

08-0104-cr

United States v. Martinucci

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Submitted: November 11, 2008

Decided: April 8, 2009)

Docket No. 08-0104-cr

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UNITED STATES OF AMERICA,

Appellee,

-v.-

AMERICO A. MARTINUCCI,

Defendant-Appellant.

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Before: LEVAL, POOLER, and PARKER, *Circuit Judges.*

The defendant Americo A. Martinucci appeals from the sentence imposed on him by the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Judge*) following his plea of guilty to a one-count indictment charging him with producing child pornography, in violation of 18 U.S.C. § 2251(a). Martinucci asserts on appeal that his sentence of 300 months imprisonment was unreasonably severe and that the court erred in considering hearsay information in determining the appropriate sentence. The Court of Appeals affirms the sentence.

GLENN T. SUDDABY, United States Attorney,
Northern District of New York (Miroslav Lovric,
Brenda K. Sannes, Assistant United States Attorneys,
of counsel) Syracuse, NY, for *Appellee*.

TERENCE L. KINDLON, Kindlon and Shanks, P.C.,
Albany, NY, for *Defendant-Appellant*.

1 Per Curiam:

2 The defendant Americo A. Martinucci appeals from the sentence imposed on him by the
3 United States District Court for the Northern District of New York (Thomas J. McAvoy, *Judge*)
4 following his plea of guilty to a one-count indictment charging him with producing child
5 pornography, in violation of 18 U.S.C. § 2251(a). Martinucci asserts on appeal that his sentence
6 of 300 months imprisonment was unreasonably severe and that the court erred in considering
7 hearsay information in determining the appropriate sentence.

8 Martinucci's offense involved his sexual abuse of a ten year old girl. The evidence
9 showed the following. The victim's family were very close friends of Martinucci, such that he
10 had been at their home when they brought their newborn daughter, the victim, home from the
11 hospital. When the girl was ten years old and they were alone together, Martinucci had the
12 young victim watch videotapes of adult pornography and bestiality. He later took her to a cabin
13 behind his home where he had her rub his penis and then had sexual intercourse with her. The
14 next day he took her to an office in a pizzeria which he ran, where he had set up a video camera.
15 He again had sex with her, and recorded the act on videotape. He then drove her to another
16 residence and had sex with her again. A few days later Martinucci had her watch the videotape
17 he had made. On another occasion, when the victim was at his residence for a party, he called
18 out her name and exhibited his penis to her.

19 Three years later, the victim told her mother, and then the police, about Martinucci's
20 offenses. Under police surveillance she placed a telephone call to Martinucci (which was
21 recorded) and accosted him with what he had done to her, expressing her fear that he would do
22 the same to his own granddaughter. In response to her inquiry about the videotape, he told her

1 that he had long ago burned it. “That’s all I got to do, keep it, so somebody will find it. Are you
2 out of your mind or what?” In explanation of his acts, he said, “What I did, what we did . . . was
3 because I wanted you to know everything about sex. Everything, so you wouldn’t get hurt.
4 That’s the reason why I taught you every goddam thing. Or most everything.” He then
5 questioned her about whether she had told anyone, cautioning, “It’s our business, it’s nobody
6 else’s business. You understand?”

7 When the New York State Police interviewed him, he admitted that he had the victim
8 touch his penis with her hand, but denied having had intercourse with her, and denied having
9 ever touched anyone else inappropriately. When interviewed by the Probation Office after his
10 guilty plea, he denied that he had sexual contact with the victim and denied making a videotape.
11 He insisted that he had pleaded guilty only to making a telephone call.

12 At the sentencing proceeding, Martinucci asserted that he had made a guilty plea only
13 because he was under a lot of pressure, and claimed he had pled only to a phone call and not to
14 the charge against him. He again denied having had sex with the girl and sought to impeach her,
15 asking, “Why did it take her three years to come forward if it was the truth, if it was the truth that
16 she was raped, that she was abused, sexually abused?” He added, “I never touched that girl . . . I
17 did nothing but good in my life, all my life.”

18 The government provided the court with evidence of Martinucci’s abuse of other young
19 girls. This included an sworn deposition of a woman who in 1985 or 1986, when she was twelve
20 years old, had worked in Martinucci’s pizzeria. She stated that many times, when she went to the
21 basement for supplies, Martinucci had pulled out his penis and had her rub it. He once tried to
22 have intercourse with her, but stopped when he heard her mother calling her. The court also

1 considered depositions of three other young women, who testified to Martinucci's similar sexual
2 abuse of them when they were twelve or thirteen years old. The court also heard evidence of
3 serious emotional harm suffered by the victim.

4 Martinucci's offense level under the United States Sentencing Guidelines was 33, which
5 indicated a sentence range of 135-168 months. His offense of conviction, however, required a
6 mandatory minimum sentence of 180 months. 18 U.S.C. § 2251(e). The government's
7 sentencing memorandum argued that under the sentencing factors prescribed by 18 U.S.C. §
8 3553(a) the court should sentence Martinucci more severely. As noted, the court determined to
9 sentence above the Guidelines range and the mandatory minimum. It imposed a term of
10 imprisonment of 300 months. In explanation, the court cited the great harm the defendant had
11 done to the victim, as well as to other child victims of his abuse, the need for severe punishment,
12 the importance of deterring others from committing similar offenses, and the need to protect
13 other potential victims from the defendant. Finally, the court cited the defendant's complete lack
14 of remorse, as evidenced by his denial at the sentencing proceeding of the very conduct he had
15 admitted at his guilty plea.

16 Discussion

17 We find no merit in the contentions Martinucci raises on appeal. For the first time on
18 appeal, he contends the court should not have considered hearsay in determining his sentence.
19 Because he did not preserve this objection in the proceedings in the district court, his claim is
20 reviewed under the *plain error* standard. *United States v. Villafuerte*, 502 F.3d 204, 207-08 (2d
21 Cir. 2007). In any event, regardless of the standard for appellate review, there is no merit to his
22 claim. It has long been established that a district court may consider hearsay evidence in

1 determining the appropriate sentence if the evidence is of sufficient reliability. *See United States*
2 *v. Martinez*, 413 F.3d 239, 242 (2d Cir. 2005). There was no error in the court's consideration of
3 the depositions of Martinucci's other victims. There was no reason to doubt the reliability of the
4 deponents, and Martinucci did not ask to be allowed to cross-examine them.

5 Nor is there merit to Martinucci's contention that the court acted unreasonably in
6 departing upward under U.S.S.G. § 5K2.8 and imposing a term of imprisonment of 300 months.
7 The district court conscientiously reviewed the pertinent sentencing factors specified by §3553(a)
8 and concluded, considering the seriousness of the offense and the great harm inflicted on the
9 victim, the defendant's recidivism, and his lack of remorse, that the need for punishment, for
10 deterrence of others, and for protection of society justified the lengthy imprisonment term. The
11 court did not exceed its sentencing discretion. *See Gall v. United States*, 128 S. Ct. 586, 595
12 (2007); *United States v. Ministro-Tapia*, 470 F.3d 137, 141 (2d Cir. 2006). In our view, the
13 sentence was altogether appropriate.

14 Conclusion

15 The judgment of conviction is affirmed.
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