NOT RECOMMENDED FOR PUBLICATION

No. 22-2066

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
KOLLIER DEVONTE RADNEY,	)	MICHIGAN
	)	
Defendant-Appellant.	)	

O R D E R

Before: SUTTON, Chief Judge; NORRIS and SILER, Circuit Judges.

Kollier Devonte Radney, a federal prisoner, appeals his conviction and sentence. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we affirm.

Radney was indicted on two counts of sex trafficking of children, in violation of 18 U.S.C. § 1591(a), and transportation with intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a). On March 4, 2022, Radney pleaded guilty as charged without a written plea agreement.

The probation office then prepared a presentence report and assigned Radney a total offense level of 38 after applying, among other enhancements, a two-level enhancement under USSG § 2G1.3(b)(3)(B) for using a computer to facilitate the offenses. This total offense level, coupled with a criminal history category of III, resulted in a guidelines range of 292 to 365 months in prison.

On September 2, 2022, Radney moved to withdraw his guilty plea, arguing that he did not knowingly or voluntarily plead guilty, largely because counsel performed ineffectively and he is innocent. The district court denied the motion.

Before and at sentencing, Radney objected to the use-of-computer enhancement, arguing that it "makes no sense today and is unfair." He also argued that he was entitled to a two-point reduction for acceptance of responsibility. The district court overruled Radney's objection and argument and sentenced him to a below-guidelines term of 192 months in prison.

Radney now appeals, arguing that (1) the district court abused its discretion in denying his motion to withdraw his guilty plea and (2) the district court erred in applying the use-of-computer enhancement and in not applying a reduction for his acceptance of responsibility.

Motion to Withdraw Guilty Plea

Standard of Review and Law

We review the denial of a motion to withdraw a guilty plea for an abuse of discretion. *United States v. Carson*, 32 F.4th 615, 623 (6th Cir. 2022). A defendant may withdraw a guilty plea after the district court accepts the plea but before it imposes a sentence if "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B).

To determine whether a defendant has established a fair and just reason, we consider the totality of the circumstances, including (1) the amount of time between the guilty plea and motion to withdraw, (2) whether the defendant has a valid reason for failing to seek withdrawal of the plea earlier, "(3) whether the defendant has asserted or maintained his innocence[,]" (4) the circumstances surrounding entry of the plea, "(5) the defendant's nature and background[,] (6) . . . the defendant['s] . . . prior experience with the criminal justice system[,] and (7) potential prejudice to the government if the motion is granted." *United States v. Catchings*, 708 F.3d 710, 717-18 (6th Cir. 2013) (quoting *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994)). The rule exists to permit "a 'hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty.'" *United States v.*

Dixon, 479 F.3d 431, 436 (6th Cir. 2007) (quoting *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991)).

Analysis

On balance, application of the *Bashara* factors supports the district court's denial of Radney's motion to withdraw.

The Amount of Time Elapsed and the Reason for the Delay

We agree with Radney's own concession that the "almost five-month delay in seeking to vacate his plea . . . extended well beyond the typical timeframe deemed appropriate for such motions." *See United States v. Jackson*, 751 F. App'x 749, 751-52 (6th Cir. 2018) (affirming the denial of a motion to withdraw a guilty plea where three months elapsed between entry of the plea and the motion to withdraw it); *Carson*, 32 F.4th at 624 ("[W]e have 'affirmed decisions denying the withdrawal of a guilty plea after delays as short as one or two months.'" (quoting *United States v. Carpenter*, 554 F. App'x 477, 481 (6th Cir. 2014)) (collecting cases)). And Radney's reason for failing to move to withdraw his plea earlier—that he "had a dissolving relationship with his former counsel"—is insufficient to justify his lengthy delay. Indeed, as the district court noted, more than eight weeks passed between Radney's guilty plea and when, through a relative, he informed his soon-to-be-former attorney (as she stated in her motion to withdraw as counsel) that he wished to withdraw his plea. Even if a motion to withdraw Radney's guilty plea had been filed at that point, it would still have been subject to denial for lack of timeliness. *See Carson*, 32 F.4th at 624.[1]

Maintaining Innocence and Circumstances of the Guilty Plea

At the change-of-plea hearing, while under oath, Radney admitted his guilt of the three counts and confirmed the factual basis supporting his guilty plea. "When a defendant has entered

[1] Radney apparently attempted to file a pro se motion to withdraw his guilty plea on July 6, 2022, at a hearing on his former attorney's motion to withdraw as counsel, but the district court denied it because he was then represented by his former attorney. Radney's purported attempt to file that pro se motion in July 2022 does not tip the first two factors in his favor because the attempt still came too late. *See Jackson*, 751 F. App'x at 751-52; *Carson*, 32 F.4th at 624.

a knowing and voluntary plea of guilty at a hearing at which he acknowledged committing the crime, the occasion for setting aside a guilty plea should seldom arise." *United States v. Ellis*, 470 F.3d 275, 280 (6th Cir. 2006) (quoting *United States v. Morrison*, 967 F.2d 264, 268 (8th Cir. 1992)). Even if Radney had asserted his innocence when the initial draft presentence report came out in May 2022, as he claims, that unsworn assertion of innocence was still made over two months after he swore that he was "pleading guilty freely and voluntarily because [he is] guilty and it is [his] choice to plead guilty" and that he was satisfied with counsel's advice and services in his case. Such sworn affirmations suggest that Radney's plea was not a "hastily entered [one] made with unsure heart and confused mind," *Alexander*, 948 F.2d at 1004, or based on the erroneous advice or performance of counsel. Rather, as the district court aptly concluded, the hearing transcript reflects that the court "engaged in an extensive and detailed colloquy with Radney before accepting his plea."

Radney's Nature, Background, and Experience with the Criminal Justice System

Radney was 28 years old at the time of his plea, has a high school education, and has prior experience with the criminal justice system in the state courts. Based on all of this, the district court reasonably concluded that "[t]here is nothing to suggest that Radney was incapable of understanding the proceedings brought against him in this case."

Potential Prejudice to the Government

Like the district court, we decline to address this factor because Radney did not put forth a fair and just reason for withdrawing his plea. *See Catchings*, 708 F.3d at 719.

Conclusion

In light of the *Bashara* factors, Radney has not shown that the district court abused its discretion when it denied his motion to withdraw his guilty plea.

Sentencing Challenges

Acceptance of Responsibility

Radney first argues that the district court erred in declining to apply a two-level reduction for acceptance of responsibility.

We afford great deference to a district court's decision to deny an acceptance-of-responsibility reduction and typically review the decision for clear error. *United States v. Genschow*, 645 F.3d 803, 813 (6th Cir. 2011). When a "defendant clearly demonstrates acceptance of responsibility for his offense," he is entitled to a two-level reduction. USSG § 3E1.1(a). One indication of accepting responsibility is the entry of a guilty plea prior to the beginning of trial. USSG § 3E1.1, comment. (n.3). This "constitute[s] significant evidence of acceptance of responsibility" when "combined with truthfully admitting the conduct comprising the offense of conviction[] and truthfully admitting or not falsely denying any additional relevant conduct." *Id.* "However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." *Id.*

The district court did not clearly err in denying Radney an adjustment for acceptance of responsibility because his post-plea conduct was inconsistent with such acceptance. As the district court noted, it was unclear whether Radney had ever accepted responsibility and he "dispelled any doubts" that he had not "when he filed his motion to withdraw [his] guilty plea asserting that he is innocent." In that motion, he claimed that he "has asserted his innocence for months." Given the deference afforded to the district court's decision on this adjustment and its reasoned rationale for denying it, Radney cannot show clear error. *See, e.g.*, *United States v. Williams*, 396 F. App'x 212, 219 (6th Cir. 2010).

Use-of-Computer Enhancement

Radney also argues that the district court erred in increasing his offense level by two for "use of a computer." *See* USSG § 2G1.3(b)(3). We generally review factual findings for clear error and review application of the guidelines to the facts de novo. *United States v. Turner*, 756 F. App'x 576, 579 (6th Cir. 2018) (citing *United States v. Taylor*, 648 F.3d 417, 431 (6th Cir. 2011)). "Whether the facts found by the district court satisfy a sentencing enhancement's requirements is a mixed question of law and fact, which we also review de novo." *Id.* at 579-80 (citing *United States v. Roberts*, 243 F.3d 235, 237 (6th Cir. 2001)).

Under USSG § 2G1.3(b)(3), a two-level increase applies if the offense involved the use of a computer or an interactive computer service to "entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with [a] minor." USSG § 2G1.3(b)(3). Here, in applying this enhancement, the district court rejected Radney's sole argument against applying the enhancement—that it is "outdated"—and directed the parties to *United States v. Lay*, 583 F.3d 436, 447 (6th Cir. 2009), where we explained that the enhancement was appropriately designed to deter "anonymous one-to-many communications by a sexual predator" who uses the internet to facilitate his crimes more easily than he would be able to offline. On appeal, Radney merely reiterates his policy argument that the enhancement should not apply in light of today's technology. The district court reasonably rejected the argument. *See id.* at 447; *see also United States v. McKnight*, 807 F. App'x 421, 423 (6th Cir. 2020) (per curiam) (noting that "we have repeatedly rejected" the argument that a two-level enhancement for use of a computer is unwarranted because it "has become virtually automatic"). Radney admittedly used a smartphone to communicate with one of the victims, furthered his crimes through online purchases, and used a computer to post lewd photos of the victims and solicit commercial sex online. The possibility that the offenses could have been committed without a computer, as Radney suggests, does not render application of the enhancement clear error.

For all of the foregoing reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk