NONPRECEDENTIAL DISPOSITION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

Argued October 1, 2024
Decided October 11, 2024

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

No. 22-1907

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN FREDENBURGH,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 21-CR-128

William C. Griesbach,
Judge.

O R D E R

John Fredenburgh pleaded guilty to traveling in interstate commerce for the purpose of engaging in sexual conduct with a minor, 18 U.S.C. § 2423(b), and attempted enticement of a minor, *id.* § 2422(b), and was sentenced to 307 months' imprisonment. He challenges one part of the district court's calculation of his advisory guidelines range: the failure to group his convictions for sentencing purposes. But we see no error in the district court's decision not to group Fredenburgh's convictions, and so we affirm.

I.

Fredenburgh engaged in a 5-year sexual relationship with a minor. He first met the minor—at the time his stepdaughter's friend—when she was 8 years old. Over time, Fredenburgh gave her gifts, compliments, and allowed her to smoke cigarettes while under his supervision. He first had sex with her when she was 12 years old. Although most of the sexual occurrences happened at his home (in Suring, Wisconsin), the two also had sex on camping trips and at hotels. They also engaged in "phone sex" on at least three occasions. The relationship came to a halt when the minor confessed to her mother that she had been in a "secret relationship" with Fredenburgh.

Fredenburgh was later indicted on two counts of traveling in interstate commerce for the purpose of engaging in sexual conduct with a minor in violation of 18 U.S.C. § 2423(b), and one count of attempted enticement of a minor to engage in sexual conduct in violation of 18 U.S.C. § 2422(b). He eventually pleaded guilty to one count of traveling in interstate commerce for the purpose of engaging in sexual conduct with a minor and one count of attempted enticement of a minor to engage in sexual conduct.

The United States Probation Office prepared a presentence investigation report (PSR), which did not group Fredenburgh's two counts of conviction for sentencing purposes. The PSR noted that, although the two counts involved the same victim, they represented separate harms against her. Because the PSR did not group the two counts, it assigned one unit to each count under the § 3D1.4 grouping rules, and added a 2-level increase to the count with the highest offense level, 34, for a multiple-count adjustment of 36. Additional offense-level enhancements boosted the recommended total offense level to 38. Because Fredenburgh had no criminal history points, his offense level yielded a guidelines imprisonment range of 235–293 months. Fredenburgh did not object to the PSR's calculation of his guidelines range.

At sentencing, the district court first inquired whether Fredenburgh disputed the guidelines calculations in the PSR, and Fredenburgh again stated that he did not object to the PSR's calculations. So the court adopted those calculations. After considering the seriousness of Fredenburgh's convictions and the duration of misconduct that spanned the minor's childhood, the court imposed an above-guidelines sentence of 300 months' imprisonment.

II.

On appeal, Fredenburgh argues that the district court erred by failing to group his convictions for purposes of U.S.S.G. § 3D1.2. Because he did not raise this argument in the district court, relief in this court depends on a finding that the district court's failure to group his convictions was plain error. *United States v. Long*, 79 F.4th 882, 885 (7th Cir. 2023), cert. denied, 144 S. Ct. 578 (2024). For that to be so, Fredenburgh must demonstrate an error that is clear and obvious, and affected both his substantial rights and the fairness or integrity of the judicial proceedings. *Id*. An error in calculating the guidelines range typically satisfies the plain error standard. *See Rosales-Mireles v. United States*, 585 U.S. 129, 132 (2018).

Section 3D1.2 of the Sentencing Guidelines provides that "[a]ll counts involving substantially the same harm shall be grouped together into a single [g]roup." The grouping guideline lists the following circumstances in which multiple counts are deemed to involve "substantially the same harm":

> (a) When counts involve the same victim and the same act or transaction.
>
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
>
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. § 3D1.2(a)–(d). Fredenburgh argues that his convictions should have grouped under § 3D1.2(d). He contends that his convictions were ongoing or continuous, as they were based on a "years-long ongoing interaction" with the minor.

But the district court committed no plain error. First, Fredenburgh cannot point to any caselaw—from this court or otherwise—supporting the proposition that his convictions should be grouped under § 3D1.2(d). Indeed, he acknowledges that there are no cases addressing the applicability of § 3D1.2(d) to counts of sexual misconduct. And on a matter of first impression, we will rarely find plain error. *See United States v. Ramirez*, 783 F.3d 687, 695 (7th Cir. 2015). Fredenburgh certainly has not shown any error here that was "clear under current law." *United States v. Natale*, 719 F.3d 719, 731 (7th Cir. 2013) (citation omitted).

In any event, the Guidelines' commentary counsels against Fredenburgh's argument. Specifically, Application Note 6 advises that most "drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior" should be grouped under § 3D1.2(d). U.S.S.G. § 3D.1.2 cmt. n.6. The application note then ticks off a list of examples of the kind of offenses that should be grouped; absent from that list are offenses involving sexual misconduct. This omission suggests that § 3D1.2(d) does not contemplate offenses involving sexual misconduct.

In addition, Application Note 4, while addressing § 3D.1.2(b), excludes sexual misconduct from grouping. The note says that "two counts of rape for raping the same person on different days … *are not* to be grouped together." U.S.S.G. § 3D.1.2 cmt. n.4. This suggests that sex crimes—even against the same victim—pose distinct and separate harms, and thus should not be grouped under the grouping guideline. Put differently, in the context of "sex crimes committed by the same defendant against the same victim over an extended period of time, … each act usually amounts to a fresh harm the victim must face anew." *United States v. Bivens*, 811 F.3d 840, 843 (6th Cir. 2016). We thus conclude that the district court did not commit plain error by failing to group Fredenburgh's counts of conviction under § 3D1.2(d).

Fredenburgh also argues that the district court erred by failing to group his convictions under § 3D1.2(b) and (c). But, as Fredenburgh conceded at oral argument, our decisions in *United States v. Von Loh*, 417 F.3d 710 (7th Cir. 2005), and *United States v. White*, 97 F.4th 532 (7th Cir. 2024), say otherwise. In *Von Loh*, we relied on the Guidelines' commentary to conclude that multiple acts of statutory rape against the same victim are separate harms and thus do not group under § 3D1.2(b) or (c). 417 F.3d at 714. Fredenburgh asks us to reconsider *Von Loh*, and he argues that the Guidelines' commentary is no longer authoritative. His argument relies on *Kisor v. Wilke*, 588 U.S.

558, 573 (2019), where the Supreme Court clarified the deference owed to an agency's interpretation of its own regulations. But in *White*, we rejected the same argument Fredenburgh now raises and held that the Guidelines' commentary remains authoritative post-*Kisor*. 97 F.4th at 539. The most we can offer under currently controlling precedent is that Fredenburgh has preserved his argument for further review at the Supreme Court.

AFFIRMED.