NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 18a0530n.06

Case No. 17-4251

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 24, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
JAMES D. SULLIVAN,	)	OHIO
	)	
Defendant-Appellant.	)	
	)	

BEFORE: MERRITT, COOK, and LARSEN, Circuit Judges.

COOK, Circuit Judge. The district court denied Defendant James Sullivan's motion to suppress, motion in limine, and motion to withdraw his guilty plea. It then varied upward from the advisory Guidelines range and sentenced Sullivan to twenty years in prison. Sullivan appeals each of those decisions. We AFFIRM.

I.

Sullivan served approximately thirty years for attempted rape and gross sexual imposition of four children. In 2014, he left prison a convicted sex offender. Less than a year later, a woman showering at a state park observed a camera protruding from a displaced ceiling tile and alerted the police; the Ohio State Highway Patrol identified Sullivan as a suspect. Trooper Eric Souders executed several search warrants that permitted him to obtain a DNA sample from Sullivan, search Sullivan's vehicle and apartment, and seize and search electronic devices found there.

APPENDIX A

The searches revealed that (1) Sullivan's DNA matched semen found on a ceiling tile in the attic above the state park shower, (2) Sullivan owned a camera matching the description given by the showering woman, and (3) a laptop found in Sullivan's apartment contained dozens of child pornography images.

A grand jury later charged Sullivan with knowingly accessing with intent to view child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), and attempted production of child pornography, in violation of 18 U.S.C. § 2251(a). Sullivan moved to suppress, challenging probable cause and particularity for the searches of his vehicle, apartment, and laptop. He also moved to exclude evidence of his prior child molestation offenses. At the final pretrial hearing, the district court heard oral argument and denied both of Sullivan's motions.

After the district court denied his motions, Sullivan agreed to plead guilty. A magistrate judge duly administered the plea proceedings, in which Sullivan pleaded guilty to Count One of the indictment—knowingly accessing with intent to view child pornography. Two months later, on July 3, 2017, the district court approved and filed the written plea agreement. On July 5, the district court adopted the magistrate's report without objection.

Over a week later, the district court received a letter from Sullivan, dated July 5, purporting to withdraw his guilty plea. The district court held a hearing and denied Sullivan's motion to withdraw the plea based on our decision in *United States v. Bashara*, 27 F.3d 1174 (6th Cir. 1994).

At sentencing, the district court calculated an advisory Guidelines range of 135 to 168 months in prison, but varied upward and imposed the statutory maximum sentence of 240 months.

II.

A. Motion to suppress

When a district court denies a motion to suppress, we review factual findings for clear error and legal conclusions de novo. *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005). On appeal, Sullivan challenges two aspects of the district court's denial of his motion to suppress: (1) probable cause supporting the search warrants executed on his vehicle, apartment, and computer, and (2) the particularity of these warrants.

Probable cause

"[N]o [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. An affidavit demonstrates probable cause when it contains facts establishing "a 'fair probability' that evidence of a crime will be located on the premises of the proposed search." *United States v. Jenkins*, 396 F.3d 751, 761 (6th Cir. 2005) (quoting *United States v. Bowling*, 900 F.2d. 926, 930 (6th Cir. 1990)). This conclusion depends on the totality of the circumstances, a "practical, nontechnical conception" dealing with the "factual and practical considerations of everyday life." *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quotations omitted).

The affidavits supporting the searches of Sullivan's apartment and vehicle overwhelmingly established probable cause to believe that Sullivan committed voyeurism, burglary, and possession of criminal tools. They stated that Sullivan's DNA profile matched semen found in the attic of the park shower, he had downloaded software and a user's manual for a camera matching the description given by the showering victim, he was a convicted sex offender, and when questioned, he admitted to visiting the county in which the park sits. These facts established a "fair probability" that investigators would find evidence related to the state park incident in Sullivan's vehicle and

apartment. *See Jenkins*, 396 F.3d at 761. Moreover, the file names uncovered by the preliminary analysis of Sullivan's laptop established a fair probability that additional evidence relating to child pornography would be found on the laptop. *See id.*

Sullivan cites a Third Circuit case for the argument that the sexually explicit file names found in relation to his laptop were insufficient to support probable cause for a search. *See United States v. Miknevich*, 638 F.3d 178, 185 (3rd Cir. 2011). But *Miknevich* says quite the opposite. It makes clear that a magistrate can determine probable cause by relying on a computer file's highly suggestive name without viewing its contents. *Id.* at 183–84. The file names discovered in the preliminary search of Sullivan's laptop here, such as one named "littlegirl uncensored porn," plainly satisfied this standard.

Sullivan makes much of the fact that Trooper Souders could not determine precisely when he left his semen in the attic of the state park shower, arguing that "at least some temporal reference point is necessary" to ascertain probable cause. *See United States v. Hython*, 443 F.3d 480, 486 (6th Cir. 2006). But the totality of the circumstances—Sullivan's semen on the ceiling tile, his ownership of a user's manual for a camera matching the one described by the victim, and his criminal past—made it reasonable to conclude that Sullivan was at the state park on or near July 18, and that evidence of criminal behavior would be found in his apartment and vehicle.

Finally, Sullivan challenges the nexus between the crime and the locations searched. But Trooper Souders attested that, based on his training and experience, digital images can be downloaded onto digital storage devices that individuals typically keep in their homes or vehicles. *See United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) ("To justify a search, the circumstances must indicate why evidence of illegal activity will be found 'in a particular place.'"). As for the search of Sullivan's laptop, the affidavit established that several child pornography files

were stored on a removable device connected to the laptop and that removable devices often leave remnants of transfers of child pornography files. *See id.* at 594–95. Thus, the district court properly concluded that probable cause supported each search warrant.

Particularity

As to particularity, Sullivan's arguments also fall short. "[I]tems to be seized pursuant to a search warrant must be described with particularity to prevent 'the seizure of one thing under a warrant describing another.'" *United States v. Blair*, 214 F.3d 690, 697 (6th Cir. 2000) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). Nevertheless, "the degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought." *United States v. Henson*, 848 F.2d 1374, 1383 (6th Cir. 1988). "[A] description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit." *Id.* (quoting *United States v. Blum*, 753 F.2d 999, 1001 (11th Cir. 1985)).

The search warrants for Sullivan's vehicle, apartment, and computer were all sufficiently particular. The warrants for the vehicle and apartment authorized seizure of equipment that could store digital photos taken at the state park, like digital cameras, CDs, DVDs, SD cards, thumb drives, and portable hard drives. At the time of their issuance, Souders only knew that the suspect used a digital camera and did not have any information about where the photos taken by the suspect might be stored. Because Souders could not have been any more specific in his descriptions of the equipment and storage devices, the descriptions in the warrants were proper. *See United States v. Blakeney*, 942 F.2d 1001, 1027 (6th Cir. 1991) ("When a more specific description of the items to be seized is unavailable, a general description will suffice."). The search of Sullivan's apartment yielded a Dell laptop, and a preliminary Secret Service analysis of the laptop revealed four sexually explicit file names referencing children. The search warrant for the laptop listed the four file names

and detailed descriptions of electronic materials—such as files, electronic records, and browsing history—related to the sexual exploitation of juveniles. Thus, the computer search warrant described the items sought with sufficient particularity.

Sullivan cites *Wheeler v. City of Lansing*, 660 F.3d 931 (6th Cir. 2011), to argue that the item descriptions in the apartment and vehicle warrants were overbroad. In *Wheeler*, we found a warrant overbroad because it failed to distinguish between stolen items and personal property. 660 F.3d at 941–42. In addition, the law enforcement officers in *Wheeler* knew specific information about the property, such as the brand names of stolen cameras, but failed to include that information in the warrant. *Id.* Neither problem plagues the warrants here because no stolen property was at issue and investigators did not hide known information. Because Trooper Souders knew only that the suspect may have used a digital camera at the state park, the digital storage devices listed in the warrants were as specific as possible under the circumstances.

Sullivan attacks the particularity of the laptop search warrant because it did not narrow the search to materials accessed within a specific timeframe. He points to *United States v. Lazar* for the proposition that a warrant must be limited to relevant dates. 604 F.3d 230, 238 (6th Cir. 2010). But the failure to specify a timeframe does not make this detailed warrant overbroad. *See United States v. Ford*, 184 F.3d 566, 578 (6th Cir. 1999) ("[E]ven though [portions of the warrant] do not contain a time limitation, their subject-matter limitation . . . fulfills the same function as a time limitation would have done, by limiting the warrant to evidence of the crimes described in the affidavit."). Here, as in *Ford*, the laptop warrant specified a subject-matter limitation sufficient to limit the warrant to evidence of the crimes described in the affidavit—namely, files related to child pornography.

The district court properly found that each warrant satisfied the particularity requirements of the Fourth Amendment. Because the search warrants were supported by probable cause and sufficiently particular, we need not apply *United States v. Leon*'s good faith exception. 468 U.S. 897 (1984). The district court therefore properly denied Sullivan's motion to suppress.

B. Evidence of prior acts of child molestation

After the government notified the district court of its intent to offer evidence of Sullivan's prior child molestation under Rules 414 and 404(b) of the Federal Rules of Evidence, the court denied Sullivan's motion to exclude such evidence. The court found that both counts of the indictment alleged "child molestation" under Rule 414(d)(2)(B), making prior acts of child molestation available to show propensity. The court also deemed evidence of prior child molestation admissible under Rule 404(b) to prove intent, motive, and absence of mistake on both counts. Finally, the district court found the prior acts evidence prejudicial, but not unfairly so. Sullivan challenges each finding.

Rule 414

Sullivan first argues that Rule 414 should not have applied to the second count of the indictment—production of child pornography—because it does not charge a child molestation offense. We review a district court's Rule 414 admission of prior acts of child molestation for abuse of discretion. *United States v. Underwood*, 859 F.3d 386, 393 (6th Cir. 2017).

Motivated by public policy, Rule 414 creates an exception to Rule 404(b)'s general ban on propensity evidence in child molestation cases. *See United States v. Seymour*, 468 F.3d 378, 384–85 (6th Cir. 2006). The rule applies "[i]n a criminal case in which a defendant is accused of child molestation." Fed. R. Evid. 414(a). Rule 414 defines "child molestation" to include attempted production of child pornography, as found in Count Two of Sullivan's indictment. Fed. R. Evid.

414(d)(2)(B). Thus, evidence of Sullivan's prior child molestation was admissible to show propensity. Sullivan disputes the factual basis of Count Two; this did not factor into the district court's admissibility determination because the indictment accuses Sullivan of "child molestation" under the statute.

Sullivan next argues that the district court failed to conduct a sufficiently thorough Rule 403 balancing of probative value with respect to the Rule 414 evidence. But "[i]f Rule 403 could be employed so easily to keep out instances of child molesting, Rule 414 would be effectively gutted." *United States v. Sanchez*, 440 F. App'x 436, 439–40 (6th Cir. 2011). Categorical exclusions of "inflammatory propensity evidence" are "precisely [what] Congress intended to overrule" by enacting Rule 414. *Id.* at 440 (alteration in original) (*quoting United States v. Stout*, 509 F.3d 796, 802 (6th Cir. 2007)). The district court thus correctly found Sullivan's prior acts not unfairly prejudicial.

Rule 404(b)

Sullivan also challenges the admissibility of his prior acts of child molestation under Rule 404(b). Mirroring the district court's three-step analysis, "[w]e review for clear error the district court's factual determination that the other act occurred; we examine de novo the court's legal determination that evidence of the other act is admissible for a proper purpose; and we review for abuse of discretion the court's determination that the probative value of the evidence is not substantially outweighed by a risk of unfair prejudice." *United States v. Barnes*, 822 F.3d 914, 920–21 (6th Cir. 2016). Panels in this circuit have long debated the appropriate standard of review in cases of this nature. *See, e.g.*, *United States v. Williams*, 662 F. App'x 366, 374 (6th Cir. 2016) (collecting cases). But regardless of the applicable standard, if Sullivan's argument fails under the "tripartite" standard of review, it also fails the less-stringent abuse of discretion standard. *See*

United States v. Clay, 667 F.3d 689, 702–03 (6th Cir. 2012) (Kethledge, J., dissenting). Indeed, other panels have determined that these two standards of review do not conflict. *See, e.g., United States v. Geisen*, 612 F.3d 471, 495 (6th Cir. 2010).

Rule 404 allows a district judge to admit prior acts evidence when it is introduced for a purpose other than to show character, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). A three-step process governs the admissibility of Rule 404(b) evidence:

> *First*, the district court must decide whether there is sufficient evidence that the other act in question actually occurred. *Second*, if so, the district court must decide whether the evidence of the other act is probative of a material issue other than character. *Third*, if the evidence is probative of a material issue other than character, the district court must decide whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect.

United States v. Jenkins, 345 F.3d 928, 937 (6th Cir. 2003).

First, Sullivan challenges the district court's determination that the prior acts occurred. The government sought to introduce the testimony of four individuals who Sullivan sexually assaulted or attempted to assault as children, testimony of the Bay Village Police Department, and a document certifying Sullivan's prior convictions for sex-related crimes. In his motion, Sullivan challenged the sufficiency of the evidence for certain offenses committed in October 1982, and an alleged admission to possession of child pornography made to the Bay Village Police. At the motion hearing, the district court explained the first step of the 404(b) analysis and asked Sullivan if he "seriously disput[ed] that these prior offenses occurred." Sullivan did not dispute the prior convictions. The court went on to find the prior acts evidence admissible, implicitly deciding that the acts occurred. *See United States v. Sandoval*, 460 F. App'x 552, 562 (6th Cir. 2012) (stating that a prior act finding "need not be express, but rather, may be implicit by virtue of the fact that the court admitted the evidence") (quoting *United States v. Matthews*, 440 F.3d 818, 828 (6th Cir.

2006)). On appeal, Sullivan argues that the government lacks proof of one victim's assault. But because Sullivan never seriously disputed the government's proffered evidence with regard to this victim until this appeal, the district court did not clearly err in determining that the prior acts occurred.

Second, Sullivan argues that the district court improperly found that his prior acts were probative of intent. Sullivan does not dispute that his intent materially affects the outcome in this case, but citing two Sixth Circuit drug cases, he argues that the prior acts were too dissimilar and remote to be probative. *See United States v. Haywood*, 280 F.3d 715, 721 (6th Cir. 2002); *United States v. Bell*, 516 F.3d 432, 443 (6th Cir. 2008). The district court did not err in finding Sullivan's prior acts probative of intent. Sullivan previously sexually abused children, broke into houses to commit sexual acts against children, and produced child pornography of some of these acts with a camera. These prior acts evince an intent to view and produce child pornography. Additionally, as Sullivan conceded at the hearing, Rule 404(b) does not contain a time limit. And even if Sullivan's prior acts were not probative of intent, Sullivan does not dispute the district court's finding that the acts were also admissible to show motive and absence of mistake.

Third, Sullivan argues that the district court abused its discretion in finding the prior acts evidence not unfairly prejudicial. Not so. As discussed above, the proffered evidence of Sullivan's previous child molestation was highly probative of Sullivan's motive and intent in committing the charged crimes. The prior acts evidence was prejudicial, but not unfairly so. *See, e.g.*, *United States v. LaVictor*, 848 F.3d 428, 448 (6th Cir. 2017); *Underwood*, 859 F.3d at 393–94 (Rule 414 evidence). As such, the district court did not abuse its "very broad" discretion in admitting the prior acts evidence. *United States v. Newsom*, 452 F.3d 593, 603 (6th Cir. 2006).

C. Motion to withdraw guilty plea

We review a district court's denial of a motion to withdraw a guilty plea for abuse of discretion. *United States v. Haygood*, 549 F.3d 1049, 1052 (6th Cir. 2008). "A district court abuses its discretion where 'it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard.'" *Id.* (quoting *United States v. Spikes*, 158 F.3d 913, 927 (6th Cir. 1998)).

After holding a hearing, the district court denied Sullivan's motion to withdraw his guilty plea. Sullivan first argues that he filed his motion to withdraw on the same day that the district court accepted his plea. He asserts that because his motion is dated July 5, the prison mailbox rule applies to permit his withdrawal "for any reason or no reason." Fed. R. Crim. P. 11(d)(1). But even accepting that Sullivan mailed his motion on July 5, he submitted it two days after the district court approved and filed the plea agreement on July 3. As a result, the "any reason" standard does not come into play.

Sullivan next disputes the district court's conclusion that no "fair and just reason" existed to withdraw the plea. *See* Fed. R. Crim. P. 11(d)(2)(B). Withdrawal "is not an absolute right but is a matter within the broad discretion of the district court." *United States v. Kirkland*, 578 F.2d 170, 172 (6th Cir. 1978) (per curiam); *see also United States v. Spencer*, 836 F.2d 236, 238 (6th Cir. 1987). To prevail, the defendant must show "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). A district court consults several factors to make this determination:

> (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had

> prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted.

Bashara, 27 F.3d at 1181.

The district court did not abuse its discretion in denying Sullivan's motion. It considered each of the *Bashara* factors and concluded that every one of them weighed against withdrawal. On appeal, Sullivan largely ignores the district court's *Bashara* factor analysis, instead arguing that his plea was not knowing, voluntary, and intelligent because of circumstances surrounding the plea. Despite Sullivan's current assertions otherwise, circumstances surrounding the plea demonstrate that Sullivan knowingly and voluntarily entered it. For example, during the plea colloquy, Sullivan stated under oath that he was satisfied with his attorney, understood the plea agreement and potential sentence, voluntarily entered into the agreement, and had not been pressured to plead guilty. He again affirmed as much when he signed the plea agreement itself. Furthermore, as the district court pointed out in its written opinion, Sullivan waited over two months to pen his withdrawal letter, has never squarely argued his innocence, is well-versed in the criminal justice system, and would prejudice the government by revoking his plea. *See United States v. Goddard*, 638 F.3d 490, 493–94 (6th Cir. 2011) ("[W]ithdrawal of guilty pleas is designed 'to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty.'") (quoting *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991)).

Sullivan also argues that the district court's bias and the absence of a factual basis for the charges taint his plea. These arguments are unconvincing. Sullivan cites two of the district court's statements from the motion hearing for the bias proposition. But Sullivan's citations are misleading and part of a broader, balanced consideration of the issues. As to Sullivan's lack of

factual basis claim, it relies on a legal argument unrecognized by this court—that digital files are not covered by 18 U.S.C. § 2252A(a)(5)(B). *See, e.g.*, *United States v. Gray*, 641 F. App'x 462, 467–68 (6th Cir. 2016) (treating digital files as "material" sufficient to violate § 2252A(a)(5)(B)).

Accordingly, the district court did not abuse its discretion in denying Sullivan's motion to withdraw his guilty plea.

D. Sentencing

We review sentencing decisions for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). First, we ensure that the district court committed no procedural error, "such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Id.* If the decision is procedurally sound, we consider the substantive reasonableness of the sentence under an abuse of discretion standard. *Id.* A defendant's claim "that a sentence is substantively unreasonable is a claim that a sentence is too long." *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). "The point is not that the district court failed to consider a factor or considered an inappropriate factor; that's the job of procedural unreasonableness." *Id.* Rather, a substantive unreasonableness claim is "a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual." *Id.* "[I]f the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness . . . [and] must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Gall*, 552 U.S. at 51. The fact that we "might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.*

Sullivan's arguments about his sentence do not distinguish between procedure and substance. He first challenges the sufficiency of the district court's statement of reasons for his sentence. Review of the sentencing transcript confirms that the district judge considered Sullivan's history of reoffending whenever given the opportunity. Based on Sullivan's history, the court explained that it believed him likely to reoffend despite his age and reasoned that the interests of society mandated an upward variance. Sullivan also makes the bare assertion that the district court disproportionately weighed the seriousness of his offense and his criminal history. This argument "boils down to an assertion that the district court should have balanced the § 3553(a) factors differently," and is beyond the scope of our review. *United States v. Sexton*, 512 F.3d 326, 332 (6th Cir. 2008). Because the district court considered all the relevant sentencing factors and concluded that it could not trust Sullivan "back [in] society after 168 months," its twenty-year sentence is not substantively unreasonable. The court therefore did not abuse its discretion.

III.

We AFFIRM.

ECF 66

UNITED STATES OF AMERICA, Plaintiff, v. JAMES D. SULLIVAN, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION
2017 U.S. Dist. LEXIS 103583
CASE No. 1:16CR155
May 3, 2017, Decided
May 3, 2017, Filed

Editorial Information: Subsequent History

Adopted by, Judgment entered by United States v. Sullivan, 2017 U.S. Dist. LEXIS 103543 (N.D. Ohio, July 5, 2017)Motion granted by, Motion denied by United States v. Sullivan, 2017 U.S. Dist. LEXIS 118896 (N.D. Ohio, July 28, 2017)

Counsel For James D. Sullivan, Defendant: Charles E. Fleming, LEAD ATTORNEY, Claire Cahoon Curtis, Office of the Federal Public Defender - Cleveland, Cleveland, OH.
For United States of America, Plaintiff: Michael A. Sullivan, Office of the U.S. Attorney - Cleveland, Northern District of Ohio, Cleveland, OH.

Judges: George J. Limbert, United States Magistrate Judge. JUDGE BENITA Y. PEARSON.

Opinion

Opinion by: George J. Limbert

Opinion

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to General Order 99-49, this case was referred on May 2, 2017, to United States Magistrate Judge George J. Limbert for the purposes of receiving, on consent of the parties, Defendant James D. Sullivan's proffer of a plea of guilty, conducting the colloquy prescribed by Fed. R. Crim. P. 11, causing a verbatim record of the proceedings to be prepared, conducting a presentence investigation, and submitting a Magistrate Judge's Report and Recommendation stating whether the plea should be accepted and a finding of guilty entered. ECF Dkt. #64. The following, along with the transcript or other record of the proceedings submitted herewith, constitutes the Magistrate Judge's Report and Recommendation concerning the plea of guilty proffered by Defendant Sullivan.

1. On May 3, 2017, Defendant James D. Sullivan, accompanied by Federal Public Defender Charles E. Fleming, executed a consent to referral of his case to a United States Magistrate Judge for the purpose of receiving his guilty plea.

2. Defendant Sullivan then proffered a plea of guilty to Count One of the Indictment.

3. Prior to such proffer, Defendant Sullivan was examined as to his competency, advised of the charges and consequences of conviction, informed that the Court is not bound to apply the Federal Sentencing Guidelines but must consult the guidelines and take them into consideration when it imposes the sentence and of the possibility of a departure from the Guidelines, notified of his rights,

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

APPENDIX C

advised that he was waiving all of his rights except the right to counsel, and, if such were the case, his right to appeal, and otherwise provided with the information prescribed in Fed. Crim. R. 11.

4. The undersigned was advised that a written plea agreement existed between the parties, and no other commitments or promises have been made by any party, and no other written or unwritten agreements have been made between the parties.

5. The undersigned questioned Defendant Sullivan under oath about the knowing, intelligent, and voluntary nature of the plea of guilty, and the undersigned believes that Defendant Sullivan's plea was offered knowingly, intelligently, and voluntarily.

6. The parties provided the undersigned with sufficient information about the charged offenses and Defendant Sullivan's conduct to establish a factual basis for the plea.

In light of the foregoing, and the record submitted herewith, the undersigned concludes that Defendant Sullivan's plea was knowing, intelligent, and voluntary, and all requirements imposed by the United States Constitution and Fed. R. Crim. P. 11 have been satisfied.

Accordingly, the undersigned recommends that the plea of guilty be accepted and a finding of guilty be entered by the Court as to Count One of the Indictment.

Date: May 3, 2017

/s/ George J. Limbert

George J. Limbert

United States Magistrate Judge

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

63990060

ECF 73

UNITED STATES OF AMERICA, Plaintiff, v. JAMES D. SULLIVAN, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION
2017 U.S. Dist. LEXIS 103543
CASE NO. 1:16-CR-155
July 5, 2017, Decided
July 5, 2017, Filed

Editorial Information: Prior History

United States v. Sullivan, 2017 U.S. Dist. LEXIS 103583 (N.D. Ohio, May 3, 2017)

Counsel For James D. Sullivan, Defendant: Charles E. Fleming, LEAD ATTORNEY, Clsire Cahoon Curtis, Office of the Federal Public Defender - Cleveland, Cleveland, OH.

For United States of America, Plaintiff: Michael A. Sullivan, Office of the U.S. Attorney - Cleveland, Northern District of Ohio, Cleveland, OH.

Judges: Benita Y. Pearson, United States District Judge.

Opinion

Opinion by: Benita Y. Pearson

Opinion

ORDER

This matter is before the Court upon Magistrate Judge George J. Limbert's Report and Recommendation ("R&R") that the Court accept Defendant James D. Sullivan's ("Defendant") plea of guilty and enter a finding of guilty against Defendant. ECF No. 66.

On May 17, 2016, the Government filed an Indictment against Defendant alleging violations of 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2251(a), access with intent to view child pornography and attempted production of child pornography, respectively. ECF No. 14. Thereafter, Defendant notified the Court of Defendant's intent to enter a plea of guilty. ECF No. 63. The Court issued an order referring the matter to Magistrate Judge Limbert for the purpose of receiving Defendant's guilty plea. ECF No. 64.

On May 3, 2017, Magistrate Judge Limbert held a hearing during which Defendant consented to the order of referral (ECF No. 65) and entered a plea of guilty as to Count 1of the Indictment. Magistrate Judge Limbert received Defendant's guilty plea and issued a Report recommending that this Court accept Defendant James D. Sullivan's plea and enter a finding of guilty. ECF No. 66.

The time limitation to file objections to the Magistrate Judge's Report and Recommendation has expired and neither party has filed objections or requested an extension of time.

Fed. R. Crim. P. 11(b) states:

> Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

APPENDIX D

63990060

oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (C) the right to a jury trial; (D) the right to be represented by counsel-and if necessary have the court appoint counsel-at trial and at every other stage of the proceeding; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere; (G) the nature of each charge to which the defendant is pleading; (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (I) any mandatory minimum penalty; (J) any applicable forfeiture; (K) the court's authority to order restitution; (L) the court's obligation to impose a special assessment; (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

The undersigned has reviewed the transcript and the Magistrate Judge's R&R and finds, that in his careful and thorough proceeding, Magistrate Judge Limbert satisfied the requirements of Fed. R. Crim. P. 11 and the United States Constitution. Defendant was placed under oath and determined to be competent to enter a plea of guilty. Defendant was made aware of the charges and consequences of conviction and his rights and waiver thereof. Magistrate Judge Limbert also correctly determined that Defendant had consented to proceed before the magistrate judge and tendered his plea of guilty knowingly, intelligently and voluntarily. Furthermore, the magistrate judge also correctly found that there was an adequate factual basis for the plea.

Upon *de novo* review of the record, the Report and Recommendation is adopted. Therefore, Defendant James D. Sullivan is adjudged guilty of Count 1 of the Indictment, access with intent to view child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).

IT IS SO ORDERED.

July 5, 2017
Date

/s/ Benita Y. Pearson

Benita Y. Pearson

United States District Judge

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

63990060

ECF # 82

UNITED STATES OF AMERICA, Plaintiff, v. JAMES D. SULLIVAN, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION
2017 U.S. Dist. LEXIS 118896
CASE NO. 1:16CR155
July 28, 2017, Decided
July 28, 2017, Filed

Editorial Information: Prior History

United States v. Sullivan, 2017 U.S. Dist. LEXIS 103583 (N.D. Ohio, May 3, 2017)

Counsel For James D. Sullivan, Defendant: Charles E. **Fleming**, LEAD ATTORNEY, Claire Cahoon Curtis, Office of the Federal Public Defender - Cleveland, Cleveland, OH; Robert E. Duffrin, LEAD ATTORNEY, Whalen & Duffrin, Youngstown, OH.

For United States of America, Plaintiff: Michael A. Sullivan, Office of the U.S. Attorney - Cleveland, Northern District of Ohio, Cleveland, OH.

Judges: Benita Y. Pearson, United States District Judge.

Opinion

Opinion by: Benita Y. Pearson

Opinion

MEMORANDUM OF OPINION AND ORDER [Resolving ECF Nos. 76, 77]

Pending before the Court is Defendant's Motion to Withdraw his Plea of Guilty, ECF No. 76, and defense counsel's Motion to Withdraw as Attorney, ECF No. 77. The Government responded. ECF No. 80. During a hearing held on July 20, 2017, the Court heard from counsel and Defendant James D. Sullivan on both motions. For the following reasons, the Court denies Defendant's Motion to Withdraw his Plea of Guilty, and grants counsel's Motion to Withdraw as Attorney.

I. Background

The Court set forth the background of this case in its Memorandum of Opinion and Order on Defendant's Motion to Suppress and Motion in Limine:

> Defendant James D. Sullivan is a convicted sex offender who was granted judicial release on July 25, 2014, after serving approximately thirty (30) years in prison for attempted rape and gross sexual imposition of four children. ECF No. 27 at PageID #: 116. Not quite two years after his release from prison, Defendant came under suspicion for voyeurism at a state park. *Id.* The Ohio State Highway Patrol ("OSHP") executed a series of search warrants and gained permission to obtain an oral DNA sample from Defendant, to search his vehicle and apartment, and to seize and search electronic devices retrieved from his vehicle and apartment. *See* Aug. 26, 2015 Search Warrant, ECF No. 38-2; Aug. 27, 2015 Search Warrant, ECF No. 32-1 (38-5); Aug. 28, 2015 Search Warrant, ECF No. 32-2 (38-6); Aug. 31, 2015 Search Warrant, ECF No. 38-7; Sept. 3, 2015 Search Warrants, ECF Nos. 32-4 (38-8) and 38-9; and Sept. 8, 2015 Search

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

APPENDIX E

Warrant ECF No. 32-3 (38-10). The searches revealed evidence of, among other things: Defendant's DNA matching that in the semen found on the ceiling tile above a state park shower; child pornography on a laptop found in Defendant's apartment; and, a camera found in Defendant's car believed to have been possessed by the semen donor at the state park.ECF No. 67 at PageID #: 594-95.

Defendant was indicted in a two-count Indictment on one count of attempted production of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and one count of knowingly possessing or accessing with intent to view child pornography in violation of 18 U.S.C. § 2251(a). ECF No. 14. After a hearing on his Motion to Suppress and Motion in Limine, in which the Court denied Defendant's requests to suppress items seized during the search of his residence, vehicle and computer and to exclude evidence related to his prior offenses (ECF Nos. 32, 55), Defendant entered into a written plea agreement. *See* May 3, 2017, Minutes of Proceedings.

During the plea colloquy before a magistrate judge, Defendant made a multitude of sworn statements substantiating his plea of guilty. Defendant, a high school graduate with a few years of college, agreed that he had read and discussed the plea agreement with his attorney before he signed it; he confirmed the Government's recitation of the substance of the plea agreement; and assured the magistrate judge that there was nothing in the agreement that he did not understand. *Id.* at PageID #: 601, 602-03, 606, 609. He also agreed that he was satisfied with his attorney's assistance and representation, *Id.* at PageID #: 603, and confirmed the factual basis supporting the Indictment, *Id.* at PageID #: 620-23. He acknowledged that he had entered the plea agreement voluntarily. ECF No. 68 at PageID #: 619, 628. And finally, after pleading guilty to accessing child pornography with intent to view it, Defendant admitted that he was pleaded guilty because he was indeed guilty of that crime. *Id.* at PageID #: 628. Neither counsel nor Defendant raised issues concerning Defendant's competency, and no party had reason to question Defendant's competency. *Id.* at PageID #: 602, 628. No objections were made to the report recommending the Court accept Defendant's plea of guilty.

II. Motion to Withdraw Plea of Guilty

Defendant moves, pursuant to Federal Rule of Criminal Procedure 11, to withdraw his guilty plea. ECF No. 76 at PageID #: 682. "'[T]he withdrawal of a guilty plea prior to sentencing is not an absolute right but is a matter within the broad discretion of the district court.'" *United States v. Spencer*, 836 F.2d 236, 238 (6th Cir. 1987), quoting *United States v. Kirkland*, 578 F.2d 170, 172 (6th Cir. 1978) (per curiam). Rule 11(d) permits the withdrawal of pleas of guilty after the court has accepted the plea only if a "defendant can show a fair and just reason for requesting the withdrawal." The rule places the burden on a moving defendant to show a "fair and just reason" why withdrawal of a guilty plea should be allowed. *See, e.g., United States v. Bazzi*, 94 F.3d 1025, 1027 (6th Cir. 1996); *United States v. Baez*, 87 F.3d 805, 808 (6th Cir.), *cert. denied*, 519 U.S. 973, 117 S. Ct. 405, 136 L. Ed. 2d 319 (1996). "[T]he aim of the rule is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes he made a bad choice in pleading guilty." *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991) (internal quotation omitted), *cert. denied*, 502 U.S. 1117, 112 S. Ct. 1231, 117 L. Ed. 2d 465 (1992); *see also United States v. Hicks*, 234 F.3d 1270, *6 [published in full-text format at 2000 U.S. App. LEXIS 27627] (6th Cir. 2000) (quoting *Brady v. United States*, 397 U.S. 742, 756, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)) ("[A] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case."). Only if the court rejects the agreement will the defendant have the opportunity to withdraw his plea for any reason without the "fair and just reason" requirement. *United States v. Hyde*, 520 U.S. 670, 676, 117

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

63990060

S. Ct. 1630, 137 L. Ed. 2d 935 (1997).

Whether a defendant has shown a fair and just reason is based on an evaluation of the totality of the circumstances, including the following seven factors:

> (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted. *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994). No one factor is controlling. *Bazzi*, 94 F.3d at 1027. In this matter, the factors weigh against granting Defendant's Motion.

A. The Amount of Time Between the Guilty Plea and the Motion to Withdraw and Reason for Delay

The first two *Bashara* factors consider the length of time between a defendant's guilty plea and the motion to withdraw, and, if the time period is lengthy, the defendant's reason for the delay. *Bashara*, 27 F.3d at 1181. A court must determine whether a defendant waited a reasonable amount of time between entering his plea and making a motion to withdraw. Although there is no bright-line rule as to what constitutes a "reasonable" length of time, the Sixth Circuit has found a delay as short as thirty-six days to be unreasonable. *United States v. Spencer*, 836 F.2d 236, 239-40 (6th Cir. 1987); *see also United States v. Valdez*, 362 F.3d 903, 913 (6th Cir. 2004) (finding an unjustified 75-day delay, on its own, was sufficient to support denial of defendant's motion to withdraw); *United States v. Benton*, 639 F.3d 723, 727 (6th Cir. 2011) (noting that the Sixth Circuit "has declined to allow plea withdrawal when intervening time periods were as brief as one month."). A defendant can overcome a lengthy delay with a valid reason. *Bashara*, 27 F.3d at 1181.

Defendant filed his Motion to Withdraw on July 13, 2017-seventy-one days after entering his guilty plea on May 3, 2017. Compared to Sixth Circuit precedent, Defendant's seventy-one day delay is unreasonably long. Giving Defendant the benefit of the doubt and calculating the date of filing from the date he allegedly penned his motion-July 5, 2017-does not improve his position. At base, Defendant still moved to withdraw his plea of guilty sixty-three days after he entered it.

At the July 20, 2017 hearing, Defendant argued that he attempted to direct his counsel to withdraw his plea on June 29, 2017, June 30, 2017, and July 3, 2017, but that his counsel did not respond to him.[2] Defendant contends that, had counsel responded, he could have withdrawn his plea freely, and, therefore, he should be allowed to withdraw his plea now. Although generally a district court lacks discretion to deny motions to withdraw guilty pleas that have been accepted, *United States v. Mendez-Santana*, 645 F.3d 822, 826 (6th Cir. 2011), this does not aid Defendant whose motion to withdraw was made after the Court had already approved his plea agreement and accepted his plea of guilty.

First, Defendant's allegation that he attempted to contact counsel numerous time seeking to withdraw his plea is belied by the record. Defense counsel clarified that on June 28, 2017, Defendant expressed interest in withdrawing his plea, but decided to wait until counsel had spoken with Defendant's state counsel. On June 29, 2017, Defendant left a message with counsel's research and writing specialist, asking to meet with her outside of counsel's presence. Next, counsel heard from Defendant's sister on July 5, 2017 *via* an email, informing counsel of Defendant's letter to the Court. The message did not, however, specify that Defendant wanted to withdraw his plea. There is no record of Defendant attempting to contact counsel on June 30, 2017 or July 3, 2017.[3] Defendant

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

never left a message with defense counsel, although his interaction with the research and writing specialist indicates that he was capable of doing so. Moreover, Defendant did not refute counsel's telling of the facts at the hearing.

Second, Defendant did not withdraw his plea prior to the Court's acceptance. The Court approved Defendant's plea agreement on July 3, 2017, two days before Defendant allegedly penned his motion to withdraw.4 ECF No. 72. In the months between accepting the plea agreement and his motion to withdraw, Defendant did not object to the Magistrate Judge's Report and Recommendation that his plea be accepted, nor did he attempt to contact the Court himself prior to the Court's acceptance of his plea. Defendant has shown that he quite capable and comfortable contacting the Court, despite being represented by counsel. In addition to his motion to withdraw, Defendant had previously filed a *pro se* supplement to his counsel's Motion to Suppress. *See* ECF No. 45. In sum, Defendant's argument that he sought to withdraw his plea prior to the Court's acceptance is unpersuasive. *See United States v. Moore*, No. 1:13CR345, 2014 U.S. Dist. LEXIS 108080, 2014 WL 3842046 (N.D. Ohio Aug. 5, 2014) (finding defendant's argument that conflict between defendant and counsel prevented defendant from moving to withdraw to be without merit, when defendant had not communicated his intent to withdraw to counsel).

The Court finds that Plaintiff waited an unreasonable and unjustified amount of time to withdraw his plea. Accordingly, *Bashara*'s first two factors weigh against permitting the withdrawal of Defendant's guilty plea.

B. Absence of Claims of Innocence

The third *Bashara* factor questions whether the defendant has asserted or maintained his innocence. *Bashara*, 27 F.3d at 1181. Apart from "declar[ing] I am not guilty," in his motion, Defendant does not assert his innocence. In fact, Defendant's arguments at the July 20, 2017 hearing do not imply innocence at all. Instead, Defendant argued that there were various deficiencies in the plea agreement, indicating that he does not believe the Government can prove its case. These arguments suggest that Defendant's withdrawal is motivated by buyer's remorse, rather than innocence.

Moreover, at his change of plea hearing, Defendant stated several times, while under oath, that he is guilty. He swore that he was pleading guilty because he was indeed guilty of the offense charged in Count 1. He also agreed with the factual basis presented by the Assistant United States Attorney, which laid out the basis for the elements of a 18 U.S.C. § 2252A(a)(5)(B) offense. ECF No. 68 at PageID #: 623, 627-28. This encourages a finding that the third *Bashara* factor weighs against withdrawal. *United States v. Catchings*, 708 F.3d 710, 719-20 (6th Cir. 2013) (finding that *Bashara*'s third factor weighed against the defendant because he had pleaded guilty, and had not asserted that he was innocent).

C. Circumstances Underlying the Entry of the Guilty Plea

Bashara's fourth factor considers the circumstances surrounding a defendant's decision to enter a guilty plea. *Bashara*, 27 F.3d at 1181. Defendant contends that his counsel did not fully inform him of the terms and consequences of the plea agreement. Defendant also argues that the terms of the plea agreement were not valid.

i. Defendant's Counsel

Defendant makes myriad complaints about his counsel. None pass scrutiny. Defendant contends that he was not given sufficient opportunity to consider the plea agreement, and his counsel did not inform him of the collateral consequences of accepting the plea agreement. He alleges that his counsel never gave him the plea agreement, and only read the agreement aloud to him minutes

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

before the hearing before the magistrate judge. When Defendant expressed his apprehension, his counsel allegedly told him that due to his past record, a jury would convict him, and that even the Court thought Defendant was guilty.5 Defendant also contends that his counsel incorrectly informed him of two collateral consequences of his plea: (1) counsel allegedly told Defendant that he would only get sentenced to a few years at the state level, when, in reality, he is facing twenty years on his state court violation; (2) counsel allegedly promised Defendant hat he would qualify for the Residential Drug Abuse Program ("RDAP"). Defendant argues that, without this erroneous advice, he would not have accepted the plea agreement.

Defense counsel clarified that, in the days before the Suppression Hearing, counsel informed Defendant that the Government was preparing a plea agreement, and would be likely to agree to a range of 151 to 188 months. Defendant was not interested in considering a plea agreement until after the suppression hearing. Defense counsel gave a copy of the completed plea agreement to the United States Marshals to deliver to Defendant the day the plea agreement was complete. Counsel vehemently refutes Defendant's statement that he told Defendant he had to plead guilty, and states that he only informed Defendant of the May 2, 2017 plea cutoff. The Government confirmed that the parties had discussed the substance of the plea prior to the Suppression Hearing, and that it was not until after the Suppression Hearing that Defendant indicated that he was interested in a plea agreement. Furthermore, defense counsel denies making any promises regarding Defendant's state court sentence or RDAP eligibility. Instead, counsel told Defendant that he would need to discuss the implications for his state sentence with his state attorney. He also told him that Defendant might be eligible for RDAP, and they could ask the Court to recommend it, but the Court cannot order it.

The Court finds Defendant's argument to be wholly without merit.6 Defendant's counsel has zealously and competently represented Defendant throughout the course of this contested litigation. While the Court was not involved in the plea negotiations, even Government's counsel agrees, to the extent he was able, with defense counsel's version of events. Although counsel delayed presenting the plea agreement to Defendant, the delay was reasonable given Defendant's refusal to consider a plea prior to the Suppression Hearing. Counsel also acted reasonably in his recommendations to Defendant regarding the effect on his state sentence and the possibility of RDAP. Although Defendant contends that, if advised differently, he would not have accepted the plea, there was nothing about the proceeding so fundamentally unfair or unreliable as to render it defective. Similarly, if Defendant felt rushed in deciding to agree to the plea, any such pressure was due to his own delay in considering the agreement.

Furthermore, Defendant's arguments are in stark contradiction to his sworn statements that his guilty plea was voluntary and not coerced, that he understood the terms and had gone over them with counsel, and that he was satisfied with his defense counsel. ECF No. 19 at PageID #: 99, 108-09, 118. Defendant does not attempt to explain why he lied under oath or why he should be believed now.

Accordingly, the Court finds that Defendant received competent counsel, that he was not prejudiced by counsel's representation, and that Defendant's arguments are unpersuasive.

ii. Validity of the Plea Agreement

Defendant makes various argu ments that the terms of the plea agreement were not valid. For example, he argues that the plea agreement lacks a factual basis, and does not say that he committed a crime. In support, Defendant attempts to parse the language of 18 U.S.C. § 2252A(a)(5)(B), arguing that the statute prohibits accessing "material," but the plea agreement states that Defendant accessed "numerous digital files," rather than specifying the Defendant accessed a flash drive or the Internet. These conclusory, baseless arguments, hoping to "get off on a

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

technicality," are not well taken, and provide no justification for permitting withdrawal.

iii. Summary

For the foregoing reasons, the Court find that the fourth *Bashara* factor weighs against withdrawal.

D. Defendant's Nature and Background and Defendant's Prior Experience with the Criminal Justice System

The fifth *Bashara* factor instructs courts to examine a defendant's background to determine whether the defendant lacks competence to understand and enter into a plea agreement. *Bashara*, 27 F.3d at 1181. A court should consider a defendant's level of education and history of mental illness. *United States v. Martin*, 668 F.3d 787, 796 (6th Cir. 2012). Relatedly, the sixth *Bashara* factor considers whether a defendant has prior experience with the criminal justice system, making it more likely that he would understand the consequences of entering into a plea agreement. *Id.*

In this case, Defendant attained an Associate's Degree in Business from Ohio University and writes and speaks English. ECF No. 71 at PageID #: 654. There is no indication that he was not able to understand the plea agreement. Moreover, Defendant has extensive experience with the criminal justice system, having spent twenty-two of the last forty years in prison. *Id.* at PageID #: 645-54. Defendant has ten separate convictions in four different courts, and has four parole revocations and one probation violation. *Id.* Defendant also has three other arrests that did not result in convictions. *Id.* In short, Defendant is well versed in the criminal justice system and would have been able to understand the consequences of a plea agreement. *United States v. Owens*, 215 F. App'x 498, 502 (6th Cir. 2007) (finding the sixth factor weighed against withdrawal for defendant with multiple felony convictions and who filed *pro se* motions). For these reasons, the Court finds that the fifth and sixth *Bashara* factors weigh against allowing Defendant to withdraw his plea.

E. Prejudice to the Government

The seventh *Bashara* factor considers potential prejudice to the Government if the motion to withdraw were granted. The Government would be significantly prejudiced if Defendant were permitted to withdraw his plea. As the Government stated in its brief:

> [T]he [G]overnment was prepared to offer testimony from two individuals are part of its proposed FRE 414 evidence (referred to as LF and JR in [G]overnment's notice [ECF No. 51]). LF and JF were children when Sullivan sexually abused them. While adults now, they still live with the trauma of the sexual abuse at Sullivan's hands. They were prepared to testify to help insure that justice was served, but they were notified, after Sullivan's plea, that their testimony would be unnecessary. To now pull the rug out from under them and tell them that they do have to testify would be cruel. To conduct the trial without the benefit of such probative evidence would be unduly prejudicial to the [G]overnment.ECF No. 80 at PageID #: 695.

The Government's argument is well taken. Permitting the withdrawal of Defendant's plea puts the Government in an unfortunate position, forcing it to choose between subjecting Defendant's victims to additional trauma, or not presenting a complete case. Defendant has offered no reason to justify further traumatizing Defendant's victims. Accordingly, the Court finds that *Bashara*'s seventh factor weigh against withdrawal.

F. Summary

Finding that the *Bashara* factors weigh against withdrawal, the Court denies Defendant's Motion to Withdraw his Plea of Guilty.

III. Motion to Dismiss Counsel

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

Defense counsel moves to withdraw as counsel for Defendant. ECF No. 77. The parties elaborated on their conflict at the July 20, 2017 Hearing. In particular, Defendant expressed dissatisfaction with counsel's work in a disrespectful manner at a meeting between counsel and Defendant on July 13, 2017. The meeting became so contentious that counsel determined it to be in the best interest of counsel and Defendant to end the meeting and leave.

Criminal defense work can be difficult. There is no reason to impose additional difficulty by requiring counsel to remain in a rancorous attorney-client relationship. Having heard from Defendant and defense counsel, and having observed their interactions at the July 20, 2017 Hearing, the Court grants the Motion to Withdraw. In a separate Order, the Court will appoint new counsel for Defendant. Defendant is cautioned against continuing such disrespectful interactions with his newly appointed counsel.

IT IS SO ORDERED.

July 28, 2017

Date

/s/ Benita Y. Pearson

Benita Y. Pearson

United States District Judge

Footnotes

1

Defendant consented to Order of Referral to Magistrate Judge. *See* ECF No. 65.

2

Defendant's accounting is specious at best. It is contradicted by his then counsel and called into question by his own writings to the Court. *See, e.g.*, Letter from Defendant dated July 16, 2017.

3

In fact, Defendant wrote a letter to the Court dated July 16, 2017 and received on July 25, 2016 criticizing his counsel for allegedly having contacted the Court about its acceptance of his plea agreement prior to July 5, 2017. In that writing, Defendant concedes that, at that time-prior to July 5--he was "either trying to freely withdraw [his]plea (*or was seriously contemplating such*)." This is further proof that Defendant is dissembling. By his own words, he admits he had not decided whether to withdraw his plea by the time the Court accepted it.

4

The approval was docketed two days later. *See* ECF No. 73 (Order Adopting Report and Recommendation).

5

Defendant argued that he felt pressured to accept the plea agreement, believing that he would be unable to get a fair trial before the Court. This is belied by the record. At his change of plea hearing, Defendant assured the magistrate judge that he knew he had a right to a trial by jury, that is a trial before twelve jurors from the community. The Court's explanation of its ruling at an evidentiary hearing, especially a suppression hearing urged by the defense, is expected and cannot be

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

63990060

controverted into a legitimate concern that Defendant believed he would be unable to receive a fair trial.
6

Although a defendant need not prove his ineffective assistance of counsel claim to justify withdrawing his plea, the framework set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is informative in this instance. Generally, to establish an ineffective assistance of counsel claim, a defendant must first demonstrate that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Next, the defendant must show that counsel's deficient performance prejudiced the defense. *Id.* "This requires showing that counsel's errors were so serious as to deprive [the petitioner] of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

Counsel's performance is deficient when the representation falls below an "objective standard of reasonableness." *Id.* at 688. A defendant must overcome the strong presumption that counsel's conduct fell "within the wide range of reasonable professional assistance," and that "the challenged action 'might be considered ``sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). Not all errors by counsel are constitutional violations. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. To satisfy the prejudice requirement of *Strickland*, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The failure to satisfy either requirement is fatal to an ineffective assistance of counsel claim. *Id.* at 697.
7

Defendant's citation to *United States v. Brune*, 767 F.3d 1009, 1022 (10th Cir. 2014) in support of this point does nothing to aid his argument. In this non-binding case, the Tenth Circuit considered whether the statute's use of "any other materials" was unconstitutionally overbroad. *Brune*, 767 F.3d at 1022-25. The court rejected the defendant's argument that the statute could be read so broadly that it would prohibit any use of the Internet. *Id.* The Tenth Circuit determined that "any other material" must be "construed to embrace only objects similar in nature to those objects enumerated" in the statute, that being "book, magazine, periodical, film, videotape, [and] computer disk." *Id.* at 1023. In fact, the Tenth Circuit specifically noted that "downloadable digitized images of child pornography"-essentially the same as "digital files"-"are the specific type of media that the statute targets." *Id.*

© 2018 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

Case No. 17-4251

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMES D. SULLIVAN

Defendant - Appellant

BEFORE: MERRITT, Circuit Judge; COOK, Circuit Judge; LARSEN, Circuit Judge;

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: November 20, 2018

APPENDIX B