

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-5125

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 07, 2019
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	ON APPEAL FROM THE UNITED
)	STATES DISTRICT COURT FOR
MATTHEW RYAN MURDOCH,)	THE EASTERN DISTRICT OF
)	KENTUCKY
Defendant-Appellant.)	
)	
)	

ORDER

Before: SUHRHEINRICH, BATCHELDER, and BUSH, Circuit Judges.

Matthew Ryan Murdoch, a federal prisoner proceeding through counsel, appeals the 175-month term of imprisonment imposed following his plea of guilty to one count of using a means of interstate commerce to knowingly receive visual depictions of a minor engaging in sexually explicit conduct. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Murdoch entered his plea pursuant to an agreement whereby the government agreed to dismiss one count of knowingly distributing and one count of knowingly possessing visual depictions of a minor engaging in sexually explicit conduct. In the agreement, Murdoch admitted that he knowingly used a “peer to peer” network called uTorrent on his Android cellphone to receive and distribute more than four thousand images of child pornography. He agreed that his base offense level would be 22 and that, among other enhancements, a two-level

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enhancement would apply under USSG § 2G2.2(b)(3)(F) because he knowingly engaged in distribution of child pornography.

A presentence report calculated Murdoch's guidelines range of imprisonment as 292 to 365 months, but because the statutorily authorized maximum sentence of 240 months was less than the minimum of the guidelines range, the guidelines range became 240 months. *See* USSG § 5G1.1(a). In calculating Murdoch's total offense level, the probation officer recommended a five-level increase for distribution in exchange for consideration, rather than the two-level increase to which the parties stipulated. Murdoch objected to the enhancement, asserting that the record contained no direct or circumstantial evidence that he knowingly distributed child pornography in exchange for more images. Moreover, he objected to the omission of a two-level decrease under § 2G2.2(b)(1) on the basis that his conduct was limited to receipt and he did not intend to distribute material involving the sexual exploitation of a minor. Pertinent to this appeal, he also objected to a proposed condition of supervised release that prohibited him from going to "locations where any form of pornography, sexually stimulating performances, or sexually oriented material, items, or services are available," arguing that it was overbroad.

The district court determined that the two-level enhancement under § 2G2.2(b)(3)(F) was appropriate, rather than a five-level enhancement under § 2G2.2(b)(3)(B), and that a decrease under § 2G2.2(b)(1) was not appropriate. This resulted in an advisory guidelines range of imprisonment of 210 to 262 months, although the district court noted that the statutory maximum was 240 months. The district court believed that Murdoch's criminal history was overstated, however, and that a downward variance was warranted. The district court therefore imposed a term of imprisonment of 175 months, to be followed by a life term of supervised release. The district court also addressed Murdoch's concerns regarding the condition of supervised release to which he had objected.

On appeal, Murdoch reasserts the following arguments raised in the district court: (1) his sentence is procedurally unreasonable because the district court applied a two-level enhancement pursuant to § 2G2.2(b)(3)(F) without explanation and without evidence that he knowingly distributed child pornography; (2) his sentence is procedurally unreasonable because the district

court denied his request for a two-level reduction pursuant to § 2G2.2(b)(1) on the basis of a lack of evidence of knowing distribution; and (3) the district court abused its discretion by imposing an overbroad special condition of supervised release that prohibited Murdoch from going to “locations where any form of pornography, sexually stimulating performances, or sexually oriented material items, or services are available.”

We review sentences for procedural and substantive reasonableness. *United States v. Collington*, 461 F.3d 805, 807-08 (6th Cir. 2006). A sentence is procedurally unreasonable if the court committed serious procedural error “such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 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.” *Gall v. United States*, 552 U.S. 38, 51 (2007). “A sentence is substantively unreasonable if the district court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors or gives an unreasonable amount of weight to any pertinent factor.” *United States v. Tristan-Madriral*, 601 F.3d 629, 633 (6th Cir. 2010) (quoting *United States v. Walls*, 546 F.3d 728, 736 (6th Cir. 2008)).

Murdoch first argues that his sentence is procedurally unreasonable as the result of the application of the two-level enhancement pursuant to § 2G2.2(b)(3)(F) for knowingly distributing child pornography. Murdoch has waived his right to challenge this enhancement. “[W]here the defendant has ‘explicitly agreed’ that a particular guideline calculation or enhancement applies to his sentence, any challenge to that enhancement on appeal is waived.” *United States v. Mabee*, 765 F.3d 666, 671 (6th Cir. 2014) (citation omitted). An explicit agreement occurs when the defendant expresses a “plain, positive concurrence” with applying the enhancement, *id.* at 671-73, like when he “agree[s] in open court” that he qualifies for a designation that increases his sentence, *United States v. Aparco-Centeno*, 280 F.3d 1084, 1088 (6th Cir. 2002) (citation omitted). Here, Murdoch admitted in his plea agreement that he knowingly distributed sexually explicit images of minors and agreed to the two-level enhancement for knowing distribution. At his plea hearing, Murdoch informed the district court

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that he had reviewed the plea agreement with counsel, he understood its terms, and was entering it voluntarily. After the government summarized the agreement, Murdoch affirmed that the summary accurately reflected the agreement's terms. Because Murdoch agreed to the enhancement, he cannot make the opposite argument on appeal; the argument is waived and we will not review it. *See id.*; *see also United States v. Hall*, 373 F. App'x 588, 591-92 (6th Cir. 2010).

Murdoch next asserts that his sentence is procedurally unreasonable because the district court failed to grant his request for a two-level reduction pursuant to § 2G2.2(b)(1). This guideline applies to offenders whose conduct is limited to receipt or solicitation of sexually explicit material involving minors and who did not intend to distribute or traffic that material. Because Murdoch agreed that the two-level enhancement for knowingly engaging in distribution of depictions of minors engaged in sexually explicit conduct should apply, he cannot also receive a reduction under § 2G2.2(b)(1). *See United States v. Shepard*, 661 F. App'x 348, 351 (6th Cir. 2016); *United States v. Abbring*, 788 F.3d 565, 567-68 (6th Cir. 2015).

Finally, Murdoch asserts that the district court abused its discretion by imposing a special condition of supervised release that prohibited Murdoch from going to "locations where any form of pornography, sexually stimulating performances, or sexually oriented material items, or services are available." He argues that the condition is overbroad in that it prohibits Murdoch from visiting any location that offers access to the internet, including the homes of friends and family or the public library, as well as a grocery store or gas station that carries Playboy magazines and condoms.

Murdoch's counsel renewed the objection to the phrasing of this condition after the district court announced its sentence. He expressed concern that pornography was available in many different places. The district court explained that there was "a lot of wiggle room" to the condition, stating that Murdoch's probation officer could allow Murdoch to visit grocery stores or gas stations, but not "the adult bookstore." Counsel thanked the court, stating that he believed that was the court's intention, and stated "with that clarification, I think that's sufficient."

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District courts have “broad discretion to impose appropriate conditions of supervised release.” *United States v. Ritter*, 118 F.3d 502, 506 (6th Cir. 1997). We have previously rejected a challenge to a condition with the exact same language that is challenged here. *See United States v. Chase*, No. 17-5981, 2018 WL 3301829, at *1 (6th Cir. July 5, 2018). In *Chase*, the defendant also argued that the condition was vague and overbroad. *Id.* at *1-2. We disagreed, explaining that, although “Chase ‘assume[d] [his] probation officer will interpret the restriction’ to prohibit a wide range of activities and material, such as reading the Bible or going to a library,” the court did not read the condition “so expansively.” *Id.* at *3 (second alteration in original) (quoting *United States v. Smith*, 564 F. App’x 200, 207 (6th Cir. 2014)). Moreover, we recognized that, if problems did occur, we had “faith in the district court’s ability to clarify its restriction.” *Id.* (internal quotation omitted) (citing 18 U.S.C. § 3583(e)(2)). Likewise, in this case, the district court assured Murdoch that his probation officer would have the discretion to allow him to visit certain locations.

Finally, although Murdoch argues that the condition would preclude him from going anywhere that had access to the internet, another special condition of Murdoch’s supervision prohibits him from using a computer or device with access to any “on-line computer service” “without the prior written approval of the probation officer.” This condition clarifies Murdoch’s prohibited conduct. The district court’s imposition of the challenged special condition was not therefore an abuse of discretion.

We **AFFIRM** the judgment of the district court.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk