

10-3696

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee

V.

TRAVIS NISSEN,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA, EASTERN DIVISION

Appellant's Reply Brief

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ARGUMENT

I. THE SENTENCING COURT ERRED IN FINDING THAT THE DEFENDANT WAS IN POSSESSION OF SIX HUNDRED (600) OR MORE IMAGES OF CHILD PORNOGRAPHY, WHICH RESULTED IN A FIVE (5) LEVEL INCREASE PURSUANT TO U.S.S.G. § 2G2.2(B)(7)(D).

A. STANDARD OF REVIEW

Mr. Nissen (“defendant”) concedes that he did not object at sentencing to the enhancement for the number of images. As a result thereof, the defendant likewise concedes that this particular argument is reviewed under the “plain error” doctrine. When a defendant fails to object to the method used to determine the sentence, this Court, generally, reviews under the plain error standard. *U.S. v. Burnette*, 518 F.3d 942, 946 (8th Cir. 2008) (citation omitted).

B. ARGUMENT

The government argues that, “Guideline §2G2.2(b)(7) does not require that depictions of child pornography be present on a hard drive when electronic evidence is examined,” yet it concedes that it has “found no Eighth Circuit case law on this specific issue...” Government’s Brief (“GB”) at 11. The government supports its position by arguing that “circumstantial evidence” can be used to support a sentencing guideline enhancement. *Id.* The government relies on *United States v. Patrick*, 363 F. App’x 722, 725 (11th Cir. 2010), for the proposition that an enhancement under §2G2.2(b)(7)(D) is proper when there is “significant circumstantial evidence” demonstrating that a given defendant knowingly

possessed images that were deleted from his hard drive. *Id.* Not only does this case have little precedential value to this Court, but it is factually and legally dissimilar to the present case before this Court.

In *United States v. Patrick, supra*, 363 F. App'x 722, 725 (11th Cir. 2010), the Court determined that there was “significant evidence” that suggested that the defendant knew the images were on his computer, which consisted of the fact that the defendant

“[1] voluntarily subscribed to a child pornography website, [2] made false statements to the federal agents indicating his computer was broken, [3] purchased a new computer immediately after learning he was under investigation, and [4] secreted his original computer to his garage in the hopes the agents would not seize it.” *United States v. Patrick, 363 F. App'x at 725.*

The Court concluded that the district court did not clearly err by determining that the defendant knowingly possessed in excess of 600 images of child pornography. *Id.* at 725-726.

More importantly, in *United States v. Patrick, supra*, 363 F. App'x 722, 725 (11th Cir. 2010), “federal agents recovered all 1,100 images from unallocated portions of [the defendant]’s hard drive, meaning that all of the images previously had been marked for deletion.” Further, the defendant actually admitted to knowingly possessing a portion of those 1,100 images that were marked for deletion. *United States v. Patrick, 363 F. App'x at 725.* The Court concluded that the defendant “apparently acknowledg[ed] he was aware the images were stored on

his hard drive.” *Id.* The Court essentially reasoned that by the defendant admitting that he possessed a portion of the 1,100 images marked for deletion, there is a logical inference that the defendant previously possessed said 1,100 images. *Id.* There is no similar inference that can reasonably be drawn in the present case before this Court.

In the case at bar, there is no evidence that the defendant actually “subscribed”¹ to any child pornography websites, made false statements to federal agents, purchased a new computer to, somehow, divert attention from contraband, nor secreted his computer when he learned that he was under investigation. More importantly, the theory that there is some larger amount of images in existence that have been “marked for deletion” but recovered cannot be applied to the present case before this Court.

Indeed, in *United States v. Patrick, supra*, 363 F. App’x 722, 725 (11th Cir. 2010), federal agents were able to actually recover all 1,100 images from unallocated portions of the defendant’s hard drive. In the case at bar, all of the images and videos that purportedly comprised the “600 or more images” were never recovered. *See* Transcript at 9. Indeed, the government concedes and opines that the defendant would have been in possession of 197 images had the 83 thumbnail images been treated the same as other images. GB at 11-12. The

¹ In *United States v. Patrick, supra*, 363 F. App’x 722, 723 (11th Cir. 2010), the defendant actually purchased “monthly memberships” to a particular child pornography website.

importance of recovering images is well-settled. *See U.S. v. Bailey*, 377 F.Supp.2d 268, 272 (2005); *U.S. v. Luken*, 560 F.3d 741, 743 (8th Cir. 2009).

Given that the defendant was assessed a 5 level increase when the purported “600 or more images” were never recovered, and when there was a significant lack of direct and even circumstantial evidence that the defendant ever possessed the same, there was an error that was plain. *See U.S. v. Burnette, supra*, 518 F.3d 942, 947 (8th Cir. 2008). This plain error likewise affected a substantial right of the defendant. *See U.S. v. Burnette*, 518 F.3d at 947. “An error affects a substantial right if it is prejudicial.” *Id.* In the context of sentencing, a prejudicial error is one where there is “a reasonable probability the defendant would have received a lighter sentence but for the error.” *Id.* In the case at bar, the plain error of the court affected a substantial right. The Court calculated the defendant’s total offense level as 28. Transcript at 10. The Court then determined that the advisory guideline is 97 to 120 months of incarceration. Transcript at 10. The Court specifically found that a guideline sentence was appropriate at the very top of the guideline. Transcript at 33. The Court sentenced the defendant to, among other things, 120 months of incarceration. Transcript at 33. Therefore, had the defendant not been assessed a 5 level increase, he would have received a “lighter” sentence.

The government argues that even if the sentencing court erred in its ruling concerning the number of images, the defendant would still have received a 120-month sentence. GB at 13. At sentencing, the government inquired whether the

sentencing court would impose the same sentence “even if the guideline calculation were different,” and the sentencing court answered affirmatively. Transcript at 39 and GB at 13. The government then reasoned that this statement cures any guideline calculation error by making the same harmless. GB at 13. The government relies upon *United States v. Davis*, 583 F.3d 1081, 1094-1095 (2009) by citing to a portion of the decision to support its argument, namely, “Because the district court explicitly stated it would have imposed a sentence of 293 months imprisonment regardless of whether Davis was a career offender, any error on the part of the district court is harmless, and we affirm.” *United States v. Davis*, 583 F.3d 1081 (2009), is factually dissimilar and not persuasive.

In *United States v. Davis*, 583 F.3d 1081, 1094 (2009), at sentencing the government inquired “whether the district court would have imposed the same sentence had the district court not found Davis was a career offender.” The district court answered affirmatively and reasoned that, “if Davis were not a career offender, he would have a criminal history category of V and an advisory Guidelines range of 235 to 293 months.” *United States v. Davis*, 583 F.3d at 1094-1095. The Court went on to reason that based upon the district court analysis of §3553(a), “293 months was the appropriate sentence, and 293 months “happen [ed] to be in the **overlap**” of the advisory Guidelines range for a criminal history category of V and VI. *Id.* at 1095 (emphasis added). There is no “overlap” in the case at bar, and this argument should be rejected.

In the case at bar, the defendant was assessed a 5 level increase pursuant to U.S.S.G. §2G2.2(b)(7)(D). Transcript at 8. The Court determined that the advisory guideline is 97 to 120 months of incarceration. Transcript at 10. The Court specifically found that a guideline sentence was appropriate at the very top of the guideline. Transcript at 33. Thereafter, the Court sentenced Mr. Nissen to 120 months of incarceration. Transcript at 33. Had Mr. Nissen not been assessed a 5 level increase, his guideline range would necessarily have been lower.

Had Mr. Nissen not been assessed a 5 level increase, then a sentence of 120 months would be above the guidelines. The government would then need to seek a variance above the guideline range to arrive at 120 months. Said 120 months would not overlap or be within the guideline range without assessing Mr. Nissen a five level increase. Moreover, had Mr. Nissen not been assessed a five level increase and had the government still insisted on a sentence of 120 months, the defendant would have been provided a opportunity to file a written objection to the variance sought by the government. Further, the defendant would have been able to orally argue against such a variance at sentencing. Accepting the government's argument to essentially allow for a variance absent any argument, orally or in writing, would do nothing more than violate the defendant's constitutional rights. Moreover, the sentencing court made the specific finding that, "...[G]iven all the statutory factors in this case, a guideline sentence is appropriate...." Transcript at 33.

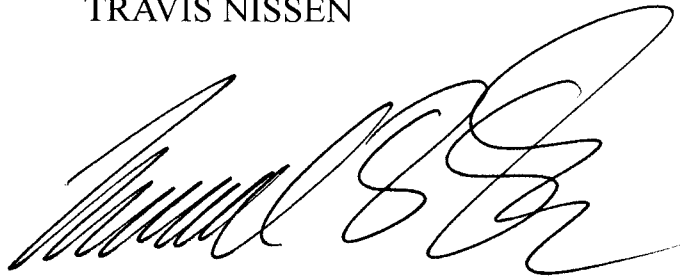
C. CONCLUSION

For the forgoing reasons, the sentencing court erred, and this case should be remanded for re-sentencing.

II. THE SENTENCING COURT ERRED WHEN IT STATED THAT THE COURT CONSIDERED “OTHER STATUTORY FACTORS” BUT DECLINED TO MAKE A RECORD OF THE SAME AND THEREAFTER SENTENCED THE DEFENDANT TO THE MAXIMUM AMOUNT OF INCARCERATION PURSUANT TO THE GUIDELINES.

With respect to this issue, the defendant relies upon his opening brief.

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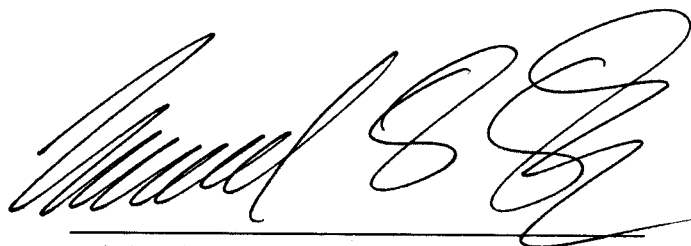
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Dated: Connecticut
July 6, 2011

CERTIFICATE OF COMPLIANCE AND SERVICE

Pursuant to FRAP 28 (c) and Rule 32(a)(7)(ii) the appellant's Reply Brief in the above-captioned matter contains 1,637 words as calculated by word count of the word processing program (Pages for Mac, Version 4.0.5), used to prepare the brief, and is otherwise in conformity with the FRAP. I hereby certify that on July 6, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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A handwritten signature in black ink, appearing to read "Michael D. Day", written over a horizontal line.

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