

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-60216
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

January 30, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STEVEN DEDUAL, JR.,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:17-CR-79-1

Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:*

Steven Dedual, Jr., pleaded guilty to one count of accessing with intent to view child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He was sentenced to 159 months of imprisonment and 10 years of supervised release. In addition, he was ordered to pay, *inter alia*, a \$5,000 assessment pursuant to the Justice for Victims of Trafficking Act (JVTA), 18 U.S.C. § 3014.

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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Dedual raises two issues on appeal. He argues that the district court erred by applying a five-level enhancement pursuant to U.S.S.G. § 2G2.2(b)(3)(B), which resulted in a procedurally unreasonable sentence. He also argues that the district court erred by imposing the \$5,000 JVTA assessment.

We review the district court's factual findings for clear error and its interpretation or application of the Guidelines *de novo*. *United States v. Halverson*, 897 F.3d 645, 651 (5th Cir. 2018). Under § 2G2.2(b)(3)(B), a defendant's base offense level for a child pornography offense is increased by five levels “[i]f the defendant distributed [child pornography] in exchange for any valuable consideration, but not for pecuniary gain.” Section 2G2.2(b)(3)(B) was amended in 2016, and we had not expressly addressed the amendment at the time of Dedual's sentencing. However, after Dedual was sentenced, we addressed the amendment and held that the “new test” under amended § 2G2.2(b)(3)(B) “requires a court to find: (1) the defendant agreed to an exchange with another person, (2) the defendant knowingly distributed child pornography to that person (3) for the purpose of obtaining something of valuable consideration, and (4) the valuable consideration came from that person.” *Halverson*, 897 F.3d at 652. We also recognized that, under the amended Guideline, the Government must prove that valuable consideration came from the person to whom the defendant distributed child pornography. *See id.* at 651-52.

We do not decide whether the district court procedurally erred by imposing the enhancement, however, because even if there was error, the error was harmless. Although the district court did not state that it considered Dedual's guidelines range without the enhancement, the district court explicitly stated that even if the guidelines range was improperly calculated or

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Dedual's objection to the enhancement was improperly resolved, it "would impose the same sentence as a variance or nonguideline sentence based upon the offense conduct in this case, the characteristics of the defendant and other [18 U.S.C. §] 3553(a) factors" discussed at sentencing. Under the circumstances, and in light of the district court's "clarity of intent" to impose the same sentence even if a lower guidelines range applied, *Halverson*, 897 F.3d at 652 (internal quotation marks and citation omitted), any error in applying the enhancement was harmless.

As for his challenge to the imposition of the \$5,000 JVTA assessment, Dedual argues that the district court erred by finding that he had the future capacity to pay the assessment even though he currently is indigent. He also asserts that he is unlikely to have sufficient income to satisfy his financial needs after his release.

Under the provisions of the JVTA, the district court is required to impose a \$5,000 assessment on "any non-indigent person" convicted of, *inter alia*, certain child pornography offenses. § 3014(a). Whether a defendant is a "non-indigent person" under the statute is a factual question reviewed for clear error; whether the district court applied the correct legal standard in assessing a defendant's non-indigence is a question of law that is reviewed *de novo*. *United States v. Graves*, 908 F.3d 137, 139, 140 (5th Cir. 2018).

As we recently explained in *Graves*, a district court does not apply the wrong legal standard in assessing a defendant's "non-indigence" for purposes of § 3014 by considering a defendant's future earning ability. *Id.* at 141-43. Thus, the district court did not err by doing so in this case. Nor was the district court's factual finding that Dedual was a "non-indigent person" clearly erroneous in light of the record as a whole. The district court's finding was based in part on Dedual's education and work history, which reflected, *inter*

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alia, that prior to his involvement in the instant offense, Dedual made over \$5,000 per month as a sales manager and was capable of obtaining and maintaining employment. While we are mindful of the possibility that Dedual may have difficulty in satisfying all of his financial obligations after he is released from prison, the district court's finding that Dedual is a "non-indigent person" for purposes of the JVTA does not leave us "with the definite and firm conviction that a mistake has been made." *Graves*, 908 F.3d at 144 (internal quotation marks and citation omitted).

The judgment of the district court is AFFIRMED. However, we remand the case to the district court for the limited purpose of correcting the judgment to reflect the correct statute of conviction. FED. R. CRIM. P. 36. Dedual was charged with and pleaded guilty to violating § 2252(a)(4)(B), but the judgment identifies the statute of conviction as § 2252(s)(4)(B).

AFFIRMED; LIMITED REMAND to correct clerical error in the judgment.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 30, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 18-60216 USA v. Steven Dedual, Jr.
USDC No. 1:17-CR-79-1

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham
By:
Debbie T. Graham, Deputy Clerk

Enclosure(s)

Mrs. Ellen Maier Allred
Mr. Gaines H. Cleveland
Ms. Andrea Cabell Jones

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J U D G M E N T

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 and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.