

PETITIONER'S APPENDIX

818 Fed.Appx. 701

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Stanley Dan RECZKO
III, Defendant-Appellant.

No. 15-50247

|
Argued and Submitted February
10, 2020 Pasadena, California

|
FILED Filed June 29, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Central District of California, No. 2:07-cr-01221-GHK-1, [George H. King, J.](#), of producing child pornography and for producing child pornography while being required to register as a sex offender. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] the district court's denial of defendant's request for substitute counsel did not violate defendant's Sixth Amendment right to counsel;

[2] the district court's denial of defendant's request for reappointment of counsel two months before trial was scheduled, which the court treated as a motion for a continuance, was not an abuse of discretion;

[3] defendant's prior conviction for rape, for engaging in sexual intercourse with another person by forcible compulsion, qualified as a prior sex conviction, for the purpose of sentencing enhancement; and

[4] the district court's denial of defendant's request to depose two witnesses in the Philippines was not an abuse of discretion.

Affirmed.

West Headnotes (8)

[1] **Criminal Law** 🔑 Particular Cases

The district court's denial of defendant's request for substitute counsel did not violate defendant's Sixth Amendment right to counsel, during prosecution for producing child pornography; the district court conducted multiple inquiries into the relationship between defendant and his attorneys, at one hearing defendant was invited to tell the court any complaint he had, the conflict between defendant and his attorneys was due to defendant's refusal to communicate with his attorneys, and despite the conflict defendant's attorneys worked in defendant's interest and did not abandon their representation of him. [U.S. Const. Amend. 6.](#)

[2] **Criminal Law** 🔑 Validity and sufficiency, particular cases

The trial court's failure to proactively reappoint counsel for defendant, who had waived his right to counsel, was not erroneous; before defendant represented himself he acknowledged the limitations he might face with regard to his ability to represent himself while incarcerated, and because defendant's circumstances did not later vary, defendant's waiver of his right to counsel remained knowing and intelligent. [U.S. Const. Amend. 6.](#)

[3] **Criminal Law** 🔑 Absence of counsel

The district court's denial of defendant's request for reappointment of counsel two months before trial was scheduled, which the court treated as a motion for a continuance, was not an

abuse of discretion; at the time of defendant's request, a continuance would have required the government to renew the process through which it worked with the Philippine government to secure the appearances of certain witnesses, including witnesses defendant requested, which would have inconvenienced the parties and those witnesses, defendant had previously been granted multiple continuances, and defendant had standby counsel as he prepared for trial. [U.S. Const. Amend. 6](#).

[4] Jury 🔑 **Form and sufficiency**

Defendant's waiver of a jury trial on the sentencing enhancement for committing repeat sex offenses against children was valid, even though the waiver was oral and not in writing; the court's colloquy with defendant was in-depth and spanned more than ten pages of transcript, and during the colloquy defendant noted that he had discussed the waiver with his counsel and repeatedly assured the court that he was making the waiver knowingly and intelligently. [18 U.S.C.A. §§ 2260A, 3559\(e\)](#); [Fed. R. Crim. P. 23\(a\)](#).

[5] Sentencing and Punishment 🔑 **Nature, degree, or seriousness of other misconduct**

Defendant's prior conviction for rape, for engaging in sexual intercourse with another person by forcible compulsion, qualified as a prior sex conviction, for the purpose of sentencing enhancement for repeat sex offenses against children; "forcible compulsion" under New York law meant "to compel" either by "physical force" or "a threat which places a person in fear of immediate death or physical injury," and the New York rape statute matched the federal sexual abuse and aggravated sexual abuse statutes, which were specifically mentioned by sentence enhancement statute as the types of offenses that qualify as prior sex convictions, as the federal statute governing sexual abuse prohibited "caus[ing] another person to engage in a sexual act by threatening or placing that other person in fear."

[18 U.S.C.A. §§ 2242\(1\), 3559\(e\)](#); [N.Y. Penal Law §§ 130.00\(8\), 130.35\(1\)](#).

[6] Criminal Law 🔑 **Elements of offense and defenses**

The district court did not commit plain error when it instructed the jury on offense of sexual exploitation of children based on employing, using, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct; instruction tracked the statutory language of offense, and it was not apparent that the district court should have additionally instructed the jury that the phrase "for the purpose of" in sexual exploitation of children statute, was the equivalent of a "but-for" causation requirement. [18 U.S.C.A. § 2251\(c\)](#).

[7] Criminal Law 🔑 **Depositions**

The district court's denial of defendant's request to depose two witnesses in the Philippines was not an abuse of discretion, during prosecution for producing child pornography; neither of the proposed deponents was willing to testify, as defendant himself acknowledged, and, as a practical matter, the district court had no authority to compel them to comply with the deposition request, because they were in the Philippines. [Fed.Rules Cr.Proc.Rule 15\(a\)](#), [18 U.S.C.A.](#)

[8] Sentencing and Punishment 🔑 **Total sentence deemed not excessive**

Sentencing and Punishment 🔑 **Cumulative or consecutive sentences**

Defendant's mandatory life sentence for committing repeated sex offenses against children did not violate the Eighth Amendment prohibition against cruel and unusual punishment; sentence was not grossly disproportionate to defendant's crimes of producing child pornography and producing

child pornography while required to register as a sex offender. [U.S. Const. Amend. 8](#); [18 U.S.C.A. § 3559\(e\)](#).

Attorneys and Law Firms

***702** [L. Ashley Aull](#), Assistant U.S. Attorney, [Nancy Spiegel](#), DOJ - Office of the U.S. Attorney, Los Angeles, CA, [Vanessa Baehr-Jones](#), Assistant U.S. Attorney, Office Of the U.S. Attorney, Oakland, CA, for Plaintiff-Appellee

[Ethan Atticus Balogh](#), [Coleman & Balogh LLP](#), San Francisco, CA, for Defendant-Appellant

Appeal from the United States District Court for the Central District of California, [George H. King](#), District Judge, Presiding, D.C. No. 2:07-cr-01221-GHK-1

Before: [BERZON](#), [TALLMAN](#), and [R. NELSON](#), Circuit Judges.

***703** MEMORANDUM*

Stanley Reczko appeals his conviction for producing child pornography under [18 U.S.C. § 2251\(c\)](#) and for doing so while being required to register as a sex offender under [18 U.S.C. § 2260A](#). Reczko received a life sentence for the first count, because of a recidivism sentencing enhancement, and a consecutive ten-year sentence for the second count. We affirm his conviction and his sentence.

[1] 1. The district court did not violate Reczko's Sixth Amendment right to counsel by denying his requests for substitute counsel. "To evaluate whether a district court abused its discretion in denying a motion to substitute counsel, we consider three factors: (1) the adequacy of the district court's inquiry; (2) the extent of the conflict between the defendant and counsel; and (3) the timeliness of defendant's motion." [United States v. Velazquez](#), 855 F.3d 1021, 1034 (9th Cir. 2017) (internal quotation marks omitted). Reczko's motions were timely, but neither of the other two factors weigh in his favor.

The district court conducted multiple inquiries into the relationship between Reczko and his attorneys. These were more than "perfunctory inquiries," [United States v. Adelzo-](#)

[Gonzalez](#), 268 F.3d 772, 778 (9th Cir. 2001); at one hearing, for example, the district court invited Reczko "to tell [the court] one by one" of any additional complaints he had, *see id.* at 777.

The record reflects extensive conflict between Reczko and his counsel, but conflicts arising from a defendant's "general unreasonableness or manufactured discontent" are generally not incompatible with continued representation. [United States v. Smith](#), 282 F.3d 758, 763–764 (9th Cir. 2002). Reczko repeatedly refused to communicate with and, at times threatened, his lawyers. Despite this conflict, his lawyers worked in Reczko's interest and did not "virtually abandon[] [their] representation" of him. [Adelzo-Gonzalez](#), 268 F.3d at 779.

[2] 2. The district court did not err when it did not proactively reappoint counsel for Reczko. In the absence of an "express[] request[]" for counsel, "the essential inquiry is whether circumstances have sufficiently changed since ... the *Faretta* inquiry that the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel." [United States v. Hantzis](#), 625 F.3d 575, 581 (9th Cir. 2010). Here, before he represented himself, Reczko acknowledged the limitations he might face with regard to his ability to represent himself while incarcerated. Because his circumstances did not later vary, it was appropriate for the district court to conclude that Reczko's waiver of the right to counsel remained knowing and intelligent.

[3] 3. The district court also did not err by denying Reczko's explicit request for reappointment of counsel in December 2014, two months before Reczko's trial was scheduled to and ultimately did begin. The ***704** district court construed Reczko's request as a request for a continuance, as our caselaw permits. *See* [United States v. Nguyen](#), 262 F.3d 998, 1001–02 (9th Cir. 2001). We weigh five factors when reviewing the denial of a continuance: "(1) whether the continuance would inconvenience witnesses, the court, counsel, or the parties; (2) whether other continuances have been granted; (3) whether legitimate reasons exist for the delay; (4) whether the delay is the defendant's fault; and (5) whether a denial would prejudice the defendant." [United States v. Thompson](#), 587 F.3d 1165, 1174 (9th Cir. 2009).

Nearly all these factors weigh against Reczko. At the time of Reczko's request, a continuance would have required the government to renew the process through which it worked with the Philippine government to secure the appearances

of certain witnesses (including witnesses Reczko requested), which would have inconvenienced the parties and those witnesses. The district court had previously granted Reczko multiple continuances, including one after Reczko waived his right to counsel. Much of Reczko's reasoning for requesting reappointment at that time was illegitimate. The late date of the request was entirely Reczko's fault, as he could have requested the reappointment of counsel at any point—in fact, months before Reczko's request, the government had asked the district court to evaluate whether Reczko still wished to continue pro se. Finally, Reczko was prejudiced by the denial of his request, but he suffered less prejudice than most defendants who request the reappointment of counsel shortly before trial. Reczko had standby counsel throughout this time, and the district court ultimately appointed his standby counsel to represent him during his trial.

Reczko's "conduct up to that point was clearly dilatory." *Thompson*, 587 F.3d at 1174 (internal quotation marks omitted). We conclude that the district court did not display "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris v. Slappy*, 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) (internal quotation marks omitted).

[4] 4. Reczko's waiver of a jury trial on the 18 U.S.C. § 3559(e) sentencing enhancement and the § 2260A charge was adequate. Reczko waived jury trial orally, not in writing, so there is no "presumption that [the waiver] was made knowingly and intelligently." *United States v. Shorty*, 741 F.3d 961, 966 (9th Cir. 2013).

We note that we are troubled by the reliance of district courts on oral waivers, especially in a case like this. *Federal Rule of Criminal Procedure 23(a)* requires that jury waivers be in writing. Although our caselaw allows some deviation from this requirement, see *Shorty*, 741 F.3d at 966, deviations lead to unnecessary uncertainty as to the validity of the waiver, as this case illustrates. But, although the district court had "reason to suspect [that Reczko] may suffer from mental or emotional instability," *id.* (citation and internal quotation marks omitted), the court's colloquy with Reczko was "in-depth," *id.*, spanning more than ten pages of transcript. During the colloquy, Reczko noted that he had discussed the waiver with his counsel and repeatedly assured the court that he was making the waiver knowingly and intelligently. We conclude that the waiver was valid.

[5] 5. Reczko's prior conviction for violating *New York Penal Law § 130.35(1)* is a "prior sex conviction" under § 3559(e). The New York Penal provision at issue categorically matches § 2241(a) and § 2242, two of the sections specified by § 3559(e) as establishing the types of offenses that qualify as "prior sex convictions," when both of the federal provisions are "taken together." *705 *United States v. Bankston*, 901 F.3d 1100, 1103 (9th Cir. 2018) (citation omitted).

New York Penal Law § 130.35(1) prohibits the use of "forcible compulsion" to coerce sexual intercourse. As relevant here, "forcible compulsion" means "to compel" either by "physical force" or "a threat ... which places a person in fear of immediate death or physical injury." *N.Y. Penal Law § 130.00(8)*. "[P]hysical injury" under New York law encompasses more conduct than "serious bodily injury" under § 2241(a), compare *N.Y. Penal Law § 130.00(8)* with 18 U.S.C. § 2246(4), but any conduct that is not covered by § 2241 is covered by § 2242A, which prohibits "caus[ing] another person to engage in a sexual act by threatening or placing that other person in fear," 18 U.S.C. § 2242(1).

Together, § 2241 and § 2242 cover the full range of threats proscribed by the New York provision under which Reczko was previously convicted.

[6] 6. The district court did not commit plain error when it instructed the jury on the § 2251(c) count. The jury instruction tracked the statutory language of § 2251(c). See *United States v. Nash*, 115 F.3d 1431, 1435–36 (9th Cir. 1997). It was not apparent that the district court should have additionally instructed the jury that the phrase "for the purpose of" in § 2251(c), a phrase we have never defined in this particular statutory context, was the equivalent of a "but-for" causation requirement.

[7] 7. The district court did not abuse its discretion by denying Reczko's requests under Rule 15 to depose two witnesses in the Philippines. "In deciding whether to grant a Rule 15(a) motion, the district court must consider, among other factors, whether the deponent would be available at the proposed location for deposition and would be willing to testify." *United States v. Olafson*, 213 F.3d 435, 442 (9th Cir. 2000). Here, neither of the proposed deponents was willing to testify—as Reczko himself acknowledged—and, as a practical matter, the district court had no authority to compel them to comply with the deposition request, because they were in the Philippines.

[8] 8. Reczko's mandatory life sentence under [§ 3559\(e\)](#) does not violate the Eighth Amendment. Under the Supreme Court's current interpretation of the Eighth Amendment, we cannot say that the sentence was “grossly disproportionate” to the crime, *Solem v. Helm*, 463 U.S. 277, 288, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), given that the current offense must be considered alongside his previous criminal history of sex crime convictions. See *Norris v. Morgan*, 622 F.3d 1276, 1294 (9th Cir. 2010).

9. Because the district court did not err, there was no cumulative error.

AFFIRMED

All Citations

818 Fed.Appx. 701

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 9 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STANLEY DAN RECZKO III,

Defendant-Appellant.

No. 15-50247

D.C. No.

2:07-cr-01221-GHK-1

Central District of California,
Los Angeles

ORDER

Before: BERZON, TALLMAN, and R. NELSON, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Judges Berzon and Nelson have voted to deny the petition for rehearing en banc and Judge Tallman so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.