

United States Court of Appeals
For the Eighth Circuit

No. 18-3338

United States of America

Plaintiff - Appellee

v.

Marlin Santana Thomas

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: September 16, 2019

Filed: September 19, 2019

[Unpublished]

Before BENTON, KELLY, and ERICKSON, Circuit Judges.

PER CURIAM.

Marlin Thomas appeals the above-Guidelines sentence the district court¹ imposed after he pleaded guilty to a drug offense. His counsel has moved for leave

¹The Honorable John A. Jarvey, Chief Judge, United States District Court for the Southern District of Iowa.

to withdraw, and has filed a brief under Anders v. California, 386 U.S. 738 (1967), suggesting that the district court made various sentencing errors.

We first conclude that the district court did not abuse its discretion in considering prior grand jury testimony by one person and hearsay testimony offered at sentencing regarding statements by a second person, as the evidence possessed sufficient indicia of reliability to support its probable accuracy. See United States v. Sheridan, 859 F.3d 579, 583 (8th Cir. 2017) (standard of review; in resolving disputed issues of fact during criminal sentencing, district court may rely on relevant hearsay, so long as evidence possesses sufficient indicia of reliability to support its probable accuracy). Next, we conclude that the district court did not clearly err in finding the grand jury testimony credible, as it was not contradicted by extrinsic evidence, internally inconsistent, or implausible. See United States v. Wright, 739 F.3d 1160, 1166-67 (8th Cir. 2014) (standard of review; district court's decision to credit testimony can almost never be clear error unless testimony is contradicted by extrinsic evidence or is so internally inconsistent or implausible on its face that no reasonable factfinder would credit it). We further conclude that the district court did not abuse its discretion by crediting hearsay testimony regarding statements by the second person, based on the court's observations of that person's testimony in another proceeding. See United States v. Tucker, 404 U.S. 443, 446 (1972) (at sentencing, district court may conduct inquiry broad in scope, and is largely unlimited as to kind of information it may consider or source from which that information may come).

We also ascertain no error in the district court's application of a Guidelines enhancement based on evidence that Thomas choked a woman and forced heroin into her mouth. See U.S.S.G. § 2D1.1(b)(2) (2-level enhancement if, inter alia, defendant used violence). We further conclude that the district court did not err in imposing an above-Guidelines sentence based on Thomas's prostitution activities, which the court found were "inextricably intertwined" with his drug offense. See United States v. Mangum, 625 F.3d 466, 469-70 (8th Cir. 2010) (upward variance was reasonable

where court made individualized assessment based on facts presented). Thomas's sentence also is not substantively unreasonable. See United States v. Feemster, 572 F.3d 455, 461-62 (8th Cir. 2009) (en banc) (discussing substantive reasonableness).

Finally, we have independently reviewed the record pursuant to Penson v. Ohio, 488 U.S. 75 (1988), and have found no nonfrivolous issues. Accordingly, we grant counsel's motion for leave to withdraw, and we affirm.
