

APPENDIX D

SIXTH CIRCUIT APPELLATE COURT'S OPINION
SLIP OP. 17-1642

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 18a0083n.06

No. 17-1642

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Feb 20, 2018

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY WARREN VALLIER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
MICHIGAN

BEFORE: SILER, BATCHELDER, and DONALD, Circuit Judges.

PER CURIAM. Timothy Warren Vallier challenges the substantive reasonableness of his 264-month sentence. As set forth below, we affirm.

Pursuant to a written plea agreement, Vallier pleaded guilty to an information charging him with attempted sexual exploitation of children in violation of 18 U.S.C. § 2251(a) and (e) and possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). From 2012 to 2016, Vallier, a high school rowing coach, used a hidden camera to produce videos of minor female athletes dressing and undressing in changing rooms at the boathouse and another school building. Vallier also downloaded child pornography from the Internet and saved it to his computer. Vallier's total offense level of 43 and criminal history category of I corresponded to a guidelines term of life imprisonment, which was capped at 600 months by the statutory maximum sentences for the two counts of conviction. *See* 18 U.S.C. §§ 2251(e), 2252A(b)(2);

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USSG § 5G1.2(b). Granting a downward variance, the district court sentenced Vallier to a total of 264 months of imprisonment followed by five years of supervised release.

In this timely appeal, Vallier argues that his sentence is substantively unreasonable.¹ We review the substantive reasonableness of Vallier's sentence under a deferential abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 51-52 (2007). "The essence of a substantive-reasonableness claim is whether the length of the sentence is 'greater than necessary' to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a)." *United States v. Tristan-Madrigal*, 601 F.3d 629, 632-33 (6th Cir. 2010). "A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008). Given "that a sentence within the applicable guidelines range is presumptively reasonable . . . [,] a defendant attacking the substantive reasonableness of a *below*-guidelines sentence has an even heavier burden to overcome." *United States v. Elmore*, 743 F.3d 1068, 1076 (6th Cir. 2014); *see United States v. Greco*, 734 F.3d 441, 450 (6th Cir. 2013) ("Although it is not impossible to succeed on a substantive-reasonableness challenge to a below-guidelines sentence, defendants who seek to do so bear a heavy burden."). Vallier has not overcome that burden.

In support of his argument that his sentence is excessive, Vallier contends that the district court failed to consider fully a number of sentencing factors. In imposing the below-guidelines sentence, the district court recognized that Vallier did not upload the videos to the internet or otherwise distribute them and that there was no evidence of inappropriate physical contact with

¹ Vallier has withdrawn his challenge to the constitutionality of 18 U.S.C. § 2251(a) and his reliance on *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001), on the basis that this court acknowledged the abrogation of *Corp* in *United States v. Bowers*, 594 F.3d 522 (6th Cir. 2010).

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not target what he describes as the passive, surreptitious filming of teens who are simply changing clothes. Courts have repeatedly upheld convictions under § 2251(a) where the defendant, with lascivious intent, secretly videoed minors engaged in otherwise innocent activities such as undressing to change clothes or take a shower. *See, e.g., United States v. Miller*, 829 F.3d 519, 524-26 (7th Cir. 2016); *United States v. Holmes*, 814 F.3d 1246, 1251-52 (11th Cir. 2016); *United States v. Johnson*, 639 F.3d 433, 440-41 (8th Cir. 2011).

Finally, Vallier asserts that proposed guidelines amendments for first offenders underscore the substantive unreasonableness of his sentence. In granting a substantial variance, the district court acknowledged Vallier's lack of criminal history. Furthermore, even if Vallier were granted a one- or two-level reduction in accordance with the proposed amendments, his 264-month sentence would still fall below the corresponding guidelines range.

Vallier does not meet his burden to overcome the presumptive reasonableness of his sentence. For these reasons, we **AFFIRM** Vallier's sentence.

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