

NONPRECEDENTIAL DISPOSITION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 January 16, 2025

Decided January 17, 2025

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 24-1649

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN DIAL,
Defendant-Appellant.

Appeal from the United States District
Court for the Central District of Illinois.

No. 22-CR-20053-001

Colin S. Bruce,
Judge.

ORDER

Kevin Dial was convicted of orchestrating the sexual exploitation of his children and sentenced to 600 months' imprisonment with a lifetime of supervised release. He appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 744 (1967). Counsel's brief explains the nature of the case and addresses the issues that an appeal of this kind typically would involve. Because the analysis appears thorough, and Dial did not respond to counsel's motion, *see* CIR. R. 51(b), we limit our review to the subjects counsel raises. *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014). We grant the motion and dismiss the appeal.

In 2022, Dial called in to a popular Filipino radio show and revealed that his wife (a resident of the Philippines) had been sending him videos and images of her sexually abusing their three minor children. The host reported this to the Philippine National Police, who in turn reported it to the FBI. The FBI asked Dial to sit for an interview at his residence in Decatur, Illinois, and he agreed. During the interview, Dial admitted to receiving photos and videos of his wife having sexual contact with their children and voluntarily gave agents two of his phones so that they could see his wife's messages. The phones stored over 600 photos and videos, largely sent between early 2019 and late 2020, of his wife sexually abusing their children. Briefly summarized, the files showed his wife engaging in oral sex with their three- and five-year-old children, and his wife engaging in sexual intercourse with Dial's ten-year-old stepchild. There were also text messages suggesting that Dial provoked this conduct from afar. Based on Dial's interview and the evidence from his phones, Dial was arrested and charged with both receipt and possession of child pornography, 18 U.S.C. § 2252A(a)(2), (5), and two counts of sexual exploitation of a minor, § 2251(a).

Dial pleaded not guilty and proceeded to trial. During a three-day trial, the jury heard from one of the FBI agents who interviewed Dial. The agent testified that Dial characterized the abuse as entirely his wife's idea, but the text messages showed that he had directed the abuse. Believing that his wife had been unfaithful, Dial set out to punish her and control her by withholding financial support (on which the family relied) unless she would send him photos and videos of her having sexual contact with the children. He detailed the specific acts he wanted performed and told her that if she did not comply, he would expose her as a child molester. He described his role in a message to his wife: "A child molester, rapist, pedophile — I am the one that turned you into this. Completely. And all on videos. Lots and lots and lots of videos recorded by you when sexually molesting all three of our [children] too." One of the minor victims also testified and confirmed that he had been sexually abused by his mother at Dial's direction. Dial, for his part, attempted to establish that his wife had set him up by using his account to send the messages and that Dial sent no messages to the children directing them to have sex with their mother. Dial moved for a judgment of acquittal at the end of the government's case-in-chief and at the close of all evidence; both motions were denied. *See* FED. R. CRIM. P. 29. The jury found Dial guilty on all counts.

The probation office prepared a presentence investigation report (PSR) setting forth the offense conduct, Dial's criminal history, and the application of the Sentencing Guidelines. The PSR reflected a total offense level of 43 (reduced from 54 to the maximum, *see* U.S.S.G. § 5A cmt. n.2) and a criminal history category of II, resulting in a

Guidelines range of life in prison, § 5A, capped by the statutory maximums. By statute, Dial faced 5 to 20 years in prison for each child pornography charge, 18 U.S.C. § 2252A(b)(1), 15 to 30 years for each child exploitation charge, § 2251(e), and five years to life on supervised release, § 3583(k). The Guidelines called for consecutive time because the statutorily authorized maximum sentences were less than the minimum under the Guidelines, *see* U.S.S.G. § 5G1.2(d); therefore, the Guidelines term of imprisonment was 1200 (240+240+360+360) months.

Dial initially objected to the offense-level calculations but later withdrew his objections because even if successful, they would not result in an offense level below 43. Instead, defense counsel expressly opted to argue about the nature of the offense through the § 3553(a) factors. The government requested a sentence of 1200 months whereas Dial did not request a specific sentence. Instead, he argued that 1200 months was excessive given his voluntary disclosure of the abuse and his own history of being incestuously abused, and he further noted that, because he was 52 years old, anything over 360 months would likely amount to a life sentence.

At the sentencing hearing, the district judge confirmed that there were no objections to the PSR and adopted it in full. The judge then heard the parties' arguments and weighed the sentencing factors under § 3553(a). He considered mitigating factors, such as Dial's age and deteriorating health, and aggravating factors, such as Dial's leadership role in the abuse and its incestuous nature. The judge ultimately sentenced Dial to a total of 600 months' imprisonment and 4 concurrent terms of lifetime supervised release.

In his *Anders* brief, counsel first considers potential challenges to the conviction, beginning with whether Dial could raise a nonfrivolous challenge to any evidentiary rulings. Dial did not object to most of the government's motions in limine. For the few motions that he quibbled with—for example, Dial agreed that the government's motive for prosecuting the case was irrelevant but wanted to cross-examine on any bias the FBI agents might individually hold toward Dial—the judge deferred ruling until the disputed issues arose at trial, and none of them did. The judge granted each of Dial's own pretrial motions. And every objection that Dial made at trial was sustained. Thus, he could not make any non-frivolous evidentiary arguments on appeal.

Counsel next considers whether Dial could plausibly challenge the sufficiency of the evidence supporting his conviction and properly determines that he could not. We will reverse a jury verdict only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Rivers*, 108 F.4th 973, 981 (7th Cir.

2024). At trial, the government produced videos and photos, which were sent by Dial's wife and saved on his phones, of her having oral and vaginal sex with their minor children, along with text messages in which Dial coerced or commanded those acts take place. This, combined with the parties' stipulation that the messages were transmitted in interstate or foreign commerce, would allow a reasonable juror to find every element of both receipt and possession of child pornography, *see United States v. Niggemann*, 881 F.3d 976, 980–81 (7th Cir. 2018), and every element of sexual exploitation of a minor as to both counts, *see United States v. Hartleroad*, 73 F.4th 493, 498–99 (7th Cir. 2023).

Evaluating the sentence, counsel first correctly determines that Dial could not plausibly challenge his within-guidelines sentence on procedural grounds. His receipt and possession charges were grouped with a base offense level of 22, *see* U.S.S.G. §§ 3D1.2(d), 2G2.2(a)(2), and the offense level was adjusted upward to 40 based on multiple special offense characteristics. These consisted of increases under § 2G2.2(b)(2) (2 levels), (b)(4) (4 levels), (b)(5) (5 levels), (b)(6) (2 levels), (b)(7)(D) (5 levels). His first exploitation conviction had a base offense level of 32, *see* § 2G2.1(a), and was increased to level 42 based on § 2G2.1(b)(1) (4 levels), (b)(2)(A) (2 levels), (b)(5) (2 levels), and § 3B1.1(c) (2 levels). The other exploitation conviction was further increased to level 46 because of the 4-level increase under § 2G2.1(b)(4)(A). Dial initially objected to some of the offense-level increases, but he waived any appellate challenge by withdrawing his objections. *See United States v. Boyle*, 28 F.4th 798, 802 (7th Cir. 2022). With a multiple-count adjustment and a 5-level enhancement because of the pattern of prohibited sexual conduct, *see* § 4B1.5(b)(1), the adjusted offense level reached 54, which was reduced to a total offense level of 43, the maximum, *see* § 5A cmt. n.2. That offense level combined with a criminal history category II (based on a prior felony conviction, *see* § 4A1.1(a)), resulted in a Guidelines range of the statutory maximum for each count, *see* § 5A. As for any adjustments not objected to, counsel identifies no plain error. *See id.*

Dial and the government disagreed on how the statutory maximums interacted with the Guidelines, but counsel correctly concludes the issue would be frivolous to argue on appeal. Under U.S.S.G. § 5G1.2(d), if the statutory maximum sentence of one charge is less than the minimum of the applicable guidelines range, "then the sentence imposed on one or more of the other counts shall run consecutively ... to the extent necessary to produce a combined sentence equal to the total punishment." The government agreed with the PSR that the sentences for each count should run consecutively to one another for a statutory maximum sentence of 1200 months. Dial contended that the possession and receipt convictions involved overlapping conduct and so their sentences could not run consecutively, and for the same reasons, neither

could the sentences for the two exploitation convictions. Thus, he urged, the maximum permissible sentence was 600 months. The judge did not decide which view was correct, but ultimately sentenced Dial to 600 months—running a 240-month sentence for possession of child pornography consecutive to a 360-month sentence for sexual exploitation, with the former running consecutive to the receipt sentence and the latter running consecutive to the second exploitation sentence. Whether required to or not, the judge did what Dial asked, rendering any challenge on appeal frivolous. Counsel does not identify any other potential procedural errors. See *Gall v. United States*, 552 U.S. 38, 53 (2007) (listing procedural sentencing errors).

To the extent that Dial’s argument about overlapping conduct hinted at an argument under the Double Jeopardy Clause, or a multiplicity challenge, counsel rightly concludes it would be frivolous to raise such arguments on appeal. A double jeopardy argument would be frivolous because the receipt and possession charges were based on different images, and those sentences run concurrently. See *United States v. Halliday*, 672 F.3d 462, 470, 473 (7th Cir. 2012). A multiplicity argument would be frivolous because Dial did not move to dismiss any charge on that ground before trial, or even belatedly, in the district court; this precludes even plain-error review. See FED. R. CRIM. P. 12(b)(3); *United States v. Lockett*, 859 F.3d 425, 427–28 (7th Cir. 2017).

Next, counsel rightly concludes that any substantive challenge to Dial’s sentence would also be frivolous. The sentence was within the guidelines range and is thus presumptively reasonable on appeal. See *United States v. De La Torre*, 940 F.3d 938, 953 (7th Cir. 2019). This presumption can be rebutted only by showing that the sentence does not comport with the § 3553(a) factors, *id.*, but Dial could not plausibly make that contention. The judge adequately detailed his rationale and reasonably balanced Dial’s mitigating arguments against the nature of the offense—one of the “top three worst, if not the worst” child exploitation cases of the judge’s career—the need for deterrence, and the need to protect the public. The sentence is also comparable to those received by other defendants in multi-count child pornography and sexual exploitation cases.[†]

Finally, counsel appropriately rejects any challenge to the length and conditions of Dial’s supervised release. Dial waived his right to challenge the conditions of

[†] E.g., *United States v. Scholtes*, 447 F. App’x 730 (7th Cir. 2011) (600-month sentence for child pornography and sexual exploitation); *United States v. Hansen*, 944 F.3d 718 (8th Cir. 2019) (600-month sentence for same); *United States v. Raiche*, 50 F.4th 279 (1st Cir. 2022) (960-month sentence for the same).

supervised release when he confirmed at his sentencing hearing that he had no objections to the proposed conditions. *See United States v. Lewis*, 823 F.3d 1075, 1083 (7th Cir. 2016). The life terms of supervision are within the statutory limit, 18 U.S.C. § 3583(k), and the judge's adequate justification of Dial's prison term extends to the duration of supervised release, *see United States v. Bloch*, 825 F.3d 862, 869 (7th Cir. 2016).

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