

In the
United States Court of Appeals
for the Seventh Circuit

No. 21-2297

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENNY BUTLER,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:17-CR-00700(1) — **Andrea R. Wood**, *Judge*.

ARGUED APRIL 27, 2022 — DECIDED JANUARY 24, 2023

Before SYKES, *Chief Judge*, and BRENNAN and SCUDDER,
Circuit Judges.

SYKES, *Chief Judge*. Benny Butler downloaded, distributed, and shared a vast amount of child pornography via internet chat rooms catering to this trade. After tracking him online for several weeks, investigators obtained a search warrant and seized ten electronic devices from his home. Forensic review of the devices revealed more than 10,000 images and videos of child pornography. Much of this material involved

very young children—including babies—and some depicted sadistic and masochistic content. For this conduct Butler pleaded guilty to a single count of transporting child pornography using a means of interstate commerce. The district judge imposed a prison sentence of 188 months, the bottom of the properly calculated Sentencing Guidelines range.

Butler appeals his sentence. Appearing by the same attorney who handled his case below, he contends without elaboration that the judge did not adequately consider his “background and mitigating circumstances” and that a lower sentence was warranted “in light of his background and mitigating circumstances.” Counsel offers no specifics.

The claim of procedural error was waived below and is undeveloped on appeal; it is also frivolous on the merits. To the extent that this appeal purports to challenge the sentence as substantively unreasonable, that claim too is woefully undeveloped and frivolous. We affirm the judgment.

I. Background

After monitoring Butler’s activity in internet chatrooms where child pornography is shared, law enforcement determined his identity and obtained and executed a search warrant at his Chicago home, seizing ten electronic devices. Forensic review of the devices revealed his extensive collection of child pornography: more than 7,600 images and more than 2,800 videos, many involving prepubescent children, some involving babies, and some depicting sadistic and masochistic content. In March 2018 a grand jury indicted Butler for child-exploitation and child-pornography crimes. After several years of competency proceedings, he was confirmed competent and pleaded guilty to a single count of

No. 21-2297

3

knowingly transporting child pornography using a means or facility of interstate commerce, 18 U.S.C. § 2252A(a)(1).

At sentencing Butler agreed that the presentence report correctly calculated the advisory Guidelines range as 188 to 235 months in prison. There were no factual disputes to resolve at sentencing, and neither side called any witnesses. Still, the hearing was extremely thorough, spanning more than two and a half hours. The prosecutor urged the court to impose a sentence of 188 months—the bottom of the Guidelines range—because Butler possessed a “staggering amount” of child pornography, much of it involving very young children and some depicting sadomasochistic content. She reminded the judge that Butler had actively traded and shared this horrific material online, and she emphasized the irreparable trauma suffered by the child victims as expressed in the victim-impact statements.

The prosecutor also briefly discussed Butler’s mental-health conditions and history of childhood abuse. As the judge was well aware from the competency proceedings and the presentence report, Butler suffers from bipolar disorder, personality disorder, and several mood disorders, and he was himself the victim of sexual, physical, and emotional abuse as a child. The prosecutor acknowledged that history as a mitigating factor, but she also pointed out that Butler’s criminal record reflected a troubling pattern of acting on his prurient interest in children, including an adult conviction for boarding a school bus while impersonating a police officer and another for child abduction in which he again posed as a police officer and attempted to lure children into his car. In sum, the prosecutor argued that these alarming episodes in Butler’s criminal history, together with the

magnitude of his offense conduct, called for a substantial prison sentence.

Butler's attorney argued for a below-Guidelines sentence of 96 months. He focused on Butler's struggle with mental illness and his history of childhood sexual abuse by his mother's boyfriends. When the time for allocution came, Butler talked about his background and psychological struggles, telling the judge that when he was young, people he trusted had hurt him "in ways no innocent life should ever experience." He also expressed regret for contributing to the suffering of the children whose abuse was depicted in the images he collected and traded. And he admitted that he needed mental-health treatment and help controlling his impulses.

The judge began her sentencing remarks by explaining that she had "considered all of the information that [had] been presented, the results of [p]robation's investigation, [and] the arguments and supporting materials that ha[d] been provided by the parties." She recognized that Butler's "own personal history and characteristics ... [are] where the greatest arguments for mitigation lie." In particular, she acknowledged the significance of "his personal history of sexual, physical, and emotional abuse[,] as well as the struggles that he's had with mental illness and all the challenges that has created for him along the way."

The judge specifically addressed how she weighed the mitigating factors of Butler's mental illness and childhood victimization against the need to protect the public. First, she described the challenge:

No. 21-2297

5

I find [determining the sentence] particularly difficult here because there is so much uncertainty in trying to determine what's sufficient but not greater than necessary in order to safeguard the public on the one hand but not unnecessarily punish Mr. Butler[,] who for much of his life has been a victim as much as the victims in the pornography that he is charged with possessing and transporting.

The judge went on to explain that she had taken account of the "really horrifying and sad details" of the childhood abuse Butler had suffered as well as his remorse for contributing to the victimization of other children. But his offense conduct was "incredibly serious" and involved an enormous volume of child pornography, including "sexually explicit and sadistic images involving the youngest of children," many quite "shocking in their nature." The judge also observed that Butler had actively "distributed, downloaded, and traded" this material online.

The judge expressed particular concern about the risk that Butler would exploit or sexually assault children in the future based on his criminal history of impersonating a police officer "to get close to children." On this point Butler's conviction for child abduction was especially troubling because it suggested that "he took steps toward[] ... possibly acting on ... the impulses that were connected to watching these images." This criminal history, she reasoned, made Butler more dangerous than other child-pornography offenders. For these reasons, the judge rejected the argument for a below-Guidelines sentence, explaining that a more

substantial sentence was necessary to protect the community.

In the end, the judge agreed with the government's recommendation and imposed a sentence of 188 months in prison, the bottom of the Guidelines range. She also imposed a 20-year period of supervised release and restitution to the victims. After explaining the conditions of supervised release, the judge addressed Butler's attorney and asked if he was satisfied that she had "addressed the main arguments in mitigation." Counsel answered in the affirmative: "I believe you have, Your Honor."

II. Discussion

Butler's attorney was appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, and we continued that appointment for purposes of appeal. As we've noted, counsel assured the judge at the end of the sentencing hearing that she had adequately addressed his main arguments in mitigation. On appeal he says exactly the opposite. He asserts that the judge did not sufficiently consider his client's "background and mitigating circumstances." But he does not elaborate. He neither identifies what he thinks the judge overlooked nor explains why the omission was consequential.

Though counsel does not frame it as such, this is a claim of procedural error. We reject it for three reasons: (1) it was waived below; (2) it is undeveloped on appeal; and (3) it is frivolous on the merits.

First, the argument is waived because the judge specifically asked counsel if she had addressed his main arguments in mitigation and he responded that she had. When defense

No. 21-2297

7

counsel is asked if the mitigation arguments have been addressed and “expresses satisfaction with the judge’s explanation” of the sentence, the defendant is “foreclosed from arguing on appeal that a principal argument remained unaddressed.” *United States v. Donelli*, 747 F.3d 936, 941 (7th Cir. 2014).

The government raised the waiver point in its brief. Counsel’s only reply was that it is “inappropriate for a party to debate the court.” But he did not have to “debate” the judge to avoid waiver. The judge directly invited him to identify anything that required further consideration, and he assured her that she had covered everything. That concession is a waiver. *See United States v. Lewis*, 823 F.3d 1075, 1084 (7th Cir. 2016).

At oral argument counsel tried to evade this conclusion, saying that he responded as he did because he wanted to avoid “going around in circles” with the judge on mitigation. That’s not an argument against waiver; it’s a concession that the judge had *already considered* his mitigation arguments.

So the claim was waived below. It is also undeveloped on appeal, which is another form of waiver. *See, e.g., United States v. Davis*, 29 F.4th 380, 385 n.2 (7th Cir. 2022) (explaining that perfunctory and undeveloped arguments are waived); *United States v. Barr*, 960 F.3d 906, 916 (7th Cir. 2020) (same). The argument section of the opening brief asserts only that the judge did not adequately consider Butler’s “background and mitigating circumstances.” Counsel does not explain which background circumstances or mitigating factors were insufficiently addressed, nor does he develop an argument that any omission was meaningful in

the context of the sentencing record as a whole. Indeed, the entire brief is just six pages long (exclusive of the jurisdictional statement and the signature page). The argument section is barely four pages, and quotations from the judge's sentencing remarks span two of those four pages. Counsel's abject failure to develop an argument about procedural error means that the claim is doubly waived.

Moreover, any claim of procedural error is frivolous on this record. Reviewing the judge's procedural steps de novo, *see Barr*, 960 F.3d at 914, we find no error. Indeed, this was a flawless sentencing proceeding. The judge gave the parties and Butler himself ample time—more than two and a half hours—to make their presentations. She had reviewed the PSR and the parties' submissions, which shows that she considered the mitigation arguments advanced by the defense. *See United States v. Stephens*, 986 F.3d 1004, 1009 (7th Cir. 2021).

Beyond that baseline, the judge's remarks throughout the hearing demonstrate her close familiarity with the details of the sentencing decision before her and the arguments both sides had presented, as the passages we have quoted above show. She repeatedly referred to Butler's background and characteristics—including his mental-health struggles and the sexual and other abuse he had experienced as a child. Indeed, the judge painstakingly described the challenge of balancing the mitigating and aggravating factors in Butler's case and explained how she weighed his history of childhood abuse against the seriousness of his crime and the danger he poses to children. She was thoughtful and fair throughout, and her analysis and explanation of the sen-

No. 21-2297

9

tence was careful and complete. In short, the record is devoid of any support for a claim of procedural error.

Counsel's opening brief also gestures toward an argument that Butler's sentence is substantively unreasonable. This claim is likewise wholly undeveloped and frivolous. A within-Guidelines sentence is presumptively reasonable. *United States v. Cunningham*, 883 F.3d 690, 701 (7th Cir. 2018). Counsel neither acknowledges the presumption nor makes any argument to overcome it.

Accordingly, we affirm the judgment. By separate order, we address counsel's conduct in advancing frivolous arguments in this appeal.

AFFIRMED