

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 8, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON WAYNE IRVING,

Defendant - Appellant.

No. 21-3140
(D.C. No. 6:20-CR-10037-JWB-1)
(D. Kan.)

ORDER AND JUDGMENT*

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

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Jason Irving pled guilty to one count of distributing child pornography, in violation of 18 U.S.C. § 2252A(a)(2), and was sentenced to 300 months of imprisonment. Irving filed a timely notice of appeal, but his appellate defense counsel subsequently filed a brief asserting there are no non-frivolous issues to

* This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

appeal and seeking to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). For the reasons explained below, we grant counsel's motion to withdraw and dismiss the appeal.

In 2002, Irving was convicted in a Kansas state court of aggravated indecent solicitation of a child under the age of fourteen and contributing to a child's misconduct. In 2017, he was convicted of violating Kansas's Offender Registration Act. In 2018, he was charged on several federal counts including the production of child pornography, but these charges were dismissed after the district court granted his motion to suppress evidence obtained in violation of his Fourth Amendment rights.

Within one month after the 2018 charges were dismissed, Irving created Facebook and Gmail accounts that he used to send and receive child pornography, including several images that depicted sadistic or masochistic conduct. He also used these accounts to interact under false pretenses with a user who identified himself as a twelve-year-old boy, to discuss sexual abuse of children with other users, and to tell another user that he had found a twelve-year-old boy for them to sexually abuse. Additionally, he received numerous images of child pornography from a user identified as "Alex," and they discussed whether Irving could sexually abuse a minor known to Alex. Irving requested a picture of the intended victim, and Alex sent him a picture of a five-year old boy.

In June 2020, Irving was indicted on several federal child-pornography charges stemming from his use of his Facebook and Gmail accounts. He ultimately

pled guilty to one count of distributing child pornography. His plea agreement noted that this offense was punishable by a term of imprisonment between fifteen and forty years. This statutory range was determined by 18 U.S.C.S. § 2252A(b)(1), which applies when a defendant in a child-pornography case “has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct, involving a minor or ward.”

Following Irving’s guilty plea, the federal probation office prepared a presentence investigative report (PSR), which described Irving’s prior criminal history, the types of images involved in his child-pornography offense, and his online conversations with other sexual abusers and with a potential victim. The PSR calculated an advisory Guidelines range of 188–235 months of imprisonment. Irving raised no objections to the PSR.

At Irving’s sentencing hearing, the district court heard arguments from both parties as to the appropriate sentence. The court then discussed each of the § 3553(a) sentencing factors and concluded that these factors warranted an above-Guidelines sentence of 300 months. In particular, the court emphasized the seriousness of the offense and the need for deterrence, pointing out that Irving not only distributed very concerning images of child sexual abuse, but also made plans with other sexual abusers to commit contact offenses. Defense counsel stated that he objected “both to the procedural sentence and the substantive sentence,” but he did not elaborate on this objection. The district court overruled the objection and imposed a 300-month sentence.

This appeal is before the court on counsel’s *Anders* brief. Pursuant to *Anders*, counsel may “request permission to withdraw where counsel conscientiously examines a case and determines that any appeal would be wholly frivolous.” *United States v. Calderon*, 428 F.3d 928, 930 (10th Cir. 2005). Counsel is required to submit an appellate brief “indicating any potential appealable issues based on the record.” *Id.* Once notified of counsel’s brief, the defendant may then submit additional arguments to this court. *Id.* We “must then conduct a full examination of the record to determine whether defendant’s claims are wholly frivolous.” *Id.* Irving has not submitted any additional arguments to this court, nor has the government filed a brief. Thus, our resolution of the case is based on counsel’s *Anders* brief and our independent review of the record. Based on this independent review, we conclude that any potential issue that could be raised on appeal is wholly frivolous.

First, the record reveals no meritorious appellate issues relating to Irving’s guilty plea. Irving entered into the plea following a full advisement of his rights, and nothing in the transcript from his change-of-plea hearing would support a challenge to the knowing or voluntary nature of his plea. Moreover, the record does not reveal any ways in which the government might have breached the terms of the plea agreement.

Second, defense counsel notes a potential issue regarding the applicability of the statutory sentencing enhancement under 18 U.S.C. § 2552A(a)(2). Counsel concludes, however, that Irving’s prior conviction for aggravated indecent solicitation of a child less than fourteen years old falls unambiguously within the

scope of § 2552A(a)(2) because the elements of this offense categorically required “abusive sexual conduct involving a minor,” § 2252A(a)(2). We agree with counsel’s analysis on this point, and we therefore conclude that Irving could not raise a non-frivolous challenge to the statutory sentencing enhancement.

Third, defense counsel notes that Irving could potentially raise a challenge to the procedural reasonableness of his sentence, but this argument would be reviewed only for plain error because Irving’s general objection to “the procedural sentence” was insufficient to put the district court on notice of any specific objections he might now assert on appeal. *See United States v. Sharp*, 749 F.3d 1267, 1291 (10th Cir. 2014). Particularly in light of this plain-error standard, we agree with counsel that Irving cannot raise a non-frivolous challenge to the procedural reasonableness of his sentence. A sentence may be procedurally unreasonable if the district court “failed to calculate (or improperly calculated) the Guidelines range, treated the Guidelines as mandatory, failed to consider the § 3553(a) factors, selected a sentence based on clearly erroneous facts, or failed to adequately explain the chosen sentence.” *United States v. Henson*, 9 F.4th 1258, 1288–89 (10th Cir. 2021) (quotations and alterations omitted). After reviewing the PSR and the district court’s sentencing explanation, we see no error, much less plain error, in the district court’s calculation of the Guidelines range. Next, the district court did not treat the Guidelines as mandatory, but rather concluded that an upward variance was appropriate in light of the § 3553(a) factors, which the court carefully considered before announcing its sentence. “[D]istrict courts are free to accept uncontested facts contained in the PSR for purposes of

sentencing,” *United States v. Robertson*, 568 F.3d 1203, 1214 (10th Cir. 2009) (quotation omitted), and the district court’s sentencing decision was based on the PSR’s uncontested statement of facts.¹ Finally, the district court fully explained its chosen sentence. Accordingly, Irving cannot raise a non-frivolous objection to the procedural reasonableness of his sentence on appeal.

Fourth, defense counsel identifies a potential argument regarding the substantive reasonableness of Irving’s sentence. “We apply an abuse-of-discretion standard when reviewing a sentence for substantive reasonableness, a standard requiring substantial deference to district courts.” *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) (quotation omitted). “We do not reweigh the sentencing factors but instead ask whether the sentence fell within the range of rationally available choices that facts and the law at issue can fairly support.” *United*

¹ We note that the district court made one factual assertion unsupported by the PSR. Specifically, the district court stated that there were “cages involved” in one or more of Irving’s child-pornography images, but we find no support for this assertion in the PSR or elsewhere in the record. Under plain-error review, however, a defendant must show “a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.” *United States v. Kaufman*, 546 F.3d 1242, 1248 (10th Cir. 2008). Based on our independent review of the record, we conclude that Irving cannot make a non-frivolous argument that his sentence was affected by the district court’s unsupported reference to “cages” in the child-pornography images. The district court’s explanation of its sentencing decision did not depend on this reference. Moreover, while the PSR does not support this specific factual assertion, it contains ample uncontested facts supporting the district court’s overall finding that the images portrayed sadistic or masochistic conduct. For instance, one of the images involved a child under the age of twelve being sexually assaulted while bound and blindfolded, and other images portrayed very young children being sexually abused by adult males. We therefore conclude that this potential factual error does not give rise to a meritorious argument Irving could raise on appeal.

States v. Blair, 933 F.3d 1271, 1274 (10th Cir. 2019) (quotation omitted). Here, the district court concluded that a 300-month sentence was necessary to reflect the seriousness of the offense, deter Irving and other potential offenders, and protect the public. The district court based this decision on the specific facts of this case, including the serious nature of the images involved, Irving’s lack of deterrence following the dismissal of his 2018 child-pornography case, and his discussions with other sexual abusers about prior and anticipated acts of child sexual abuse, such as his conversations with Alex about abusing a five-year-old boy known to Alex. The district court considered potential mitigating factors, such as the sexual abuse Irving experienced when he was a child, but the court ultimately concluded that these factors were outweighed by the factors warranting a longer sentence. Based on the seriousness of Irving’s conduct and the other factors highlighted by the district court, we agree with defense counsel that Irving cannot raise a non-frivolous argument that this decision fell outside the range of permissible choices available to the district court.

Our independent review of the entire record reveals no other potentially meritorious issues Irving could raise on appeal. We accordingly **GRANT** defense counsel’s motion to withdraw and **DISMISS** the appeal.

Entered for the Court

Michael R. Murphy
Circuit Judge