Adams's argument. Just like the defendant in *Grigsby*, Adams raises the empirical-flaw argument from *Dorvee*. We rejected that argument because "the Guidelines remain the Guidelines"—that is, district courts must consider them even if Congress insisted on a less-than-empirical approach. *Grigsby*, 749 F.3d at 911; *see also United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("Broad as [the Sentencing Commission's] discretion may be, . . . it must bow to the specific directives of Congress."). And just as the defendant did in *Franklin*, so too does Adams parrot the same argument about § 2G2.2's empirical flaws and harshness. We rejected that argument because of the settled dangers of child-pornography crimes—all of which are present here. Adams's sentence is substantively reasonable.[4]

[4] Adams also raises a clerical error in the sentencing judgment—that the "written judgment . . . repeats count six twice, and omits count five." The government does not oppose a limited remand to fix this error. We accordingly remand with instructions to correct. *See* Fed. R. Crim. P. 36 ("After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.").

CONCLUSION

We affirm the district court's sentence as substantively reasonable. But we remand for the district court to correct the clerical error in the sentencing judgment.

Entered for the Court

Gregory A. Phillips
Circuit Judge