APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
August 17, 2020

Lyle W. Cayce
Clerk

No. 19-10982
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ADAM DONALD BENNETT,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-96-1

Before JONES, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:[*]

Adam Donald Bennett pleaded guilty to one count of sexual exploitation of children, in violation of 18 U.S.C. §§ 2251(a) and (e). The district court sentenced him to, *inter alia*, a within-Sentencing Guidelines term of 600-months' imprisonment. Bennett asserts five claims of error in the district court's determining his sentence.

[*] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

He, however, failed to preserve in district court four of those five claimed errors. Review of the first four of the following five issues, therefore, is only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Bennett must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citations omitted). If he makes that showing, we have the discretion to correct such reversible plain error but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.* (citation omitted).

First, Bennett contends the court erred by using his prior deferred adjudication for indecency with a child, in violation of Texas Penal Code § 21.11(a)(2), to apply the enhanced sentencing penalties set forth in 18 U.S.C. § 2251(e) (enhancing penalty for defendant's violating § 2251(a) when defendant has previous "conviction . . . under the laws of any State relating to", *inter alia*, "aggravated sexual abuse, sexual abuse, [or] abusive sexual contact involving a minor or ward"). According to Bennett, "deferred adjudication is not a conviction" under Texas law, and "federal courts defer to state law when assessing a 'conviction'" for purposes of § 2251(e).

Bennett (as he concedes) did not raise this issue in district court. For the resulting plain-error review, he has not shown the requisite clear or obvious error because, as he correctly recognizes, his contention is foreclosed by *United States v. Ary*, 892 F.3d 787, 790 (5th Cir.) (noting deferred adjudication for indecency with a child is a "conviction" under the Texas Penal Code and federal law), *cert. denied*, 139 S. Ct. 394 (2018).

Second, Bennett asserts this previous Texas offense does not qualify as a prior conviction under 18 U.S.C. § 2251(e) because Texas Penal Code

§ 21.11(a)(2) defines a minor more broadly than the generic definition. As Bennett concedes, he did not raise this issue in district court.

For our plain-error review, and as Bennett correctly recognizes, his contention is foreclosed by our precedent. *See United States v. Zavala-Sustaita*, 214 F.3d 601, 604 (5th Cir. 2000) ("The best 'ordinary, contemporary, common' reading of the phrase 'sexual abuse of a minor' [from 18 U.S.C. § 2251(a)] is that it encompasses a violation of Texas Penal Code § 21.11(a)(2). The victim of a § 21.11(a)(2) offense, 'a child younger than 17 years,' is clearly a 'minor.'"). Further, his assertion that we should reconsider *Zavala-Sustaita* in the light of the Supreme Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), lacks merit. Unlike the immigration statute at issue in *Esquivel-Quintana*, 18 U.S.C. § 2256 unambiguously defines "minor", as used in § 2251(a), as "any person under the age of eighteen years". 18 U.S.C. § 2256(1); *see also Esquivel-Quintana*, 137 S. Ct. at 1567. There is, therefore, no need to rely on *Esquivel-Quintana*'s generic definition of minor. *See Esquivel-Quintana*, 137 S. Ct. at 1568. In short, there is no clear or obvious error.

Third, Bennett contends his previous Texas offense does not qualify as a prior conviction under 18 U.S.C. § 2251 because Texas Penal Code § 21.11(a)(2) does not require the offender make physical contact with the minor. Once more, Bennett (as he concedes) failed to preserve this issue in district court.

Under our limited plain-error review, and as Bennett again correctly recognizes, this contention is also foreclosed by our precedent. *See Contreras v. Holder*, 754 F.3d 286, 294 (5th Cir. 2014) ("[A] sexual act does not require physical contact with a minor to be abusive, since psychological harm may occur even without such contact and can be equally abusive". (citing *Zavala-Sustaita*, 214 F.3d at 604–05)). Additionally, to the extent Bennett asserts we

should reconsider *Contreras* in the light of *Esquivel-Quintana*, our court has previously held that *Esquivel-Quintana* did not abrogate our court's precedent that physical contact with a minor is not required for a sexual act to be abusive. *See Shroff v. Sessions*, 890 F.3d 542, 545 (5th Cir. 2018). Once again, there was no clear or obvious error.

Fourth, Bennett contends the district court erred in considering the conduct underlying his previous arrest for indecency with a child because the Texas grand jury "no-billed" the criminal charge. Bennett (as he concedes) did not raise this contention in district court.

For this final plain-error review, Bennett contends this issue is foreclosed by *United States v. Fields*, 932 F.3d 316 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1299 (2020). In *Fields*, our court stated: a no-bill under Texas law is "nothing more than the decision by a particular grand jury that the specific evidence before it did not convince it to charge the defendant with an offense"; and "[b]y itself, the no-bill cannot transform a factual recitation with sufficient indicia of reliability into one that lacks such indicia". *Id.* at 323.

It is not clear, however, that *Fields* squarely governs the result here. As stated in *Fields*, that appeal "d[id] not require [our court] to address whether a grand jury no-bill precludes a sentencing court's ability to find by a preponderance that the defendant committed *the particular no-billed offense*, and neither party [in *Fields* had] ask[ed] us to do so". *Id.* at 324 (emphasis added). Rather, "[t]he district court relied on sufficiently reliable evidence to find that [defendant] had committed *the underlying activities* and [determined defendant's sentence] in part upon *those activities*". *Id.* (emphasis added). Bennett, by contrast, asserts, *inter alia*, "[t]he district court had an inadequate factual basis to conclude that [he] committed *two offenses* for which he had been no-billed". (Emphasis added.)

In any event, "[i]t is well-established that prior criminal conduct not resulting in a conviction may be considered by the sentencing judge". *United States v. Lopez-Velasquez*, 526 F.3d 804, 807 (5th Cir. 2008) (per curiam) (citation omitted). As discussed, this includes activities underlying a Texas no-billed offense. *See Fields*, 932 F.3d at 323–24.

By adopting Bennett's presentence investigation report (PSR), the court implicitly found that, even though the Texas grand jury did not indict Bennett for indecency with a child, a preponderance of the evidence showed that he engaged in the conduct the PSR described. For that description, the PSR relied on an offense report generated by local law enforcement and a report from Child Protective Services. These documents provided "an adequate evidentiary basis with sufficient indicia of reliability", and Bennett "d[id] not present rebuttal evidence or otherwise demonstrate that the information in the PSR [was] unreliable". *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (per curiam) (citation omitted). Accordingly, Bennett has not shown the requisite clear or obvious error in the district court's considering the PSR's description of the conduct underlying his prior arrest for indecency with a child. *See id.* (citation omitted).

Finally, for the only issue not reviewed for plain error, Bennett contends his 600-month sentence, at the top of his advisory Guidelines sentencing range, is substantively unreasonable because the court failed to give adequate weight to the abuse his pastor inflicted on him while a youth. Although post-*Booker* the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence, as in this instance, is reviewed for substantive reasonableness under an abuse-of-

discretion standard. *Id.* at 51; *see also, e.g.*, *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, the district court's application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (citation omitted).

Additionally, we "appl[y] a rebuttable presumption of reasonableness to a properly calculated, within-[G]uidelines sentence". *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009) (citation omitted). "The presumption is rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing [the] sentencing factors" in 18 U.S.C. § 3553(a). *Id.* (citation omitted). Defendant's "mere belief that the mitigating factors presented for the court's consideration should have been balanced differently is insufficient to disturb this presumption". *United States v. Alvarado*, 691 F.3d 592, 597–98 (5th Cir. 2012) (citation omitted).

In this instance, the district court: adopted the findings and calculations in Bennett's PSR; considered Bennett's abuse as a youth and other mitigating circumstances; expressed concern regarding the "disturbing" and "dangerous" nature of Bennett's offense and prior conduct; and considered the 18 U.S.C. § 3553(a) sentencing factors. Bennett, consequently, has not rebutted the presumption of reasonableness afforded his within-Guidelines sentence. *See Cooks*, 589 F.3d at 186 (citations omitted).

AFFIRMED.

APPENDIX B

United States District Court

Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §

v. § Case Number: 4:19-CR-096-A(01)

ADAM DONALD BENNETT §

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Aisha Saleem. The defendant, ADAM DONALD BENNETT, was represented by Federal Public Defender through Assistant Federal Public Defender John J. Stickney.

The defendant pleaded guilty on April 5, 2019 to the one count Information filed on April 1, 2019. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

Title & Section / Nature of Offense	Date Offense Concluded	Count
18 U.S.C. §§ 2251(a) and 2251(e) Sexual Exploitation of Children	05/10/2018	1

As pronounced and imposed on August 23, 2019, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of $100.00.

The court further concluded that the defendant is indigent and waived the $5,000 assessment required pursuant to 18 U.S.C. § 3014.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 600 months. This sentence shall run consecutively to any sentence which may be imposed in Case No. F-2012-1957-C in the 211th District Court of Denton County, Texas, which is a pending probation revocation, and consecutively to any sentence which may be imposed in Case No. F-19-445-211 in the 211th District Court of Denton County, Texas.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of Life and that while on supervised release, the defendant shall comply with the standard conditions ordered by this Court and shall comply with the following additional conditions:

1. The defendant shall not commit another federal, state, or local crime.

2. The defendant shall not unlawfully possess a controlled substance.

3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

4. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.

5. The defendant shall register as a sex offender with state and local law enforcement as directed by the probation officer in each jurisdiction where the defendant resides, is employed, and is a student, providing all information required in accordance with state registration guidelines, with initial registration being completed within three business days after release from confinement. The defendant shall provide written verification of registration to the probation officer within three business days following registration and renew registration as required by his probation officer. The defendant shall, no later than three business days after each change of name, residence, employment, or student status, appear in person in at least one jurisdiction and inform that jurisdiction of all changes in the information required in the sex-offender registry.

6. The defendant shall have no contact with the victim(s), including correspondence, telephone contact, or communication through third parties except under circumstances approved in advance by the probation officer and not enter onto the premises, travel past, or loiter near the victims' residences, places of employment, or other places frequented by the victims.

7. The defendant shall have no contact with minors under the age of 18, including by correspondence, telephone, internet, electronic communication, or communication through third parties. The defendant shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer.

8. The defendant shall not use any computer other than the one the defendant is authorized to use without prior approval from the probation officer.

9. The defendant shall not use any software program or device designed to hide, alter, or delete records and/or logs of the defendant's computer use, Internet activities, or files stored on the defendant's computer.

10. The defendant shall not use any computer or computer-related equipment owned by his employer except for the strict benefit of his employer in the performance of his job-related duties.

11. The defendant shall participate and comply with the requirements of the Computer and Internet Monitoring Program, contributing to the cost of the monitoring in an amount not to exceed $40 per month. The defendant shall consent to the probation officer's conducting ongoing monitoring of his computer/computers. The monitoring may include the installation of hardware and/or software systems that allow evaluation of computer use. The defendant shall not remove, tamper with, reverse engineer, or circumvent the software in any way. The defendant shall only use authorized computer systems that are compatible with the software and/or hardware used by the Computer and Internet Monitoring Program. The defendant shall permit the probation officer to conduct a preliminary computer search prior to the installation of software. At the discretion of the probation officer, the monitoring software may be disabled or removed at any time during the term of supervision.

12. The defendant shall provide the probation officer with accurate information about his entire computer system. The defendant's email shall only be accessed through a pre-approved application.

13. The defendant shall submit to periodic, unannounced examinations of his computer/computers, storage media, and/or other electronic or Internet-capable devices, performed by the probation officer at reasonable times and in a reasonable manner based on reasonable suspicion of contraband evidence of a violation of supervision. This may include the retrieval and copying of any prohibited data and/or the removal of such system for the purpose of conducting a more thorough inspection. The defendant shall provide written authorization for release of information from the defendant's Internet service provider.

14. The defendant shall not install new hardware, perform upgrades, or effect repairs on his computer system without the prior permission of the probation officer.

15. The defendant shall not access any Internet Service Provider account or other online service using someone else's account, name designation, or an alias, and shall not use or own any device that allows Internet access, other than as authorized by the probation officer. This includes, but is not limited to, PDA's, electronic games, and cellular/digital telephones.

16. The defendant shall not possess, have access to, or utilize a computer or Internet connection device, including, but not limited to Xbox, PlayStation, Nintendo, or similar device, without permission of the probation officer.

17. The defendant shall neither possess nor have under his control any pornographic matter or any matter that sexually depicts minors under the age of 18 including, but not limited to, matter obtained through access to any computer and any matter linked to computer access or use.

18. The defendant shall participate in sex-offender treatment services as directed by the probation officer until successfully discharged, which services may include psycho-physiological testing to monitor the defendant's compliance, treatment progress, and risk to the community, contributing to the costs of services rendered at the rate of at least $25 per month.

19. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.

3. The defendant shall provide to the U.S. Probation Officer any requested financial information.

4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.

6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.

7. The defendant shall support his dependents and meet other family responsibilities.

8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.

9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.

10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.

13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.

14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 24th day of August, 2019.

JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

_____

_____

_____

Defendant delivered on _____, 2019 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal