NOT FOR PUBLICATION

In the United States Court of Appeals For the Eleventh Circuit

---

No. 25-13945
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OCTAVIUS LEE DURDLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 1:25-cr-00004-AW-MAL-1

No. 25-13946
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OCTAVIUS LEE DURDLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 1:09-cr-00031-AW-MAL-1

No. 25-13948
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OCTAVIUS LEE DURDLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 1:21-cr-00028-AW-MAL-1

Before NEWSOM, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

Octavius Durdley was convicted of failing to register as a sex offender and for violating the conditions of his supervised release.

He received a 72-month sentence for failing to register—an upward variance from his guideline range of 21 to 27 months' imprisonment—and 14-months' imprisonment total for his violations of the conditions of supervised release. He appeals both sentences.

First, Durdley argues that the district court plainly erred by treating his underlying sex offense as a Tier II offense under the Sex Offender Registration and Notification Act, 34 U.S.C. § 20911(2)–(4), rather than a Tier I offense. *Second*, he argues that his sentences were procedurally and substantively unreasonable because the district court failed to properly consider the true nature and severity of his underlying offense.[1] After careful review, we affirm.

I

Durdley argues that the district court plainly erred by classifying his underlying child-pornography offense as a Tier II offense.

We review objections to sentencing calculations raised for the first time on appeal for plain error. *United States v. Bennett*, 472 F.3d 825, 831 (11th Cir. 2006). The defendant must show that the district court committed a plain error that affects his substantial

[1] Durdley also moves for this Court to take judicial notice of three sentencing transcripts in unrelated cases where his sentencing judge presided. He seeks to use them to argue that, based on this judge's track record, there is a reasonable probability that his sentences would have been different if the district court had applied a lower guideline range. This motion is **DENIED**. The transcripts do not contain facts that are "not subject to reasonable dispute"—they do not establish, as he argues, this judge's sentencing habits. *See United States v. Bradley*, 644 F.3d 1213, 1252 n.81 (11th Cir. 2011) (taking judicial notice of easily identifiable facts).

rights. *Id*. For an error to be plain, "it must be plain under controlling precedent or in view of the unequivocally clear words of a statute or rule." *United States v. Johnson*, 694 F.3d 1192, 1195 (11th Cir. 2012) (citation modified).

Under the SORNA, sex offenses are classified largely based on their severity. *See* 34 U.S.C. § 20911(2)–(4). A Tier I sex offense is one that does not fall within a higher tier. *Id*. § 20911(2). A Tier II sex offense includes those sex offenses, other than those in Tier III, that are punishable by more than one year in prison and, as relevant here, involve "production or distribution of child pornography." *Id*. § 20911(3)(B)(iii). Durdley was convicted of "receipt or distribution or attempted receipt or distribution of child pornography," which he contends is a Tier I offense. He argues that this Court should apply the categorical approach in deciding an offender's tier under the SORNA, and under that approach, his conviction is broader than that in Tier II because he could have been convicted of receipt only, which is not a Tier II offense.

A party may not challenge a ruling as error if the party invites it. *United States v. Carpenter*, 803 F.3d 1224, 1236 (11th Cir. 2015). The line between simply failing to object (triggering plain-error review) and affirmatively inviting an error (precluding appellate review altogether) is thin. *See, e.g.*, *United States v. Dortch*, 696 F.3d 1104, 1112 (11th Cir. 2012). Durdley invited any error here because: (1) his counsel in a prior sentencing for other violations of conditions of supervised release said that his underlying offense was Tier II; (2) when asked if there were any objections to the

presentence report (which listed Durdley as a Tier II offender) at this sentencing hearing, his counsel stated, "Not from the defense, Your Honor"; (3) Durdley's counsel expressly declined to raise at this sentencing hearing issues regarding whether his underlying offense involved distribution of child pornography; and (4) his counsel stated, "No, Your Honor," when asked if he had any objections to the sentences imposed here. These comments are similar to the one made in *United States v. Thayer*: We held there that the defendant invited error because his counsel responded to the district court's affirmative solicitation of objections by saying, "I really don't object." 204 F.3d 1352, 1355 (11th Cir. 2000).

Even if Durdley had not invited any error, the district court did not plainly err by classifying his underlying offense as Tier II under the SORNA because it is not clear and obvious under current law that his offense is Tier I. *See Johnson*, 694 F.3d at 1195. We've held that a noncategorical approach applies to some parts of the SORNA, *see United States v. Dodge*, 597 F.3d 1347, 1351 (11th Cir. 2010) (en banc), but not others, *see United States v. Vineyard*, 945 F.3d 1164, 1171 (11th Cir. 2019). But Durdley does not cite any binding authority that clearly establishes that the categorical approach should be used to determine the tier of an underlying offense. A district court using a noncategorical approach could find that his underlying offense involved distribution and thus was a Tier II offense because the final judgment for his underlying offense described it as "receipt or distribution or attempted receipt or distribution of child pornography" and the PSR from that sentencing stated that the offense involved "a peer-to-peer file sharing network

in which [Durdley] listed child pornography for distribution." Accordingly, we affirm on this issue.

II

Durdley next argues that his sentences were procedurally and substantively unreasonable because the district court failed to properly consider the true nature and severity of his underlying offense. And he argues that by preventing his witness from testifying that Durdley did not distribute pornography, the court precluded evidence that would have corrected its misunderstanding regarding his underlying offense.

If a defendant does not object to the sentence's procedural reasonableness at sentencing, we review for plain error. *United States v. Owens*, 96 F.4th 1316, 1320 (11th Cir. 2024). Durdley did not object, so we review for plain error. When reviewing procedural reasonableness, we ensure that the district court committed no significant procedural error, including any of the following: improperly calculating the guideline range; treating the Guidelines as mandatory; failing to consider the 18 U.S.C. § 3553(a) factors; selecting a sentence based on clearly erroneous facts; or failing to adequately explain the chosen sentence. *United States v. Trailer*, 827 F.3d 933, 936 (11th Cir. 2016). If the district court varied from the defendant's guideline range, it must offer a sufficient justification to support that variance. *United States v. Kuhlman*, 711 F.3d 1321, 1326 (11th Cir. 2013); *see also* 18 U.S.C. § 3553(c)(2).

Durdley's sentences were procedurally reasonable because the district court did not base them on a clearly erroneous finding

regarding his underlying offense. The court explained that "[Durdley] is a person who has a conviction for possessing and distributing and receiving child pornography," Sent'g Hearing Tr. at 16, Dkt. No. 85, a conclusion that is not clearly erroneous because: (1) the judgment entered for Durdley's underlying offense stated that he was convicted of "Receipt or Distribution or Attempted Receipt or Distribution of Child Pornography"; and (2) the PSR for this sentencing hearing stated that Durdley had been "convicted of Receipt or Distribution or Attempted Receipt or Distribution of Child Pornography," and Durdley did not object. Even if the district court had committed plain error by finding that Durdley had been convicted of distribution, there is not a reasonable probability that he would have received a different sentence without the error. The court did not base its sentence on the specific fact that Durdley had been convicted of distribution. *See Bennett*, 472 F.3d at 831–32.

Durdley's argument that the court plainly erred by preventing him from introducing evidence regarding his underlying conviction is also unavailing. Durdley stated that he would not raise at his sentencing hearing the issue of whether he had been convicted of distribution. Instead, Durdley moved the court to allow a character witness. Durdley does not cite any authority that clearly shows that a district court must allow a character witness at a sentencing hearing for a defendant's failure to register as a sex offender to speak about the defendant's underlying offense. *Cf. United States v. Madden*, 733 F.3d 1314, 1322 (11th Cir. 2013).

Durdley has also failed to show that his sentences are substantively unreasonable. We review the substantive reasonableness of a sentence for abuse of discretion. *United States v. Oudomsine*, 57 F.4th 1262, 1266 (11th Cir. 2023). A district court abuses its discretion only when it "(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *Id.* (citation modified).

Durdley's sentences are substantively reasonable because the district court properly stated that it considered all of the § 3553(a) factors, discussed several of the factors, and explained why it did not believe that a sentence within the guideline range sufficed. The district court stated that it based its sentence on: (1) the need to promote respect for the law and deter Durdley from continuing to violate it by refusing to register as a sex offender; (2) the need to protect the public from someone who had been convicted of a child-pornography offense and repeatedly failed to register; and (3) Durdley's history and characteristics, including his failure to comply with the law and "sexual interest in children." Sent'g Hearing Tr. at 16, 23, Dkt. No. 85. The court properly justified its variance by stating that it did not believe that a guideline sentence would sufficiently protect the public or promote respect for the law, as Durdley's previous sentence did not deter him from failing to register as a sex offender.

Accordingly, we affirm the procedural and substantive reasonableness of Durdley's sentences.

* * *

For the foregoing reasons, we **AFFIRM.**