United States of America
First Circuit Court of Appeals

NOS. 2018-2082 & 2018-2093

UNITED STATES OF AMERICA

Appellee,

v.

RYAN S. LIN

Defendant/Appellant.

APPEAL FROM MASSACHUSETTS
FEDERAL DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT, RYAN S. LIN

May 25, 2019

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On May 9, 2018, Ryan Lin pleaded guilty, in the United States District Court for the District of Massachusetts, Boston, to: seven counts of cyberstalking, contrary to 18 U.S.C. § 2261A(2)(B); five counts of distribution of child pornography, contrary to 18 U.S.C. § 2252(a)(2); nine hoax bomb threats, contrary to 18 U.S.C. § 844(e); three counts of computer fraud, contrary to 18 U.S.C. § 1030(a)(2)(C) and 18 U.S.C. § 1030(c)(2)(B)(ii); and one aggravated identity theft, contrary to 18 U.S.C. § 1028A.

On October 30, 2018, the court (*William G. Young*, J.), sentenced Ryan Lin, within the general terms of the parties' plea agreement, to a total of 210 months imprisonment, 60 months post-imprisonment supervised release with numerous conditions, registration as a sex offender, and restitution in the amount of $12,802.85. JUDGMENT IN A CRIMINAL CASE (Oct. 30, 2018), *Addm*. at 68.

A notice of appeal was filed on October 31, 2018 and another on November 13, 2018, which have been consolidated for this proceeding.

STATEMENT OF ISSUES

I. Did the sentencing court err in enhancing Mr. Lin's sentence for knowingly distributing child pornography, when the enhancement is identical to an element of the crime, and resulting in double counting?

II. Did the sentencing court err in enhancing Mr. Lin's sentence for use of a computer, when the crime of distribution of child pornography is virtually always done with a computer, resulting in double counting?

III. Did the sentencing court err in enhancing Mr. Lin's sentence by using sentencing enhancements that duplicate elements of the underlying crimes, thereby violating the "parsimony principle" enshrined in the sentencing statute?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Ryan Lin's crimes involved people identified in the record as ten Jane Does and John Does. Over the course of about a year-and-a-half in 2016 and 2017, using his computer, Mr. Lin selected victims, took their personal information and stalked them in a variety of ways, and distributed child pornography to them and their associates. Mr. Lin also identified institutions in the Boston area, including schools, courts, hotels, and malls, and threatened imminent conflagrations, resulting in police responses and public emergencies. INFORMATION (Apr. 9, 2018), *Addm*. at 18; PLEA AGREEMENT (May 9, 2018), *Addm*. at 55; *Change of Plea Trn.* (May 9, 2018), *passim*; *Sentencing Trn.* (Oct. 3, 2018), *passim*.

As a result of this conduct, Mr. Lin pleaded guilty to 25 counts of various crimes. In their type-C plea agreement, FED. R. CRIM. PROC. 11(c)(1)(C), the parties stipulated to incarceration between 84 and 210 months, 60 months of post-incarceration supervised release, restitution as determined by the court, and forfeiture. PLEA AGREEMENT at 3, 6-7.

Mr. Lin agreed to certain sentencing enhancements, *id*. at 3-4, but contested others regarding the pornography distribution counts, for which he reserved his appellate rights. PLEA AGREEMENT ¶4 at 4 & ¶7(b) at 8. The contested sentencing enhancements were imposed by the court, and are challenged here.

Due to the number of counts, differing grouping rules under the guidelines, and mandatory-minimum directives, sentencing was complicated. *Sentencing Trn.* at 22-28. Using the contested enhancements to arrive at its guidelines calculation, the court sentenced Mr. Lin at the very top of the range to which he stipulated. PLEA AGREEMENT at 6.

SUMMARY OF ARGUMENT

Ryan Lin argues that his sentence should not have been enhanced for distributing child pornography using a computer, nor for knowingly distributing pornography, because the enhancements are identical to the definition of each crime, thereby causing double counting. He also argues that his sentence violates the parsimony principle of the sentencing statute.

ARGUMENT

I. Court Should Not Have Enhanced Sentence for Use of a Computer, When Use of a Computer is an Element of the Underlying Crime

Congress criminalized "certain activities relating to material involving the sexual exploitation of minors." The statute provides that:

> [a]ny person who … knowingly receives, or distributes, any [specified] visual depiction using any means or facility of interstate or foreign commerce … by any means *including by computer*, … shall be … imprisoned not less than 5 years and not more than 20 years.

18 U.S.C. § 2252(a)(2) (emphasis added); *see also* 18 U.S.C. § 2256 (defining computer).

In his plea, Mr. Lin acknowledged that all his crimes involved conduct using a computer. *Change of Plea Trn.* at 8, 9, 10, 13, 23, 27; *Sentencing Trn.* at 90 (allocution).

The guidelines provide for a 2-point sentencing enhancement when child pornography crimes are committed "involv[ing] the use of a computer." U.S.S.G. § 2G2.2(b)(6) ("If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.").

Thus, Mr. Lin received a sentencing enhancement for conduct that is part of the definition of the crime to which he pleaded, yet the sentencing guideline enhances for use of a computer. This court has explicitly declined to double count in this fashion.

In *United States v. Chapman*, 60 F.3d 894, 899 (1st Cir. 1995), this court construed the enhancement for "exploitation" in U.S.S.G. § 2G2.2(b)(4), where "exploitation" was both an element of the crime in the statute and also among the sentencing enhancements sought by the government.

While "[i]n the world of criminal sentencing, double counting is a phenomenon that is less sinister than the name implies," *United States v. Fiume*, 708 F.3d 59, 61 (1st Cir. 2013) (quotation omitted), this court in *Chapman* barred double counting in the manner imposed here:

> If we were to adopt the government's argument that the computer transmission of child pornography is sexual exploitation, then the first sentence of this note would mean that a court may depart upward from the guideline sentencing range for *the very same act of "exploitation"* – i.e., the transmission of a photograph – that led to the conviction. The Commission might as well draft a sentencing guideline applicable to bank robberies, and then state in an application note that "if the defendant robbed a bank at any time, an upward departure may be warranted." This is not how the guidelines are meant to operate; departures are permitted only if "an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." 18 U.S.C. § 3553(b). Yet the application note says nothing about an aggravating circumstance; if trafficking is sexual exploitation, then trafficking alone, without any aggravating circumstances, permits a judge to depart upward. This makes no sense:

> An offense specifically punishable under the guideline cannot at the same time be "an aggravating … circumstance … not adequately taken into consideration" by the Commission; indeed, if the offense may also, by itself, warrant an upward departure, then the guideline serves no useful purpose. Thus, we must conclude that "sexually exploited," as used in application note 5 of § 2G2.2 to warrant an upward departure, must mean something different than the substantive offenses punishable under that guideline.

Chapman, 60 F.3d at 899 (emphasis and omissions in original) (superceded on other grounds, *see United States v. Woodward*, 277 F.3d 87, 91 n.2 (1st Cir. 2002)); *see also United States v. Hunerlach*, 258 F.3d 1282, 1286 (11th Cir. 2001) (court could not depart upward based on conduct which constituted relevant conduct already considered in calculating base level).

Moreover, distribution of child pornography by computer may have once been a particularly egregious way to commit the crime, or indicative of a heightened motive. *See, e.g., Chapman*, 60 F.3d at 899 (in 1995 defendant connected to "America Online" using computer attached to telephone); U.S.S.G § 2G2.2(b)(5) (Nov. 1, 1997) ("use of a computer" provision added to the sentencing guidelines in 1997 edition) (codified in current language and location in 2004 edition, U.S.S.G § 2G2.2(b)(6) (Nov. 1, 2004)). But now, nearly all distribution of child pornography is done by computer. Fully 96.3% of cases of possession of child pornography depicting prepubescent minors involve computers. *Report to Congress: Federal Child Pornography Offenses*, at 209 (U.S. SENT'G

COMM'N 2012). <https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf>.

This development has led the Second Circuit to recognize that the computer use provision in the child pornography guidelines is "an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results," *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010), such that a "first-time offender is … likely to qualify for a sentence … approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction." *Id.* at 186.

Accordingly, this court should find that Mr. Lin's sentence was unlawfully enhanced, and remand for re-sentencing.

II. Court Should Not Have Enhanced Sentence for Knowing Distribution, When Knowing Distribution is an Element of the Underlying Crime

As noted, the statute provides:

> [a]ny person who … *knowingly* receives, or distributes, any [specified] visual depiction using any means or facility of interstate or foreign commerce … by any means including by computer, … shall be … imprisoned not less than 5 years and not more than 20 years.

18 U.S.C. § 2252(a)(2) (emphasis added); *see also* 18 U.S.C. § 2252(b)(1) (penalties); 18 U.S.C. § 2256 (defining prohibited visual depictions).

In his plea, Mr. Lin "expressly and unequivocally admits that he committed the crimes charged … knowingly, intentionally and willfully." PLEA AGREEMENT at ¶ 1 at 1; *Change of Plea Trn.* at 9, 23.

The guidelines provide for a 2-point sentencing enhancement when child pornography crimes are committed "knowingly." U.S.S.G. § 2G2.2(b)(3)(F) ("If the defendant knowingly engaged in distribution, … increase by 2 levels."). In sentencing Mr. Lin, the court applied this 2-level enhancement, thereby basing its imposed sentence, in part, on the enhancement.

Mr. Lin thus received a sentencing enhancement for conduct that is squarely an element of the crime to which he pleaded. Because the statute has a "knowing" mens rea, a person who distributes child pornography without knowing, is not guilty of the crime.

In cases where defendants received and possessed unlawful pornographic images, but were unaware that their computers were set up so that what they received and possessed could be re-distributed to others in the network, they were ineligible for the enhancement. *See e.g.*,

United States v. Baldwin, 743 F.3d 357, 359 (2d Cir. 2014); *United States v. Robinson*, 714 F.3d 466 (7th Cir. 2013); *United States v. Durham*, 618 F.3d 921 (8th Cir. 2010); *see also United States v. Dunning*, 857 F.3d 342, 349-50 (6th Cir. 2017) (distribution ancillary to root crime).

Here however, knowing distribution *was* the underlying crime. Every defendant convicted of Mr. Lin's crime is necessarily also eligible for the enhancement. *Chapman*, 60 F.3d at 899.

Accordingly, this court should find that Mr. Lin's sentence was unlawfully enhanced, and remand for re-sentencing.

III. Court Violated "Parsimony Principle" by Using Sentencing Enhancements that Duplicate Elements of the Underlying Crime

Criminal sentences are subject to the "parsimony principle," which, "enshrined in 18 U.S.C. § 3553(a), directs the court to 'impose a sentence sufficient, but not greater than necessary' to achieve the legitimate goals of sentencing." *United States v. Vargas-Garcia*, 794 F.3d 162, 168 (1st Cir. 2015).

Because Mr. Lin's sentence was at the top of the agreed-upon range, based on enhancements that are central to his crime, the court imposed a substantively unreasonable sentence. *See* 18 U.S.C. § 3553(a); *Rita v. United States*, 551 U.S. 338 (2007). This court should accordingly remand for re-sentencing.

CONCLUSION

This court may set aside unreasonable sentences. *Gall v. United States*, 552 U.S. 38, 49 (2007). It should find the "use of a computer" and "knowingly" enhancements inapplicable, and remand this case for re-sentencing.

Respectfully submitted,

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/s/

Dated: May 25, 2019

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