

United States Court of Appeals For the First Circuit

Nos. 19-1869

19-1872

UNITED STATES,

Appellee,

v.

JORDAN MONROE,

Defendant - Appellant.

Before

Thompson, Kayatta and Barron,
Circuit Judges.

JUDGMENT

Entered: November 10, 2021

Defendant-appellant Jordan Monroe appeals from his convictions and sentences for production and possession of child pornography. Appellant, who has elected to appear before this court pro se, raises challenges to several pre-plea rulings of the district court, only some of which were expressly reserved for appeal in his plea agreement; he also challenges his 480-month sentence. Appellant has filed his merits brief and the government has moved for summary disposition. Appellant has responded and also has tendered a sur-reply to the government's reply. The sur-reply is accepted for filing, though, as reflected below, the court has considered only those claims not waived by appellant.

Appellant raises a number of challenges to pre-plea rulings of the district court that were not reserved for appeal in his plea agreement. These include a challenge to the search warrant executed at his home, as well as a challenge to the indictment on statute of limitations grounds. As this court regularly has confirmed, "[i]t is well-established that an unconditional guilty plea results in the waiver of errors preceding the plea." United States v. Castro-Vazquez, 802 F.3d 28, 32 (1st Cir. 2015). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Tollett v. Henderson, 411 U.S. 258, 267 (1973). This includes challenges based on the applicable statute

of limitations, see Acevedo-Ramos v. United States, 961 F.2d 305, 308-09 (1st Cir. 1992)("[L]ike other affirmative defenses, the statute of limitations is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense."), as well as unpreserved challenges to pre-charge searches, see United States v. Adams, 971 F.3d 22, 30 (1st Cir. 2020) (when a defendant elects to enter a guilty plea, "virtually any and all nonjurisdictional issues not explicitly preserved for appeal in the conditional plea agreement — and certainly all Fourth Amendment suppression issues — are deemed waived").

Appellant also raises several claims of error at sentencing. Assuming without deciding that these claims do not fall within the scope of the waiver of appeal in appellant's plea agreement, we conclude that appellant has not demonstrated reversible sentencing error. Appellant claims that the application of a statutory-maximum sentence of ten years on the possession count violated the prohibition on ex post facto laws, but the claim fails to convince. While the applicable statutory maximum in fact was lower at the time appellant commenced the conduct charged in the indictment, the possession conduct spanned a long period, during which the applicable statutory maximum increased from five years to ten years. Because appellant continued to possess child pornography after the statutory maximum had increased, there was no ex post facto violation in deeming him subject to the higher maximum penalty.

Appellant next argues that the district court erred by applying the incorrect version of the sentencing guidelines to calculate the guidelines sentencing range on the production counts, citing United States v. Mantha, 944 F.3d 352 (1st Cir. 2019)(application of the "one-book rule" to non-grouped offenses where the offenses are not "closely related" violates the ex post facto clause). We conclude that no reversible error occurred in this respect. The district court, recognizing the somewhat unsettled state of the law in this area, carefully calculated appellant's guideline sentencing range under both potentially applicable versions of the guidelines and explained why it would impose the same sentence under either version. The district court acknowledged that the 480-month sentence ultimately imposed reflected a substantial upward variance or departure from the guidelines range prescribed by the earlier version of the guidelines. In explaining its rationale for such a variance, the court cited the appropriate §3553(a) factors, particularly the extreme seriousness of the offense conduct and the need for both specific and general deterrence. The district court also appropriately cited Peugh v. United States, 569 U.S. 530, 550 n.8 (2013), for the proposition that "[n]otwithstanding the rule that retrospective application of a higher guideline range violates the Ex Post Facto Clause, sentencing courts [are] free to give careful consideration to the current version of the guidelines as representing the most recent views of the agency charged by Congress with developing sentencing policy." Thus, even if we assume, without deciding, that appellant is correct that Mantha required the sentencing court to utilize the earlier version of the guidelines and to apply the corresponding lower guideline sentencing range, we discern no reversible error because the district court adequately explained why it would, upon application of the earlier version, impose a substantial upward variance, leading to imposition of the same 480-month sentence. In light of the foregoing, we conclude that, regardless of which version of the guidelines properly applied, the district court arrived at a sentence reflecting a "plausible sentencing rationale" and a "defensible result." United States v. Gomera-Rodriguez, 952 F.3d 15, 20 (1st Cir. 2020).

Appellant also raises challenges, as expressly reserved in his plea agreement, to the district court's resolutions of two pretrial motions to suppress evidence. After a careful review of the record, we discern no reversible error in the district court's analysis of the facts, application of the prevailing legal standards, or ultimate conclusions.

Substantially for the reasons set forth in the district court's November 1, 2018 Memorandum and Order, we affirm the district court's denial of appellant's motion to suppress evidence stemming from the disclosure of appellant's IP address, said disclosure having been made pursuant to an order issued by the District Court for the District of Columbia under the auspices of the Stored Communications Act, 18 U.S.C. §2703(d). Appellant's claim that the United States District Court for the District of Columbia lacked jurisdiction to issue an order under 18 U.S.C. §2703(d) is unconvincing. As the district court observed, federal investigators accessed and downloaded illegal images from the subject file sharing service while physically present in the District of Columbia, making that court one of "competent jurisdiction" under the Stored Communications Act. See 18 U.S.C. § 2711(3)(A)(i) (a court of "competent jurisdiction" under the SCA includes "any district court of the United States (including a magistrate judge of such a court) that ... has jurisdiction over the offense being investigated"); United States v. Langford, 688 F.2d 1088, 1094 (7th Cir. 1982), cert. denied 461 U.S. 959 (1983)(jurisdiction in child pornography cases is proper in any district "through which the mailed obscene material moves"); United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983) ("[T]here is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent.").

Appellant's claim that the government violated his fourth amendment rights by obtaining his IP address via an order obtained under 18 U.S.C. §2703(d), rather than a probable-cause-based warrant, is foreclosed by prior precedent of this court. See United States v. Hood, 920 F.3d 87, 92 (1st Cir. 2019)(the government did not violate the Fourth Amendment by utilizing § 2703(d) to obtain, without a warrant, appellant's IP address in connection with its investigation of images of child pornography transmitted over an instant messaging application); United States v. Morel, 922 F.3d 1, 9 (1st Cir.), cert. denied, 140 S. Ct. 283 (2019) (no fourth amendment violation in use of §2703(d) to compel disclosure of appellant's IP address in an internet child pornography case because he "did not have a reasonable expectation of privacy in the IP address information that the government obtained from" the third party service to which he uploaded the images, and it was "that information which connected [appellant] to the uploaded images").

Finally, we concur with the district court's careful analysis, set forth in its September 11, 2017 Memorandum and Order, of appellant's claims that his rights were violated during interrogations at his home and at the police station. In particular, we agree with the district court that appellant's comments during the custodial interrogations did not constitute "unequivocal" requests for counsel such that a "reasonable police officer in the circumstances would understand the statement[s] to be a request for an attorney." See United States v. Davis, 512 U.S. 452, 462 (1994). We further see no error in the district court's factual determination, which we review with deference to the trial court's superior position to evaluate witness credibility, see United States v. Jones, 187 F.3d 210, 214 (1st Cir. 1999), that interviewing officers did not hear appellant state "conversation's over," and its resulting conclusion that officers therefore could not objectively have understood appellant to be invoking his right to remain silent, particularly in light of appellant's

subsequent voluntary resumption of the conversation. See United States v. Dudley, 804 F.3d 506, 513 (1st Cir. 2015)("If no officer heard [an alleged invocation], it could not have been a clear invocation [of the right] . . . [because] officers could not have objectively understood a statement they did not hear to be an assertion of the right"); United States v. Thongsopaporn, 503 F.3d 51, 56 (1st Cir. 2007)(it is "well-settled that law enforcement may resume questioning a defendant in custody who has exercised his right to remain silent if the defendant subsequently initiates further discussions about the investigation").

The judgment of the district court is affirmed. Loc. R. 27.0(c). All filings or exhibits placed provisionally under seal upon receipt shall remain under seal. Any remaining pending motions, to the extent not mooted by the foregoing, are denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Jordan Monroe
John P. McAdams
Lauren S. Zurier