

APP 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30645
Summary Calendar

D.C. Docket No. 5:16-CR-246-1

United States Court of Appeals
Fifth Circuit

FILED
June 14, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

SHAWN ALUISO,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Louisiana

Before REAVLEY, GRAVES, and HO, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.



Certified as a true copy and issued
as the mandate on Jul 06, 2018

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

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Before REAVLEY, GRAVES, and HO, Circuit Judges.

PER CURIAM:*

J.H., the 16-year old girlfriend of Shawn Aluiso's cousin, Quince, was driven by Aluiso and Jacob Cuellar from Houston to a hotel in Shreveport for the purpose of engaging in prostitution, finding customers through ads Quince placed on the website backpage.com. Aluiso pleaded guilty to illegal transportation for prostitution and aiding and abetting and was sentenced to 100 months of imprisonment. On appeal, Aluiso contends that his sentence

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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erroneously included guidelines enhancements for unduly influencing a minor to engage in a prohibited sex act and for using an interactive computer service to induce, entice, coerce, or facilitate the travel of a minor to engage in prohibited sexual conduct. He also avers that he should not have received three criminal history points for his prior Texas aggravated assault conviction. Finding no merit to these arguments, we affirm.

A defendant receives a two-level enhancement if “a participant [in the sex offense] otherwise unduly influenced a minor to engage in prohibited sexual conduct.” U.S.S.G. § 2G1.3(b)(2)(B). Aluiso argues that it was Quince alone who convinced J.H. to engage in prostitution. This argument fails for two reasons. First, there is sufficient evidence of Aluiso’s own complicity in unduly influencing J.H.: he helped transport J.H. to Shreveport; he, Quince, and Cuellar forbade J.H. from leaving the Shreveport hotel; he, Quince, and Cuellar threatened J.H. not to talk to police; and J.H. expressed fear of repercussions from Aluiso’s and Quince’s families. *Cf. United States v. Anderson*, 560 F.3d 275, 283 (5th Cir. 2009). Second, even if Quince alone unduly influenced J.H., § 2G1.3(b)(2)(B) applies based on the conduct of *any* offense participant. To that end, Aluiso does not allege that Quince’s conduct was outside the scope of or not in furtherance of their joint criminal undertaking or that it was not reasonably foreseeable in connection with the offense. See U.S.S.G. § 1B1.3(a)(1)(B). On these facts, there was no error in applying the undue-influence enhancement to Aluiso. *See United States v. Fernandez*, 770 F.3d 340, 342, 344 (5th Cir. 2014).

A defendant also garners a two-level enhancement if a sex offense “involved the use of a computer or an interactive computer service to . . . entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor[.]” § 2G1.3(b)(3)(B). Aluiso contends that he had no knowledge that

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Quince or anyone else was posting backpage.com ads for J.H. He thus concedes that the offense involved the prohibited use of an interactive computer service. As above, Aluiso does not dispute that Quince's use of backpage.com was within the scope of and in furtherance of their joint criminal undertaking. *See* § 1B1.3(a)(1)(B)(i)-(ii). And given indications that Aluiso and Quince had long used backpage.com to prostitute women, it is plausible to find that Aluiso could reasonably foresee that Quince would do so here. *See* § 1B1.3(a)(1)(B)(iii); *United States v. Coleman*, 609 F.3d 699, 708 (5th Cir. 2010). Accordingly, the district court did not err in applying the § 2G1.3(b)(3)(B) enhancement. *See* *Fernandez*, 770 F.3d at 344-45.

Finally, a defendant receives three criminal history points for "each prior sentence of imprisonment exceeding one year and one month." U.S.S.G. § 4A1.1(a). Upon his conviction for aggravated assault, Aluiso received a deferred probation sentence of seven years, which was revoked—resulting in execution of the sentence—after his commission of the instant offense but before his federal sentencing. "A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence[.]" U.S.S.G. § 4A1.2, comment. (n.1). Accordingly, there was no error in calculating Aluiso's criminal history score. *See* *Fernandez*, 770 F.3d at 344-45. We do not take up Aluiso's wholly conclusory and unsupported assertion that the district court erred by "double dipping" in determining his criminal history score. *See* *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006).

AFFIRMED.

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1 this case it says a participant otherwise unduly influenced a
2 minor to engage in prohibited sexual conduct. So when you look
3 at the participants in this case, Quince Aluiso and Jacob
4 Cuellar, certainly their conduct can be viewed in light of what
5 was undue influence in this case.

6 THE COURT: I am not sure about that. But as the
7 Court indicates, at the time that this began, Quince was under
8 18 years of age.

9 MR. CAMPBELL: That's correct.

10 THE COURT: At the time of the arrest, he was what?
11 18 years and two months?

12 MR. CAMPBELL: Yes, ma'am.

13 THE COURT: The Court views that relationship as --
14 we have two kids here who had no place else to go: Quince and
15 J.H.

16 And the Court views Shawn's role in taking them on as a
17 different type of coercion, in addition to, as we said, the
18 threats of physical violence that -- an aura of physical
19 violence that was surrounding this. There was also that, that
20 relationship influence on them.

21 So whether or not you are correct; they could be a
22 participant, the Court sees that the relationship dynamic of
23 Shawn's influence on Quince and then Quince's influence on the
24 girlfriend stemming from Shawn's relationship with them all in
25 taking them in and providing them with a place. And they are

1 in his care, custody, and control, and this is what ends up
2 happening to them.

3 MR. CAMPBELL: And certainly I understand that -- the
4 Government certainly contends that there's enough evidence if
5 you just wanted to limit it to just specifically Shawn's
6 Aluiso's conduct.

7 THE COURT: And the Court does. And that would be
8 the Court's ruling. The Court believes that this is a factual
9 inquiry and there's sufficient facts contained in the PSR to in
10 fact overrule that objection because there's sufficient facts
11 of undue influence.

12 MR. GLASSELL: We would like our objection be noted.
13 And we have filed an objection to all those allegations of
14 threats and violence and everything, in which he denies any of
15 that.

16 You're accepting a PSR's statements of those acts that he
17 was threatening people and everything?

18 THE COURT: Yes, Mr. Glassell, and the Court would --
19 we will get to each of those objections in turn. It's
20 certainly my intention to take up each of your objections.

21 The Court would note that what the PSR reports is what
22 people said. And that is valid evidence in this court.

23 So the PSR, of course, under Fifth Circuit precedent is
24 inherently reliable. So if you want to dispute those facts,
25 you will need to put on your own evidence. When it comes to

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1 did not use a computer to communicate with the minor victim.

2 Finally, the defendant admits that he has no knowledge of
3 the *backpage.com* ad, but rather that Quince Aluiso was
4 responsible for the internet posting.

5 The Court notes that there is a Circuit split regarding
6 the interpretation of Commentary Note 4, but the Fifth Circuit
7 has foreclosed this argument for the defendant as a matter of
8 law. And we'll get to the matter of fact in a second.

9 In *United States versus Pringler*, P-R-I-N-G-L-E-R,
10 765 F.3d 445, Fifth Circuit, 2014, with the cert denied at
11 2015, the Fifth Circuit held that Note 4 is not authoritative;
12 and that instead, Section 2G1.3(b)(3), which is the two-level
13 enhancement about which we are talking, applies when a computer
14 is used to post advertisements on the internet.

15 So that the only factual issue before the Court is whether
16 or not Shawn Aluiso knew of the *backpage.com* ad, or even if
17 not, whether he can be held responsible for it under 1B1.3.
18 And of course that section provides that in the case of jointly
19 undertaking activity, the defendant is held responsible for all
20 acts and omissions of others that were within the scope of the
21 jointly undertaken criminal activity in furtherance of the
22 criminal activity and reasonably foreseeable in connection with
23 that criminal activity that occurred during the commission of
24 or in preparation of the instant offense.

25 The facts that we do have in this case are that the --

1 this was how they operated; that all of the women had
2 backpage.com ads that were posted and this is how they
3 advertised, in general.

4 So the Court would ask if the Government has any further
5 information to link Shawn Aluiso with the Backpage ads and his
6 knowledge of the Backpage ads.

7 MR. CAMPBELL: Your Honor, the Government's position
8 is that the defendant knew that Backpage ads were being used,
9 but that we have no evidence to present to the Court that he
10 actually placed them on that page, but that he knew as part of
11 this whole activity, that Backpage ads would be used to
12 advertise for the young ladies in this case.

13 THE COURT: What is your information to that effect,
14 to prove that fact that he knew of the fact that that was the
15 M.O.?

16 MR. CAMPBELL: Your Honor, the Government would like
17 to present some evidence. I think it may be outside of what's
18 in the PSR.

19 THE COURT: Okay.

20 MR. CAMPBELL: The Government would like to present
21 some evidence.

22 THE COURT: Okay. At this time, Mr. Alsup and Mr.
23 Glassell, you can have a seat and we are going to hear some
24 testimony on this issue.

25 We'd ask that the witness be sworn.

1 GOVERNMENT'S WITNESS, CHRIS PLANTS, SWORN

2 DIRECT EXAMINATION

3 BY MR. CAMPBELL:

4 Q Good afternoon, sir.

5 A Good afternoon.

6 Q Will you please state your name for the record.

7 A My name is Chris Plants, P-L-A-N-T-S.

8 Q And you are with the FBI?

9 A Yes, sir. Special Agent with the FBI.

10 Q And you are the case agent who -- or lead case agent in
11 this case?

12 A Yes, sir.

13 Q And were you present when you heard the Court inquiry
14 about whether or not the defendant knew about ads being placed
15 on *backpage*?

16 A Yes, sir.

17 Q And do you have any information to advise the Court as to
18 that particular issue?

19 A There were *Backpage* ads. We have the J.H. *Backpage* ads.

20 The other young ladies told us that they had *Backpage* ads.

21 Quince was supposed to -- well, I was told by J.H. and by
22 Ashley that Quince was the one that put J.H. *Backpage* ad on.
23 And I was told Ashley, Ashley from herself, that she did put
24 the other *Backpage* out.

25 Q Now, who is Ashley?

1 A Ashley Florez is the mother of Shawn Aluiso's children,
2 who was in the room with her baby.

3 Q Now, what -- other than the relationship as far as the
4 sharing the parentage of a child, is there any other
5 relationship that the two have?

6 A Ashley and Shawn?

7 Q And Shawn, yes.

8 A They are boyfriend/girlfriend. Is that what you're
9 asking?

10 Q Yes.

11 A Yes, sir.

12 Q And was there ever any communications between Ashley and
13 Shawn?

14 A Amanda Hinton stated that Shawn tells Ashley what to do
15 and then Ashley tells the other ladies what to do.

16 Q And what is entailed in these communications far as being
17 instructions?

18 A Usually the instructions are -- she didn't say that this
19 entailed, but from other cases, you know, how much to charge an
20 hour, what to talk to the johns about. You know, there again,
21 what's in the *Backpage* ads, how much, what numbers they are
22 calling from the *Backpage* ads.

23 Q Now, let's talk about the nature of the prostitution
24 that's taking place in this case. Based on the information you
25 have far as talking to the ladies involved, J.H. and the two

1 other ladies involved --

2 A Yes, sir.

3 Q -- was this going to be prostitution kind of activity
4 where they were walking the streets?

5 A No, sir.

6 Q Would it be a situation where it can just be strictly by
7 phone?

8 A Phone.

9 Q Okay. And how would they get the numbers?

10 A From the *Backpage* ads.

11 Q And let me ask you this. Far as J.H., did Shawn, was
12 Shawn Aluiso and other members of this conspiracy, if you will,
13 were they involved in the prostitution of J.H. prior to them
14 arriving in Shreveport?

15 A Yes, sir.

16 Q Please explain that to the Court.

17 A J.H. had stated that they had been prostituting in the
18 Houston area with Shawn Aluiso and Quince Aluiso.

19 Q And how did that prostitution work?

20 A The same thing: *Backpage* ads was how they advertised for
21 that prostitution.

22 Q So, Shawn Aluiso and Quince Aluiso was involved in
23 prostitution in the Houston area using *Backpage* ads?

24 A Yes, sir.

25 Q And based on your investigation, did they continue that

1 same M.O.?

2 A Yes, sir.

3 Q Okay. And based on your investigation, do you have any
4 information to advise the Court that suggests that Shawn Aluiso
5 did not know that *Backpage* was being used to advertise the
6 services?

7 A No, sir.

8 MR. CAMPBELL: No further questions, Your Honor.

9 THE COURT: Mr. Glassell, excuse me. Before you turn
10 to cross, the Court has a question; and by doing it now, that
11 will allow you to cross on the Court's question as well.

12 Do we know whose phone number it was, sir, that was used?

13 THE WITNESS: I don't, Your Honor. I do not.

14 THE COURT: Mr. Glassell?

15 CROSS-EXAMINATION

16 BY MR. GLASSELL:

17 Q Did somebody tell you it was Quince's phone number on the
18 *Backpage* ad?

19 A Yes. Yes, sir. J.H. said that it was Quince's phone
20 number. Yes, sir. Yes, sir. I had forgot that; I apologize.

21 Q And did J.H. say that Quince is the one that placed the
22 ad?

23 A Yes, sir.

24 Q Did J.H. -- did you question J.H. about who placed the ads
25 in Houston?

1 A I did not, no, sir.

2 Q So -- but here in Shreveport, the ad was placed by Quince
3 and it was his phone number?

4 A Yes, sir.

5 Q And she was staying in the room with Quince?

6 A She was staying in the room with Quince.

7 Q Okay. Was there anything in the ad that would indicate by
8 any language or any writing in the ad that she was a minor?

9 A No, sir.

10 MR. GLASSELL: Nothing further.

11 REDIRECT EXAMINATION

12 BY MR. CAMPBELL:

13 Q Who purchased the room that J.H. was -- that you
14 discovered J.H. in?

15 A The receipt was in Shawn Aluiso's name.

16 Q And it was two rooms, correct? I mean, two rooms total?

17 A Two rooms total, yes, sir.

18 Q But the room that J.H. was found was Shawn's?

19 A Yes, sir.

20 MR. CAMPBELL: No further questions.

21 THE COURT: Thank you, sir. All right. Are we
22 finished with this gentleman? He may step down?

23 Any argument, Mr. Glassell?

24 MR. GLASSELL: We just don't think there has been any
25 evidence that showed that he connected at all to placing an

1 ad -- to link him to the ad, the *Backpage* ad that Quince put
2 for Shawn.

3 THE COURT: All right. The Court is going to
4 overrule the objection on the following basis.

5 The ads were the method by which the women were advertised
6 and how contact was made. As head of this operation, Shawn
7 Aluiso, especially as it pertains to the minor, was the -- had
8 to know that that is how business was drummed up. And,
9 therefore, the Court is going to overrule this, since this is
10 part of the modus operandi for this enterprise.

11 MR. GLASSELL: You are denying the objection?

12 THE COURT: I am overruling the objection; that is
13 correct.

14 MR. GLASSELL: I would like our objection noted to
15 the ruling.

16 THE COURT: It is, sir.

17 The next is paragraph -- you objected to the leadership
18 enhancement. That was removed from the PSR --

19 MR. GLASSELL: Yes, ma'am.

20 THE COURT: -- and that objection is now moot.

21 Paragraph 50. The defendant objects to this paragraph and
22 that assigns three criminal history points for a 2015
23 aggravated assault conviction arising out of Brazoria County,
24 Texas. The Defense argues that only one point should be
25 assigned for this conviction, as he was sentenced to probation,

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1 before the date of the offense in federal court. And that you
2 would obviously -- and I've always thought you look at what is
3 the, the sentence would be, what was the sentence imposed after
4 the probation was revoked. And that's what I think that
5 statute is aimed at, either probation or parole in state court
6 that all happens before, before the offense in federal court.
7 And that's why I think they put that in, so there would be no
8 confusion that if somebody got a state court probation on, say,
9 a drug case in state court and they violated the probation and
10 they went back and were sentenced for that, and then they
11 committed a federal offense, obviously, if the sentence was
12 more than a year, they would get three points. And I think
13 that's what that's saying there.

14 THE COURT: Thank you, sir, for your argument.

15 The Court is going to overrule that objection for the
16 reasons that the Court has enunciated and for the reasons set
17 out in Probation's response to the objection. I think that the
18 defense attorney's objection ignores the language of Commentary
19 Application Note 1, which defines "prior sentence" and would
20 like to make that time period different from the "sentence of
21 imprisonment" in number 2. So the Court would overrule that
22 objection.

23 MR. GLASSELL: I'd like our objection noted to the
24 Court's ruling.

25 THE COURT: Thank you, Mr. Glassell.