IP 06-0129-CR 1 H/F USA v Rinehart
Judge David F. Hamilton Signed on 02/02/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
RINEHART, ERIC,	)	CAUSE NO. IP06-0129-CR-01-H/F
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. IP 06-129-CR-1 H/F
	)	
ERIC RINEHART,	)	
	)	
Defendant.	)	

ENTRY ON SENTENCING

Eric Rinehart pled guilty to two counts of producing child pornography. On January 3, 2007, the court accepted his guilty pleas and imposed the mandatory minimum sentence of fifteen years in prison. The separate written order of judgment and conviction is being entered today. The court is issuing this written explanation of the sentence so that it may be of assistance in the event of an application for executive clemency. Based on the information before the court, such an application would be appropriate. Under the circumstances of this case, as set forth below, the mandatory minimum sentence that the court was required to impose is much more severe than needed to serve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

The factual basis for the guilty pleas shows the following. In 2006, Mr. Rinehart was 32 years old. His second marriage was breaking up. He had custody of his seven year old son. He had worked for a number of years as a police officer in the small town where he lived. He had served as a member of the Indiana National Guard for nine years and then re-enlisted in 2005. He had no prior criminal record.

In the spring and summer of 2006, Mr. Rinehart became involved in relationships with two teenage girls in the small town that he has served as a police officer. The girls are identified in the record as "Jane Doe 1" and Jane Doe 2." After Mr. Rinehart established a profile on myspace.com, Jane Doe 1 contacted him. Jane Doe 2 was part of a family that had a role in the training of police officers. Mr. Rinehart had known her as she was growing up.

By late July or early August, both relationships involved consensual sexual relations. At the relevant times, Jane Doe 1 was 16 years old and Jane Doe 2 was 17 years old. The age of legal consent for sexual relationships in Indiana is 16 years. Ind. Code § 35-42-4-9 (person at least 18 years old commits crime of sexual misconduct with a minor for sexual activity with child at least 14 years old but less than 16 years old). That means Mr. Rinehart was not breaking any law by having sexual relations with these two teenage girls.[1]

[1]The age of consent in areas under direct federal jurisdiction is also 16 years. See 18 U.S.C. § 2243(a) (sexual abuse of a minor). In Indiana and most (continued...)

In late July 2006, Jane Doe 1 told Mr. Rinehart that she had posed for photographs before in some provocative poses. She offered to do the same for him, and he loaned her his digital camera. She returned it to him a few days later with pictures of herself engaged in what federal law calls "sexually explicit conduct." That phrase is defined to include masturbation and the "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A).

On August 3, 2006, Mr. Rinehart had two separate encounters, one with Jane Doe 1 and one with Jane Doe 2. In one encounter, he used the digital camera to take still photographs of Jane Doe 1 engaged in similar conduct that counts as "sexually explicit conduct." In the encounter with Jane Doe 2, he used the camera's video capacity to take short videos of himself and the girl engaged in sexual intercourse and other sexual activities with each other.

Within the next several days, Mr. Rinehart copied the camera's digital files containing the still pictures and video images to the memory of his home computer.

On the record before the court, it is not entirely clear how these events came to the attention of law enforcement authorities, but so they did. An examination of Mr. Rinehart's computer on August 9, 2006 pursuant to a search warrant

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[1](...continued)
other states, Jane Doe 1 and Jane Doe 2 would have been free to marry without their parents' consent.

showed the files with images of Jane Doe 1 and Jane Doe 2. There is no evidence of any distribution of those images. There is no evidence that Mr. Rinehart had previously collected or even searched for child pornography, let alone possessed, distributed, or produced such materials.

The case was presented to a grand jury. The grand jury indicted Mr. Rinehart on two counts of producing child pornography in violation of 18 U.S.C. § 2251(a) and one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Mr. Rinehart agreed to plead guilty under a binding plea agreement that limited the sentence to range of 15 years minimum up to 235 months, which was the bottom of the applicable sentencing guideline range. Both the defense and the government recommended a sentence of 15 years, the minimum required by statute, which amounted to a government recommendation of a downward departure from the applicable guideline range.

By way of explanation of its reasons for bringing the case involving sexual activity that was itself legal, the government argued that the existence of images of sexual activity may cause more lasting harm to the subject of those images than the sexual activity itself, so that a higher age of consent is appropriate for the child pornography statutes. The court assumes that may be true, particularly if the images are actually distributed, or at least that Congress could reasonably make that judgment in exercising its legislative power. The legislative history for the statutory amendment does not reflect any such judgment, however.

In 1984, Congress raised the upper age limit for federal child pornography from 16 to 18 as part of Public Law 98-292, the Child Protection Act of 1984. To explain the change, the committee reported that it is often impossible to locate the child in a child pornography case, so that the images are the only evidence of the child's age. H.R. Rep. No. 98-536, reprinted in 1984 U.S. Code Cong. & Ad. News 492, 494. The prosecution had found it "extremely difficult" to prove beyond a reasonable doubt that a child was under the age of 16 if the child showed any signs of puberty. Raising the age to 18 "would facilitate the prosecution of child pornography cases and raise the effective age of protection of children from these practices probably not to 18 years of age, but perhaps to 16." *Id.*[2] The section-by-section summary repeated this explanation and explained that a conviction could thus be obtained "if the child does not look like an adult." *Id.* at 498-99.

In connection with the 1984 amendment, the Department of Justice apparently expressed no view on whether Congress should increase the age. The Department's representative explained the advantages that the 18-year limit would have for prosecuting cases in which 15-year olds had been exploited, but also recognized the countervailing consideration that the higher limit would apply "to 16 and 17-year olds, whom for some purposes society regards as adults." *Id.* at 505 (concluding "we believe the appropriate definition of the term 'minor' for

[2]The committee report refers at one key point to "raising the age to 16," but that is an error. The intended reference must have been to 18.

purposes of the federal child pornography provisions is a moral judgment best left to a determination by Congress").

Thus, the only stated Congressional purpose for raising the age limit to 18 is not served at all by the prosecution in this case, where the victims and their ages are known and readily provable to be 16 and 17. That fact does not mean that the crime was not committed, but it is surely relevant in determining a just punishment, which courts ordinarily have the power and responsibility to do under 18 U.S.C. § 3553(a).

The sentencing guidelines, which are driven by the mandatory minimum sentence, are very high in this case. For each of counts one and two, the base offense level is 32, under USSG § 2G2.1(a). For each count, two levels are added because the offense involved commission of a sexual act or sexual contact under USSG § 2G2.1(b)(2)(A), even though the sexual activity was lawful. Under USSG § 3D1.4, the two counts, both at level 34, are not grouped, so two more levels are added for a combined adjusted offense level of 36. Mr. Rinehart is entitled to a three level reduction for acceptance of responsibility under USSG § 3E1.1. Chapter four of the Guidelines imposes an additional five-level increase for a "pattern of activity involving prohibited sexual conduct" under § 4B1.5(b)(1). The total offense level is therefore 38. For a defendant like Mr. Rinehart with no

criminal history, in Category I, the guideline range for the case is 235 to 293 months, or 19 years and seven months to 24 years and five months.[3]

By way of comparison, a person who hijacks an airplane and pleads guilty is at offense level 35. See USSG § 2A5.1. A person who commits second degree murder and pleads guilty is at offense level 35. See § 2A1.2. For a bank robber to reach the same level as Rinehart's case, he would need to fire a gun, inflict serious bodily injury on a victim, physically restrain another victim, and get away with the stunning total of $2.5 million. See § 2B3.1.[4] Surely those crimes deserve much more severe punishment than Rinehart's handful of images of lawful sexual activity, which he did not distribute and apparently did not intend to distribute.

The mandatory minimum sentence in this case is much heavier than necessary to serve the statutory purposes of sentencing under 18 U.S.C. § 3553(a). The court's judgment about the excessive mandatory minimum sentence in this case depends on several factors. First, the sexual conduct itself was not illegal. Second, there was no distribution of the images. Third, Rinehart did not intend any distribution of the images. Fourth, there is no evidence that

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[3]The government, the defense, and the court agree that these guideline calculations, which were in the pre-sentence report, correctly apply the guidelines to this case, according to their letter.

[4]Base offense level of 20, plus two for robbery of financial institution, plus seven levels for discharge of firearm, plus four for serious bodily injury, plus two levels for physical restraint of a victim, plus six levels for loss of more than $2.5 million, to adjusted offense level of 41, minus three levels for acceptance of responsibility.

Rinehart had any history of possessing or even looking for child pornography. Fifth, there was no evidence that Rinehart abused his badge or his status as a police officer in soliciting the girls' consent to any part of the relationships. Sixth, there was no evidence that Rinehart was responsible for any threat against the girls.[5]

As the court said at sentencing, Rinehart used miserable judgment and made a serious moral error in his relationships with Jane Doe 1 and Jane Doe 2. Nevertheless, the mandatory minimum 15 year sentence is far greater than is necessary to serve the statutory purposes of sentencing: to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C.A. § 3553(a)(2).

This court recognizes how destructive and exploitive child pornography can be, and this court has imposed heavy sentences in appropriate cases. See, *e.g.*, *United States v. Turner*, 2006 WL 3368902 (7th Cir. Nov. 21, 2006) (affirming 100-

[5]One victim reported to the government that she had received a threatening telephone call after Mr. Rinehart was arrested. There is no evidence that Mr. Rinehart had anything to do with the call. The government concluded it was probably a family member who was upset. The government responded in a restrained way by warning the defense that any further contact would result in arrests, and there was no further problem of that sort.

year sentence); *United States v. Cunningham*, 405 F.3d 497 (7th Cir. 2005) (affirming 210 month sentence that was upward departure under guidelines).

This case, involving sexual activity with victims who were 16 and 17 years old and who could and did legally consent to the sexual activity, is very different. But because of the mandatory minimum 15 year sentence required by 18 U.S.C. § 2251(e), this court could not impose a just sentence in this case. The only way that Rinehart's punishment could be modified to become just is through an exercise of executive clemency by the President. The court hopes that will happen.

Date: February 2, 2007

DAVID F. HAMILTON, JUDGE
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Southern District of Indiana

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