NONPRECEDENTIAL DISPOSITION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 June 15, 2023
Decided June 22, 2023

Before

DIANE S. SYKES, *Chief Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2737

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ASHLEY D. HARPER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:22CR007-001

Jon E. DeGuilio,
Chief Judge.

O R D E R

Ashley Harper pleaded guilty under 18 U.S.C. § 2251(a) to sexually exploiting a minor, for which he was sentenced to 210 months in prison and five years of supervised release. He filed a notice of appeal, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). We grant the motion and dismiss the appeal.

On July 20, 2021, Harper picked up Jane Doe, a five-year-old girl, from her babysitter, who permitted Harper to take Doe to a park. When Harper brought Doe

home that evening, the girl told her mother that Harper had licked her vagina. After Doe's mother reported the incident, the Michigan City Police Department investigated.

Several months later, Google provided the National Center for Missing and Exploited Children with images and videos that had been uploaded to Harper's account, which Google flagged as depictions of the sexual abuse of children. The center alerted federal authorities, who, after receiving the materials, learned about the pre-existing investigation in Michigan City. Agents obtained a warrant to search Harper's phone, where they found eight images and one video of Doe from July 20, 2021. In each she was wearing the same clothing that she wore to the park with Harper. In some of the materials, another person can be seen or heard; it is undisputed that this is Harper. One image depicts Harper's finger pulling down Doe's underwear and partially penetrating her vagina with his fingertip. In the video Doe's genitalia are exposed, and she tells Harper, "Wipe me off."

Federal authorities arrested Harper on a criminal complaint. Shortly after his arraignment, he was indicted on one count of producing child pornography, 18 U.S.C. § 2251(a), and two counts of possessing child pornography, *id.* § 2252(a)(4)(B). Without a plea agreement, Harper pleaded guilty to the production count. At his change-of-plea hearing conducted by the assigned magistrate judge, Harper admitted that he had used his cell phone to take the images and video of Doe while she "was in [his] custody" and under his care and control. Without objection, the district judge accepted the magistrate judge's recommendation to accept Harper's guilty plea and dismissed the two possession counts on the government's motion.

The probation office then prepared a presentence investigation report ("PSR"), which calculated a Guidelines range of 210 to 262 months in prison based on a total offense level of 37 and a criminal-history category of I. To the base offense level of 32 under U.S.S.G. § 2G2.1(a), the PSR added four levels because the victim was under age 12, U.S.S.G. § 2G2.1(b)(1)(A); two levels because Harper had "performed oral sex on the victim," *id.* § 2G2.1(b)(2)(A); and another two levels because the victim had been in Harper's custody, care, or supervisory control, *id.* § 2G2.1(b)(5). Harper received a three-level deduction for timely accepting responsibility for his offense. *Id.* § 3E1.1.

Harper objected to both two-level increases, denying the oral sex and arguing that Doe had not been in his custody and care. But the judge determined that Doe's statement to her mother—and the video of Doe saying, "Wipe me off"—supported a finding that Harper had performed a "sexual act." *See* § 2G2.1(b)(2)(A). And regardless,

the judge explained, an increase for "sexual contact" was warranted based on the photograph of Harper's fingertip penetrating Doe, "however slight[ly]." *See id.*; 18 U.S.C. § 2246(2). The judge also applied the custody-and-care increase because it was undisputed that Harper had taken Doe with the babysitter's permission and that no other adults accompanied them. Moreover, when he pleaded guilty, Harper expressly admitted that Doe had been in his custody, care, and control.

After hearing the parties' arguments, the judge sentenced Harper to 210 months in prison and the mandatory minimum five years of supervised release. The judge explained that a sentence at the low end of the range was appropriate because although Harper's offense and its lasting effects were serious, Harper was older, had limited education and mental-health issues, and had quickly accepted responsibility. The judge also stated that even if the Guidelines range had been lower, he would have imposed the same sentence to adequately reflect the seriousness of Harper's conduct.

That brings us to this appeal. Counsel's brief explains the nature of the case and raises potential issues that we would expect an appeal like this to involve. Because the analysis appears thorough and Harper has not come forth with additional issues to raise in an appeal, *see* 7TH 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).

Counsel first tells us that he advised Harper about the risks and benefits of withdrawing his plea, and Harper does not wish to do so. Therefore, counsel permissibly omits discussion of whether the magistrate judge complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedure for ensuring a knowing and voluntary guilty plea. *See United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012) (citing *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002)).

Next, counsel correctly concludes that Harper could not raise any nonfrivolous challenge to the Guidelines calculations. The offense-level increases for engaging in a sexual act or contact and for exploiting someone in his custody and control, *see* § 2G2.1(b)(2)(A), (b)(5), are based on factual findings that we would review for clear error. *See United States v. Johnson*, 784 F.3d 1070, 1073 (7th Cir. 2015). We would review the judge's interpretation of the Guidelines de novo. *Id.*

Harper could argue that the sexual-act increase should not apply because the only evidence he engaged in oral sex was Doe's hearsay statement to her mother. But because the rules of evidence do not apply at sentencing, Harper would need to

demonstrate that the statement was unreliable. *See United States v. Betts-Gaston*, 860 F.3d 525, 539 (7th Cir. 2017). He did not meet that burden, particularly given the corroborating video. Regardless, as the district judge found, the photo of Harper using his finger to penetrate Doe shows "intentional touching … of the genitalia" and supports the "sexual contact" increase. *See* § 2G2.1(b)(2)(A) & cmt. n.2 (incorporating 18 U.S.C. § 2246(3)). As for the custody-and-care adjustment, Harper admitted at his plea hearing that Doe was in his custody, care, and control, and that he was the only adult present with her for several hours. *See* § 2G2.1(b)(5); *United States v. Carson*, 539 F.3d 611, 612 (7th Cir. 2008). He did not attempt to withdraw those admissions, which would require him to explain his contrary statement under oath. *See United States v. Chavers*, 515 F.3d 722, 724 (7th Cir. 2008). Therefore, we agree with counsel that it would be frivolous to argue that findings supporting these two adjustments were clearly erroneous.

Counsel also rightly concludes that even if the judge had erred in the Guidelines calculations, any error would be harmless. Giving "specific … attention to the contested guideline issue[s]," the judge offered a "detailed explanation" why he would have imposed the same sentence even without the disputed offense-level increases. *See United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022). Specifically, the judge explained that the gravity of Harper's conduct toward a young child in his care justified the 210-month sentence irrespective of the Guidelines range. *See id.* at 581–82.

Counsel continues that any other procedural challenge would be frivolous, and we agree. The prison sentence and five-year term of supervised release are within the relevant statutory boundaries. *See* 18 U.S.C. §§ 2251(e), 3583(k). Nothing suggests that the judge relied on inaccurate information. *See United States v. Issa*, 21 F.4th 504, 508 (7th Cir. 2021). And after properly calculating the Guidelines range, the judge allowed both parties to present arguments, considered those arguments along with the factors under 18 U.S.C. § 3553(a), and explained his reasoning. *See Gall v. United States*, 552 U.S. 38, 53 (2007) (listing procedural errors).

Challenging the substantive reasonableness of the sentence would also be frivolous, as counsel explains. Because Harper's sentence is within a properly calculated Guidelines range, we would presume that it is not unreasonably high. *See United States v. Melendez*, 819 F.3d 1006, 1013 (7th Cir. 2016). And counsel finds no way to rebut that presumption because the district judge adequately considered the § 3553(a) factors, balancing the mitigating factors (Harper's mental health, age, and minimal criminal

history) against the seriousness of the offense, especially the amount of harm to the victim. *See id.* at 1013–14.

Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeal.