NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 7, 2025
Decided January 10, 2025

Before

AMY J. ST. EVE, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 24-1527

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN DANIEL RUMBO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 4:21-CR-40041-JPG-1

J. Phil Gilbert,
Judge.

O R D E R

Benjamin Rumbo[†] pleaded guilty to distributing child pornography and was sentenced to 240 months in prison. He appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 744

[†] The record notes that Rumbo began a gender transition in February 2023, though it does not indicate Rumbo's preferred pronouns. With no disrespect intended, we use the pronouns that appear throughout the record and in the briefs.

(1967). Counsel's brief details the nature of the case and discusses issues that an appeal of this kind might be expected to involve. Because counsel's analysis appears thorough, and Rumbo did not respond to the motion, *see* CIR. R. 51(b), we limit our review to the subjects that counsel discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Rumbo sent messages via Kik, an online messaging platform, to an undercover FBI agent who was posing as a mother with a 10-year-old daughter. Rumbo and the agent conversed through direct messages: Rumbo solicited pornographic images of the child and expressed interest in having sexual relations with both the purported mother and the child. On January 6, 2021, Rumbo sent the agent several videos depicting child pornography. After his arrest on a criminal complaint, Rumbo was indicted under 18 U.S.C. § 2252A(a)(2) for distributing one of those videos. Rumbo was released on bond, but he was admonished for violations including viewing adult pornography, and later taken back into custody for drinking alcohol to intoxication.

Rumbo ultimately pleaded guilty without a plea agreement. The district court conducted the change-of-plea hearing, and Rumbo confirmed under oath that he understood the charge, the minimum and maximum penalties (imprisonment for 5 to 20 years, up to a $250,000 fine, 5 years to life of supervised release, and registering as a sex offender), and the trial rights he was waiving. After finding that Rumbo was competent, that the plea was knowing and voluntary, and that there was an adequate factual basis establishing Rumbo's guilt, the court accepted Rumbo's guilty plea.

In the final presentence investigation report (PSR), the probation officer calculated a total offense level of 39 under the Sentencing Guidelines. From a base level of 22, *see* U.S.S.G. § 2G2.2(a)(2), the PSR applied 5 special offense characteristics to increase the offense level: by 2 levels for material involving a minor under the age of 12, *see* § 2G2.2(b)(2); by 7 for an offense involving distribution to a minor intended to persuade the minor to travel for prohibited sexual conduct, *see* § 2G2.2(b)(3)(E); by 4 for material with sadistic, masochistic, or violent depictions, *see* § 2G2.2(b)(4)(A); by 2 for the use of a computer, *see* § 2G2.2(b)(6); and by 5 for the offense involving 600 or more images, *see* § 2G2.2(b)(7)(D). It then decreased the offense level by 3 for acceptance of responsibility. *See* § 3E1.1(a), (b). Rumbo had no criminal history and was therefore assigned a category of I.

Rumbo objected to the seven-level increase under § 2G2.2(b)(3). He argued that he did not send materials with an intent to persuade the minor to travel for prohibited sexual conduct. Instead, Rumbo argued that the two-level increase under § 2G2.2(b)(3)(F)—the catchall provision for knowing distribution—should apply

instead. At the sentencing hearing, the court heard argument and agreed that both the seven-level and two-level increases were inapplicable but concluded that § 2G2.2(b)(3)(C)—distribution to a minor—applied, adding five levels. Rumbo agreed that this provision applied to his offense. The court adopted the PSR with that change.

The district court then explained that Rumbo's guidelines range was 210 to 262 months' imprisonment and 5 years to life of supervised release, based on a total offense level of 37 and a criminal history category of I. There were no objections to these calculations. After hearing arguments from both sides, as well as Rumbo's allocution, the court sentenced Rumbo to the statutory maximum of 240 months' imprisonment, 10 years' supervised release, and a fine of $300.

In his brief, counsel first states that he consulted with Rumbo and confirmed that Rumbo does not wish to withdraw the guilty plea, so counsel properly omits discussion of potential arguments related to the guilty plea or plea colloquy. *See United States v. Larry*, 104 F.4th 1020, 1022 (7th Cir. 2024).

Counsel next considers procedural challenges to Rumbo's sentence. The district court applied the five-level increase under § 2G2.2(b)(3)(C), which applies to offenses involving "distribution to a minor." During the sentencing hearing, counsel agreed that this increase applies to Rumbo's conduct based on *United States v. McMillan*, in which we held that contact with the parent of a minor constituted persuasion of a minor into criminal sexual acts, even without direct contact between the defendant and the minor. 744 F.3d 1033, 1036 (7th Cir. 2014). We have not decided whether the logic of *McMillan* would apply in the context of § 2G2.2(b)(3)(C), and we need not do so here, because Rumbo has waived any challenge to its applicability. *See United States v. Fuentes*, 858 F.3d 1119, 1121 (7th Cir. 2017).

Counsel correctly concludes that any other procedural challenge would be frivolous. Rumbo did not object to the other increases to his offense level, so we would review them only for plain error. *See United States v. Truett*, 109 F.4th 996, 1002 (7th Cir. 2024). Although we have recently clarified that a defendant does not need to object to an error that arises in the course of a sentencing explanation to preserve the issue for appeal, *see United States v. Martin*, 122 F.4th 286, 289–90 (7th Cir. 2024), an objection was required here to preserve a challenge to the district court's guidelines calculation. And Rumbo could not establish that the offense level was plain error because the special offense characteristics that the court applied were based on undisputed facts in the PSR. Additionally, the sentence does not exceed the statutory maximum of 240 months. *See* § 2252A(b)(1). Counsel identifies no other potential procedural errors.

Finally, counsel considers, and appropriately rejects, any argument challenging the substantive reasonableness of the sentence. A within-guidelines sentence is presumptively reasonable, and we will affirm if the court provides an "adequate statement of [its] reasons." *United States v. Major*, 33 F.4th 370, 384–85 (7th Cir. 2022) (quotation omitted). Here, the court explained the sentence with reference to the 18 U.S.C. § 3553(a) factors, highlighting the "horrendous offense" and Rumbo's "several" bond violations. Balancing these factors against Rumbo's lack of criminal history and his addiction, the court settled on the within-guidelines sentence of 240 months. Rumbo therefore would be unable to overcome the presumption of reasonableness on appeal.

We GRANT counsel's motion to withdraw and DISMISS the appeal.