

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 11-1639

United States of America,

Appellee,

v.

Jeffrey W. Provancial,

Appellant.

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Appeal from the United States
District Court for the
District of South Dakota.

[UNPUBLISHED]

Submitted: November 17, 2011

Filed: November 22, 2011

Before MURPHY, ARNOLD, and BENTON, Circuit Judges.

PER CURIAM.

Under the terms of a written plea agreement, Jeffrey W. Provancial pleaded guilty to sexual abuse, in violation of 18 U.S.C. §§ 1153, 2242(2), and 2246(2)(A). The district court¹ imposed a sentence of 108 months in prison, at the top of the advisory Guidelines range, and 5 years of supervised release. Mr. Provancial filed a timely pro se notice of appeal, claiming ineffective assistance of counsel. His counsel has moved to withdraw and filed a brief under Anders v. California, 386 U.S. 738 (1967), arguing that the district court improperly relied on the government's

¹The Honorable Roberto Antonio Lange, United States District Judge for the District of South Dakota.

failure to prove a use-of-force enhancement under the Guidelines in determining its sentence; and that the court clearly erred in finding at sentencing that Mr. Provancial had “no employment history whatsoever,” when he in fact had worked for one summer prior to his arrest at age 18.

We reject counsel’s arguments. First, we see no indication that the district court gave significant weight to any improper factor at sentencing. See United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (en banc). Second, we conclude that the mischaracterization of Mr. Provancial’s employment history, to which counsel did not object below, was not plain error. See United States v. Molnar, 590 F.3d 912, 914-15 (8th Cir. 2010). We decline to consider Mr. Provancial’s ineffective-assistance claim on direct appeal. See United States v. Ramirez-Hernandez, 449 F.3d 824, 826-27 (8th Cir. 2006).

Having reviewed the record independently under Penson v. Ohio, 488 U.S. 75, 80 (1988), we find no nonfrivolous issue. Accordingly, we affirm the judgment of the district court and we grant counsel’s motion to withdraw, subject to counsel informing Mr. Provancial about procedures for seeking rehearing or filing a petition for certiorari.
