

NONPRECEDENTIAL DISPOSITION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 November 15, 2023

Decided January 3, 2024

BeforeDIANE S. SYKES, *Chief Judge*MICHAEL B. BRENNAN, *Circuit Judge*JOHN Z. LEE, *Circuit Judge*

No. 23-1288

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*TYLER MICHAEL THOMPSON,
*Defendant-Appellant.*Appeal from the United States District
Court for the Northern District of
Indiana, Hammond Division.

No. 2:22-CR-076-001

Jon E. DeGuilio,
*Judge.***ORDER**

Tyler Thompson pleaded guilty to distributing child pornography after the FBI discovered images and videos of child pornography on his phone and online accounts. He was sentenced to 235 months in prison, the bottom of the guidelines range. On appeal, he argues that we should vacate his sentence, because the district court failed to consider his proffered material about sentences in similar cases, did not address his arguments in mitigation, and imposed a substantively unreasonable sentence. But the record shows that the judge did consider the sentencing material Thompson submitted; Thompson waived his contention that the judge had failed to adequately consider his

No. 23-1288

Page 2

mitigation arguments; and the within-guidelines sentence is substantively reasonable. We therefore affirm.

In 2021, a federal agent was investigating child sexual abuse using a social network called KIK. The agent began a chat with Thompson and, over several weeks, received from him videos depicting child pornography. Thompson claimed that he recorded these videos of himself and his minor stepdaughter. Soon after, the FBI executed a search warrant at Thompson's home. Agents seized devices that contained videos and images of child pornography and chats discussing, distributing, and trading child pornography. During the search, Thompson confessed to distributing and possessing child pornography but said that the videos were not of him and that he did not have a stepdaughter as he had claimed online. The agents did not arrest Thompson but warned him to stop these activities.

A few months later, another undercover officer investigating KIK activity viewed possible child pornography that Thompson had uploaded. In a chat message with the agent, Thompson claimed that he was sexually abusing his niece and stepdaughter. Agents once again contacted Thompson, who this time denied possessing child pornography but admitted to sending the chats. Content pulled from his phone and KIK account, however, revealed images and videos of child pornography that Thompson had shared, including depictions of prepubescent minors involving sadistic or masochistic content. In total, he had approximately 380 images and videos of child pornography and 75 KIK chats where he received or distributed child pornography.

This time, Thompson was indicted for distributing child pornography in violation of 18 U.S.C. § 2252(a)(2) and eventually pleaded guilty. In anticipation of sentencing, the probation officer prepared a presentence investigation report (PSR), which found that Thompson had possessed and/or distributed more than 10,000 images of child pornography. The PSR then recommended a criminal history score of I and a total offense level of 37, which included a 3-level reduction for acceptance of responsibility. The offense level also included enhancements for images containing prepubescent minors, material involving sadistic or masochistic conduct and the sexual abuse of an infant or toddler, Thompson's use of a computer in the commission of the offense, and his possession of over 600 such images.

In his sentencing memorandum, Thompson did not object to the guidelines calculation in the PSR, but he did present data showing that other judges had sentenced comparable defendants to terms of imprisonment well below the applicable guidelines range. Thompson also submitted excerpts from the Sentencing Commission's 2021

report, which characterized Congress's statutory scheme for child pornography as "outdated" and noted the prevalence of downward variances for sentences in child pornography cases. The report also urged courts to focus on the "content" of the child-pornography collection, the defendant's degree of "involvement" with other offenders, and any sexual exploitation.

In response, the government's memorandum noted the district judge's wide discretion to disagree with the Commission's policy. It also argued that, even under the Commission's suggested approach, Thompson did not merit a below-guidelines sentence.

At the sentencing hearing, the district judge adopted the PSR (except for a portion of the restitution recommendation), heard arguments about mitigation, and commented on the sentencing information Thompson had submitted. For his part, Thompson emphasized that he had been sexually abused as a child and that his use of drugs and alcohol had impaired his judgment during the KIK chats. In retort, the government noted that the chats did not appear incoherent, a point that Thompson conceded.

In fashioning a sentence, the judge accepted the Commission's recommendation to focus on the "content" of the depictions found on Thompson's computer, his "involvement" with other offenders, and the exploitation of the minors in the photographs and videos. In so doing, the judge described the content, some of which involved videos with infants, toddlers, and children in pain, as "deplorable, depraved, and frankly disgusting." The judge also noted Thompson's frequent participation in KIK chats dedicated to incest fantasies and the exchange of child pornography. The judge also was "very disturbed" by Thompson's inability to control himself even after he had been caught and warned to desist. Finally, the judge discounted the information showing downward variations for comparable offenders because it was based on a small sample and did not control for various relevant enhancements.

The judge then proceeded to address Thompson's mitigation arguments. He "accept[ed]" Thompson's assertions that he had experienced "prolonged" sexual abuse as a child. But the judge rejected Thompson's claim that his struggles with substance abuse influenced his offense. Lastly, after reviewing the mitigation arguments, the judge asked Thompson if he had "adequately addressed" his arguments, including "any made in mitigation." Defense counsel replied, "Yes."

In the end, the judge sentenced Thompson to 235 months of imprisonment, five months under the statutory maximum but at the bottom of the guidelines range of 235 to 240 months. The judge also imposed a ten-year term of supervised release. In conclusion, the judge asked if Thompson's counsel had "any objection" to the sentence. Counsel answered that Thompson would "stand silent" to avoid waiving any issues for appeal.

Thompson now advances several arguments on appeal. He first contends that the district judge committed procedural error by rejecting, without sufficient explanation, the data Thompson presented about downward variances in child-pornography cases as well as the Sentencing Commission's criticisms about Congress's sentencing parameters in such cases. He also cites out-of-circuit decisions applying downward variances in cases involving child pornography. None are persuasive.

First, the judge explained that the sentencing data Thompson offered was not compelling because the sample size was too small and failed to control for the enhancements that applied to Thompson. Second, the judge explained that he accepted the Commission's suggestion that he focus on the pornographic "content" and the degree of Thompson's "involvement" with child pornographers. In doing so, the judge reasonably found that those issues justified a guidelines sentence because of how "depraved" and "disgusting" the sadistic content involving infants and toddlers was and how frequently Thompson participated in chats about it. And to the extent that Thompson believes that the judge ignored whatever disparities may have existed between his sentence and those of defendants in other child pornography cases, this argument also fails, because a within-guidelines sentence shows that the judge appropriately sought to avoid such unwarranted disparities. *United States v. Pape*, 601 F.3d 743, 749–50 (7th Cir. 2017).

Additionally, Thompson contends that the judge inadequately addressed Thompson's childhood history of sexual abuse and his current substance abuse. *See* 18 U.S.C. § 3553(a). But this too falls short for several reasons. First, Thompson waived this argument at the sentencing hearing. As we have said previously, we encourage district judges to ask the defendant "after imposing sentence" if all the defendant's arguments, including those in mitigation, have been adequately addressed. *United States v. Stephens*, 986 F.3d 1004, 1009 (7th Cir. 2021). Here, after reviewing Thompson's mitigation arguments (although, albeit, before announcing the sentence), the court asked if it had "adequately addressed" them, and Thompson answered

No. 23-1288

Page 5

unequivocally: “Yes.” That is waiver. *United States v. Garcia-Segura*, 717 F.3d 566, 569 (7th Cir. 2013).

Despite this, Thompson insists that he did not waive his argument, because his counsel responded “yes” without knowing precisely what weight the judge would give to those factors. But the *weighing* of mitigating factors goes to the substantive reasonableness of a sentence, not to the issue of procedural error. And although in *Garcia-Segura*, we encouraged judges to query the defendant “after imposing sentence,” 717 F.3d at 569, asking this question before announcing the sentence but after discussing the mitigating and aggravating factors serves the same purpose.

In any event, Thompson’s argument is groundless. The judge explicitly found that Thompson had experienced “prolonged” sexual abuse as a child, as Thompson had argued. And the judge’s factual finding that Thompson was not intoxicated during his inculpatory chats on KIK was not clearly erroneous. *United States v. Jackson*, 70 F.4th 1005, 1009 (7th Cir. 2023).

That brings us to the sentence’s substantive reasonableness. The guidelines range (to which Thompson did not object) was 235 to 240 months’ imprisonment. A within-guidelines sentence is presumptively reasonable, and this court generally upholds such sentences if the judge provides an “adequate statement of reasons.” *United States v. Major*, 33 F.4th 370, 384–85. Here, the judge did so by reasonably balancing Thompson’s mitigating factors of “prolonged” sexual abuse, “issues with substance abuse,” regret, and desire to “address his issues” against the “very disturb[ing]” facts that Thompson immediately reoffended after the FBI warned him to desist; the images were “depraved, and frankly disgusting”; and Thompson was deeply involved in the child-pornography community with extensive chats and trades about child pornography. Because the judge reasonably weighed both aggravating and mitigating factors, the resulting within-guidelines sentence is not substantively unreasonable.

AFFIRMED