

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2007

5 (Argued: September 5, 2007 Decided: November 28, 2007)

6 Docket No. 06-2716-cr

7 -----x
8 UNITED STATES OF AMERICA,

9
10 Appellee,

11
12 -- v. --

13
14 ARTHUR JUWA,

15
16 Defendant-Appellant.

17 -----x
18
19 B e f o r e : WALKER, CALABRESI, and SACK, Circuit Judges.

20
21 Appeal by Defendant Arthur Juwa from a judgment of
22 conviction of one count of possession of child pornography in
23 violation of 18 U.S.C. § 2252A(a) (5) (B), challenging a sentence
24 of 90 months' imprisonment, entered in the United States District
25 Court for the Southern District of New York (Stephen C. Robinson,
26 Judge). Because it is unclear to what extent the district court
27 based its sentencing enhancement on unsubstantiated charged
28 conduct, we hold that the sentence was procedurally unreasonable.

29 VACATED AND REMANDED.

30 MALVINA NATHANSON, New York,
31 N.Y., for Defendant-Appellant.

32
33 EUGENE INGOGLIA, Assistant
34 United States Attorney, of
35 counsel, (Katherine Polk

1 Failla, Assistant United
2 States Attorney, of counsel,
3 on the brief), for Michael J.
4 Garcia, United States Attorney
5 for the Southern District of
6 New York, New York, N.Y., for
7 Appellee.

8 JOHN M. WALKER, JR., Circuit Judge:

9 Defendant-Appellant Arthur Juwa, who pled guilty to one
10 count of possession of child pornography, asks us to vacate and
11 remand his sentence of 90 months' imprisonment because it was
12 procedurally and substantively unreasonable. In this case, the
13 recommended Sentencing Guidelines range was 24 to 30 months'
14 imprisonment, which both parties agreed would be reasonable. The
15 district court (Stephen C. Robinson, Judge), however, imposed a
16 sentence of 90 months based, at least in part, on pending state
17 charges against Juwa for sexual abuse of a minor. In declaring
18 its reasons for the upward departure, the district court cited
19 the fact that Juwa had engaged in sexual conduct with a minor
20 child "on repeated occasions." Yet Juwa had indicated his intent
21 to plead guilty only to one count of felony sexual abuse in the
22 state case. Because it is unclear to what extent the district
23 court impermissibly based its sentencing enhancement on
24 unsubstantiated charged conduct, we hold that the sentence was
25 procedurally unreasonable, and we vacate and remand for
26 resentencing.

1 **BACKGROUND**

2 On February 16, 2005, while investigating allegations of
3 sexual abuse of a minor in Rockland County, New York, state law
4 enforcement officers conducted a search of Juwa's home and car.
5 In his car, they found a laptop computer containing images of
6 child pornography, at least one of which had been downloaded from
7 the Internet. Juwa was charged federally with one count of
8 receiving and distributing images containing child pornography,
9 in violation of 18 U.S.C. § 2252A(a) (2) (B), and one count of
10 possessing child pornography, in violation of 18 U.S.C. §
11 2252A(a) (5) (B).

12 On October 19, 2005, Juwa agreed to plead guilty in federal
13 court to possession of child pornography. In calculating the
14 applicable Sentencing Guidelines range, the parties and the
15 Probation Office determined that under U.S.S.G. § 2G2.2, Juwa's
16 base offense level was 18. A two-level increase for the use of a
17 computer and a three-level decrease for acceptance of
18 responsibility produced an adjusted offense level of 17. With a
19 Criminal History Category of I, the resulting Guidelines range
20 was 24 to 30 months' imprisonment. In the plea agreement, Juwa
21 and the government agreed that they would not seek any downward
22 or upward departures, respectively, and that a sentence within
23 this range would be reasonable.

24 The Presentence Report ("PSR") prepared by the Probation

1 Office on December 20, 2005, noted that Juwa's laptop had been
2 seized during the Rockland County investigation into charges of,
3 inter alia, sexual abuse and sexual misconduct against a child
4 ("the Rockland County case"). The PSR further noted that Juwa
5 had been arrested on March 22, 2005, on the following state
6 charges: course of sexual conduct against a child in the first
7 degree (one count); criminal sexual act in the first degree (four
8 counts); sexual abuse in the first degree (three counts); and
9 endangering the welfare of a child (one count). The state
10 indictment alleged that, on various dates between December 25,
11 2001 and December 31, 2004, Juwa had engaged in oral sexual
12 conduct with his nephew, who was eight years old at the time of
13 Juwa's arrest. According to the PSR, however, Juwa had not
14 admitted to those allegations. The Probation Office ultimately
15 recommended a term of 24 months' imprisonment, at the bottom of
16 the Guidelines range, followed by three years' supervised
17 release.

18 On January 26, 2006, Juwa appeared before the district court
19 for sentencing. The district judge indicated that he had
20 received and read defense counsel's submissions, which included
21 letters in support of Juwa, as well as two "victim impact
22 statements" submitted by Juwa's nephew and the nephew's mother
23 through the U.S. Attorney's Office. Defense counsel objected to
24 consideration of these letters because Juwa's nephew was not a

1 victim of the federal offense. The district judge stated that he
2 would hear from both the defense and the prosecution, as well as
3 from the nephew and the nephew's mother. If he decided to
4 consider the latter's statements or to consider an upward
5 departure, or both, he would adjourn the sentencing proceeding to
6 give defense counsel an opportunity to respond.

7 After giving all relevant parties a chance to speak, the
8 district judge stated that he would not consider the victim
9 impact statements but that he would consider an upward departure.
10 In particular, he was interested in the status and timeline of
11 the Rockland County case, whether Juwa was going to plead guilty
12 to those charges, and if and when he would be sentenced in that
13 case. After asking the defense and the government "to contact
14 their corresponding parties in the Rockland County case" and
15 clarify these issues, the district judge adjourned the
16 proceeding.

17 Sentencing resumed on May 9, 2006. The district judge began
18 by noting that, in the interim, he had received a letter from the
19 government indicating its understanding that the Rockland County
20 case would not be resolved until after Juwa's federal sentencing;
21 that Juwa intended to plead guilty to one count of felony sexual
22 abuse; and that the anticipated sentence was five years'
23 imprisonment, to run concurrently with his federal sentence.
24 Defense counsel indicated that he had no objections to the

1 contents of the government's letter.

2 The defense then asked the district court to impose a
3 sentence within the Guidelines range, citing the nature of the
4 crime and Juwa's lack of criminal history, and stating that,
5 "apart from the Rockland County matter, there is nothing that
6 would warrant either a departure or stepping outside the
7 guidelines in applying the sentence." The district court,
8 however, stated that it could not look past the Rockland County
9 case. In response, the defense argued that if the Rockland
10 County case was taken into account, the district court should
11 apply U.S.S.G. § 2G2.2(b)(5), which states: "If the defendant
12 engaged in a pattern of activity involving the sexual abuse or
13 exploitation of a minor, increase by 5 levels." U.S.S.G. §
14 2G2.2(b)(5). A five-level increase would result in a Guidelines
15 range of 41 to 51 months. The defense also acknowledged
16 Application Note 6, which provides for an unspecified upward
17 departure "[i]f the defendant engaged in the sexual abuse or
18 exploitation of a minor at any time (whether or not such abuse or
19 exploitation occurred during the course of the offense or
20 resulted in a conviction for such conduct)," but argued that even
21 under this provision, a five-level increase would be sufficient.
22 U.S.S.G. § 2G2.2 Application Note 6.

23 The district judge then indicated that although he would not
24 consider the disposition of the Rockland County case, he would

1 consider the underlying misconduct and would sentence "based on
2 the information before me." Prior to imposing the sentence, the
3 district judge noted the relevant factors before him, including
4 the recommended Guidelines range, the pending state charges, and
5 the representation that Juwa would plead guilty to one count of
6 felony sexual abuse. He then discussed the factors that he was
7 directed to consider pursuant to 18 U.S.C. § 3553(a), as well as
8 the upward departure provisions of U.S.S.G. § 2G2.2(b)(5) and
9 Application Note 6. Regarding the Rockland County conduct, the
10 district judge stated that "[t]his Court is permitted to consider
11 this abuse, even though Mr. Juwa has not yet pled guilty in state
12 court. Considering this conduct, then, the Court imposes a
13 guidelines sentence of 90 months," pursuant to Application Note
14 6.

15 In the alternative, the district judge stated that he would
16 impose a non-Guidelines sentence of 90 months, given that there
17 were no restrictions on the type of information a sentencing
18 court could consider in arriving at an appropriate sentence. But
19 in describing his reasons for imposing this non-Guidelines
20 sentence, the district judge stated that "Mr. Juwa has engaged in
21 sexual conduct with a minor child. He has done so on repeated
22 occasions." In addition to the term of imprisonment, the
23 district judge ordered a three-year term of supervised release
24 and a mandatory special assessment of \$100.

1 Defense counsel objected to the sentence as excessive and
2 pointed out that Juwa had not agreed to plead guilty to every
3 count of the Rockland County indictment. To this, the district
4 court replied, "I said he intended to plead to one count. . . .
5 Sexual abuse." In the written judgment of conviction, the
6 district court provided the following explanation for imposing a
7 sentence outside the advisory Guidelines range: "The defendant,
8 through his attorney, and the gov't informed the Court that the
9 defendant was going to enter a plea of guilt to an aggravated
10 sexual assault charge in State Ct. That charge was for molesting
11 his nephew for 3 years from the ages of ≈ 7-10."

12 Juwa ultimately pled guilty to count six of the Rockland
13 County indictment ("sexual abuse in the first degree"), in that
14 he "subjected another person who was less than eleven years old .
15 . . to sexual contact on December 25, 2001" in violation of New
16 York Penal Law § 130.65. This appeal followed.

17 **DISCUSSION**

18 We review a district court's sentencing determination for
19 reasonableness. United States v. Booker, 543 U.S. 220, 260-62
20 (2005). Reasonableness review has both a procedural and a
21 substantive component; it involves "consideration not only of the
22 sentence itself, but also of the procedures employed in arriving
23 at the sentence." United States v. Fernandez, 443 F.3d 19, 26
24 (2d Cir. 2006); see also United States v. Rattoballi, 452 F.3d

1 127, 131-32 (2d Cir. 2006). "If a sentencing judge committed a
2 procedural error by selecting a sentence in violation of
3 applicable law, and that error is not harmless and is properly
4 preserved . . . for review . . . , the sentence will not be found
5 reasonable." United States v. Crosby, 397 F.3d 103, 114 (2d Cir.
6 2005) (citation omitted).

7 Juwa challenges his sentence on both procedural and
8 substantive grounds. He argues that the district court committed
9 procedural error when it did not adequately explain the reasoning
10 behind its sentence, as required by 18 U.S.C. § 3553(c)(2), and
11 when it relied on a fact concerning Juwa's other misconduct that
12 had not been established by admission or by a preponderance of
13 the evidence. Juwa further argues that the sentence was
14 substantively unreasonable in light of his favorable background
15 and the relatively minor nature of his offense. Because we agree
16 that the sentence was procedurally unreasonable, we need not
17 answer the question of substantive reasonableness. See id. at
18 114 ("[A] sentence would not be 'reasonable,' regardless of
19 length, if legal errors, properly to be considered on appeal, led
20 to its imposition.").

21 **I. The District Court's Statement of Reasons**

22 Section 3553(c)(2) of Title 18 requires a sentencing judge
23 to state in open court the reasons for imposing a particular
24 sentence. If the sentence is outside the applicable Guidelines

1 range, the district court must state its reasons for deviating
2 from the Guidelines "with specificity" in the written order of
3 judgment. 18 U.S.C. § 3553(c)(2). As we have noted, the writing
4 and specificity requirements serve the important purpose of
5 facilitating effective review in the courts of appeals. See
6 United States v. Jones, 460 F.3d 191, 197 (2d Cir. 2006) ("[I]t
7 will generally be helpful to the reviewing court . . . to have
8 the judge's statement of reasons for a sentence outside an
9 applicable guideline conveniently set forth in the written order
10 of judgment and commitment.").

11 In this case, the district judge discussed in open court the
12 § 3553(a) factors that every sentencing judge must consider,
13 including the nature and circumstances of the offense, the
14 history and characteristics of the defendant, the applicable
15 Guidelines range, and the need for the sentence to serve the
16 goals of retribution, deterrence, and incapacitation. See 18
17 U.S.C. § 3553(a). In the written order of judgment, the district
18 court identified the following reasons for imposing a non-
19 Guidelines sentence: "the nature and circumstances of the offense
20 and the history and characteristics of the defendant"; "to
21 reflect the seriousness of the offense, to promote respect for
22 the law, and to provide just punishment for the offense"; "to
23 afford adequate deterrence to criminal conduct"; and "to protect
24 the public from further crimes of the defendant." To this point

1 the district judge's recitation of the sentencing reasons set
2 forth in § 3553(a) was not objectionable, even though we have
3 stated our preference that the reasons be tied to the facts of
4 the case. See Rattoballi, 452 F.3d at 133, 138.

5 The problem arose when the district judge discussed the
6 Rockland County conduct that figured into his decision to depart
7 upwardly from the Guidelines. He stated that he was applying
8 U.S.S.G. § 2G2.2 Application Note 6, which permits an upward
9 departure if the defendant engaged in sexual abuse of a minor at
10 any time. And twice, after noting Juwa's sexual misconduct with
11 a minor, the district judge declared, "Considering this conduct,
12 then, the Court imposes a . . . sentence of 90 months."

13 But there is uncertainty from both the sentencing transcript
14 and the written order surrounding whether and to what extent the
15 district judge based his sentencing enhancement on the assumption
16 that Juwa had engaged in multiple instances of sexual abuse, as
17 opposed to the single instance to which Juwa had anticipated
18 pleading guilty in state court. Indeed, there is evidence in the
19 record that the district judge was aware that Juwa intended to
20 plead guilty to just one count in the indictment, but there is
21 also evidence that he believed that Juwa had engaged in multiple
22 instances of sexual abuse. In describing the circumstances
23 relevant to sentencing, the district judge stated:

24 [T]he government has informed me by letter dated February
25 27, 2006, a letter which defense counsel has received and

1 agrees with, that the defendant's case in Rockland County is
2 expected to be resolved with a guilty plea by the defendant
3 to one count of felony sexual abuse after my sentencing
4 today.
5 But immediately afterward, he stated, "Mr. Juwa's counsel has
6 represented to this Court that Mr. Juwa will plead guilty to
7 those charges." The district judge later reiterated, "Mr. Juwa
8 has been charged with engaging in sexual conduct with a minor
9 child, and will plead guilty to that offense when he is before
10 another judge." But he went on to say, "Mr. Juwa has engaged in
11 sexual conduct with a minor child. He has done so on repeated
12 occasions. Considering this conduct, this Court imposes a
13 nonguidelines sentence of 90 months." When defense counsel
14 attempted to clarify that Juwa had not agreed to plead to every
15 count in the Rockland County indictment, the district court
16 indicated that it understood: "I said he intended to plead to one
17 count." However, in the written statement of reasons, the
18 district judge cited as a reason for his departure the fact that
19 Juwa "was going to enter a plea of guilt to an aggravated sexual
20 assault charge . . . for molesting his nephew for 3 years." In
21 fact, consistent with his stated intention, Juwa ultimately pled
22 guilty to just one instance of sexual contact with his nephew, on
23 December 25, 2001. Thus, it is insufficiently clear whether the
24 district court based its sentence on charged conduct that had
25 neither been sufficiently established nor admitted to by the
26 defendant. The confusion surrounding the basis for the district

1 court's determination rendered the sentence procedurally
2 unreasonable, and a remand is necessary to resolve that
3 uncertainty.

4 **II. Reliance on an Unsubstantiated Fact**

5 If, as Juwa argues, the district court sentenced him in
6 reliance on the assumption that Juwa had sexually abused a minor
7 on more than one occasion, this reliance was improper on the
8 record before us. Because Juwa agreed to admit only to a single
9 incident charged in the Rockland County indictment, and because
10 the district court had ruled out reliance on the oral and written
11 testimony of Juwa's nephew and the nephew's mother, the district
12 court, as far as we can tell, was not presented with reliable
13 substantiation for the remaining charges in the state indictment.
14 Under such circumstances, a sentence enhancement based solely on
15 unproven charges in an indictment would be improper.

16 A sentencing court is not limited to considering only
17 evidence of the convicted offense; it may take into account other
18 relevant conduct, see U.S.S.G. § 1B1.3 cmt. ("Conduct that is not
19 formally charged or is not an element of the offense of
20 conviction may enter into the determination of the applicable
21 guideline sentencing range."), and even acquitted conduct, see
22 United States v. Vaughn, 430 F.3d 518, 521 (2d Cir. 2005); see
23 also Wasman v. United States, 468 U.S. 559, 563 (1984)
24 (describing sentencing court's discretion to "consider any and

1 all information that reasonably might bear on the proper sentence
2 for the particular defendant”).

3 Nevertheless, there are distinct limits to this discretion,
4 and they include a defendant’s due process right to be sentenced
5 based on accurate information. See United States v. Tucker, 404
6 U.S. 443, 447 (1972); see also Townsend v. Burke, 334 U.S. 736,
7 740-41 (1948) (noting that “whether caused by carelessness or
8 design, [it] is inconsistent with due process of law” for a
9 defendant to be sentenced based on assumptions concerning his
10 criminal record that were materially untrue, when the defendant’s
11 sentence had been influenced by other criminal charges to which
12 he had not pled guilty). As the Third Circuit stated in United
13 States v. Matthews, “[f]actual matters considered as a basis for
14 sentence must have ‘some minimal indicium of reliability beyond
15 mere allegation.’” 773 F.2d 48, 51 (3d Cir. 1985) (quoting
16 United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982)).

17 We have held that facts relevant to sentencing must be found
18 by a preponderance of the evidence. Vaughn, 430 F.3d at 525;
19 United States v. Concepcion, 983 F.2d 369, 388 (2d Cir. 1992).
20 Here, the district judge applied the upward departure provision
21 of U.S.S.G. § 2G2.2 Application Note 6 in imposing “a guidelines
22 sentence of 90 months.” In the alternative, he imposed “a
23 nonguidelines sentence of 90 months” based, at least in part, on
24 the Rockland county conduct. If he imposed this sentence based

1 on a finding that Juwa had sexually abused a minor on multiple
2 occasions, that finding would have to have been substantiated by
3 a preponderance of the evidence. There was, however, no evidence
4 of which we are aware to support that finding apart from the
5 charges contained in the state indictment, and a bare-bones
6 indictment, without more, is insufficient to support a factual
7 underpinning for sentencing purposes.

8 It is axiomatic that in a criminal trial "an indictment is
9 not evidence of guilt," nor may it alter the presumption of
10 innocence with which every defendant is cloaked; it is "only a
11 finding of probable cause that a crime has been committed."
12 United States v. Romano, 706 F.2d 370, 374 (2d Cir. 1983)
13 (emphasis added). While the evidentiary standard at sentencing
14 is more relaxed than at trial, and the burden of proof on the
15 government is a preponderance of the evidence and not beyond a
16 reasonable doubt, probable cause is a lower standard than
17 preponderance of the evidence; it "requires only a probability or
18 substantial chance of criminal activity, not an actual showing of
19 such activity." United States v. Bakhtiari, 913 F.2d 1053, 1062
20 (2d Cir. 1990) (quoting Illinois v. Gates, 462 U.S. 213, 243 n.13
21 (1983)). Moreover, an indictment is not meant to serve an
22 evidentiary function. Its primary purpose is to "acquaint the
23 defendant with the specific crime with which he is charged,"
24 United States v. Berlin, 472 F.2d 1002, 1007 (2d Cir. 1973)

1 (internal quotation marks and citation omitted), allow him to
2 prepare his defense, and protect him from double jeopardy, United
3 States v. Doe, 297 F.3d 76, 87 (2d Cir. 2002); see also United
4 States v. Dhinsa, 243 F.3d 635, 667 (2d Cir. 2001) (describing
5 notice function); United States v. D'Anna, 450 F.2d 1201, 1204
6 (2d Cir. 1971) (notice and protection from double jeopardy).

7 We therefore adhere to the prescription that at sentencing,
8 an indictment or a charge within an indictment, standing alone
9 and without independent substantiation, cannot be the basis upon
10 which a criminal punishment is imposed. Some additional
11 information, whether testimonial or documentary, is needed to
12 provide evidentiary support for the charges and their underlying
13 facts.

14 Given that Juwa intended to plead guilty, and ultimately did
15 plead guilty in state court, to only one instance of sexual
16 abuse, and given the lack of reliable independent information to
17 support the other charges in the state indictment, it was
18 impermissible for the district court to simply assume the
19 multiple charges to be true and to enhance Juwa's sentence
20 accordingly. As we have discussed, however, it is unclear from
21 the record whether the district court did rely on the assumption
22 that Juwa had engaged in sexual misconduct on more than one
23 occasion. Therefore, we remand the case to the district court
24 with instructions to resentence the defendant consistent with

1 this opinion and to make clear the basis upon which the sentence
2 rests.

3 **CONCLUSION**

4 For the foregoing reasons, the judgment of sentence is
5 VACATED and the case is REMANDED for resentencing.

6