NONPRECEDENTIAL DISPOSITION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 22, 2024*
Decided January 30, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 23-2104

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ADAM SPRENGER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 18 CR 105

John J. Tharp, Jr., *Judge*.

O R D E R

Adam Sprenger pleaded guilty to producing and possessing child pornography. He was sentenced to 30 years' imprisonment. On his initial appeal we vacated the production conviction as inconsistent with *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020), but held that the possession conviction remains valid. We remanded for resentencing. *United States v. Sprenger*, 14 F.4th 785 (7th Cir. 2021).

---

*This successive appeal has been submitted to the panel that decided Sprenger's initial appeal. See Operating Procedure 6(b). After examining the briefs and the record, we have concluded that a second oral argument is unnecessary. See Fed. R. App. P. 34(a); Cir. R. 34(f).

In addition to pleading guilty to producing and possessing child pornography, Sprenger stipulated that the district court could consider the conduct alleged in a separate production charge, though only for the purpose of sentencing. Under the stipulation Sprenger admitted to the following:

> He lived with Victim B's mother and took four videos of Victim B, who was 13 years old, while she was sleeping. In the first video, he "pulled back the blanket that was covering Victim B and focused the camera on Victim B's clothed buttocks and vagina"; his "erect penis was visible as he masturbated over Victim B." In the second video, he "reached with his hand and made physical contact with Victim B's clothed vagina." In the third, he "made physical contact with Victim B's clothed vagina and buttocks," and in the last, he "ejaculated onto Victim B's clothed buttocks."

14 F.4th at 789 (citations to record omitted). Our opinion left unresolved the question whether such conduct constitutes the production of child pornography under *Howard*. See 14 F.4th at 794 & n.2.

The district judge resentenced Sprenger to 19 years, a reduction of 11 years from the original sentence. The judge concluded that the stipulated conduct amounts to the production of child pornography under 18 U.S.C. §2251(a) and *Howard*. He immediately added:

> It should be understood, however, that what we're talking about is a guideline calculation. Whether or not this conduct under the guideline calculation constitutes an offense that should count as another offense that the guideline calculation takes into account and, you know, you go through the grouping rules and everything else, ultimately is absolutely immaterial to my evaluation of the appropriate sentence to impose here. Whether or not the conduct technically satisfies the definition of production under 2251(a) or not, the conduct is the conduct, and it was abhorrent, reprehensible conduct that, you know, again, regardless of whether it constituted technically a violation of that particular statute doesn't change the nature, doesn't mitigate the seriousness and reprehensibility of that conduct, and doesn't really change the nature of that conduct.
>
> It's undeniable that Mr. Sprenger was taking advantage through physical contact of Victim B's genitalia for his own sexual

> gratification. Whether that's a violation of 2251(a) or not, that's the conduct that the Court's sentence is going to be based on, or the Court's sentence is going to include consideration of that conduct. And ultimately, as will be discussed further, the question of whether this conduct technically satisfies the requirements of 2251(a) will not be material to the Court's determination of the appropriate sentence.

The 11-year reduction in Sprenger's sentence gives force to the judge's statement that Sprenger was being sentenced for possession, not for possession plus production.

Sprenger's principal appellate argument is that the district judge erred in concluding that the stipulated conduct constitutes the production of child pornography. But Sprenger was convicted of possession alone, and the district judge forcefully declared that the appropriate classification of the stipulated conduct did not affect the sentence. This is not a passing remark but is the sort of considered and detailed explanation that makes it unnecessary—indeed, inappropriate—to decide a substantive question of first impression in this circuit. See *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009); *United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022). Because the sentence is independent of the conduct's appropriate legal classification—and because the judge unquestionably was entitled to consider the conduct for its bearing on Sprenger's behavior, character, and risk of recidivism—we need not address this matter further.

Sprenger's second appellate argument is that the district judge should have allowed him to hire a second recidivism expert at public expense. See 18 U.S.C. §3006A(e)(1). The judge approved funds for one such expert, whose opinion was not as favorable to Sprenger as counsel wished. Sprenger hoped for a more favorable evaluation from a second expert (or perhaps a re-evaluation by the first expert). The district judge thought that one expert on the subject suffices, and we conclude that the judge did not abuse his discretion. Sprenger does not explain why he believes the first report defective or why a second would produce a more accurate evaluation. No more need be said.

AFFIRMED