

2019 WL 404244

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UNITED STATES of America, Plaintiff-Appellee

v.

Steven DEDUAL, Jr., Defendant-Appellant

No. 18-60216

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Summary Calendar

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Filed January 30, 2019

Synopsis

Background: Defendant pled guilty in the United States District Court for the Southern District of Mississippi, No. 1:17-CR-79-1, to accessing with intent to view child pornography and was sentenced. Defendant appealed.

Holdings: The Court of Appeals held that:

any error in district court imposing sentencing enhancement for distribution of child pornography in exchange for any valuable consideration was harmless, and

district court did not clearly err in finding defendant was a non-indigent person.

Affirmed; limited remand to correct clerical error.

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

Attorneys and Law Firms

Andrea Cabell Jones, Esq., [Gaines H. Cleveland](#), Assistant U.S. Attorney, U.S. Attorney's Office, Southern

District of Mississippi, Gulfport, MS, for Plaintiff-Appellee

[Ellen Maier Allred](#), Assistant Federal Public Defender, Federal Public Defender's Office, Southern District of Mississippi, Gulfport, MS, for Defendant-Appellant

Before [DAVIS](#), [HAYNES](#), and [GRAVES](#), Circuit Judges.

Opinion

PER CURIAM: *

*1 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](#).

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

APPENDIX 3

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 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.

*2 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).

Footnotes

- * 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.

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 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.

All Citations

--- Fed.Appx. ----, 2019 WL 404244