UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 3:21-CR-122-KAC-JEM
	)	
ANDREW STEPHEN COUCH,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

Before the Court is Defendant's "Motion to Withdraw Plea" [Doc. 45] and the "United States's Response in Opposition" [Doc. 47]. Because Defendant failed to establish a fair and just reason to justify withdrawal of his guilty plea, the Court denies his motion.

On October 6, 2021, the Grand Jury charged Defendant with four (4) counts [Doc. 1]. Count One charged Defendant with distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) [*Id.* at 1]. Counts Two and Three charged Defendant with production of child pornography on two separate dates, in violation of 18 U.S.C. §§ 2251(a) and (e) [*Id.* at 1-2]. Count Four charged Defendant with possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) [*Id.* at 2].

On March 29, 2022, the Parties filed a signed Plea Agreement, in which Defendant agreed that he "is in fact guilty" of Counts Two and Three [Doc. 18 at 1, 4]. He further "agree[d] and stipulate[d]" to specific facts sufficient to satisfy each of the required elements of Counts Two and Three [*Id.* at 1-4]. Defendant also agreed that:

> No promises have been made by any representative of the United States to the defendant as to what the sentence will be in this case. Any estimates or predictions made to the defendant by defense counsel or any other person regarding any potential sentence in this case are not binding on the Court, and may not be used as

> a basis to rescind this plea agreement or withdraw the defendant's guilty pleas. The defendant understands that the sentence in this case will be determined by the Court after it receives the presentence investigation report from the United States Probation Office and any information presented by the Parties.

[*Id.* at 4-5].

Then, on May 5, 2022, the Court held a hearing at which Defendant pled guilty to Counts Two and Three under oath [Doc. 24]. Under oath, Defendant agreed with the United States's summary of his criminal acts [*See* Doc. 25]. Defendant swore that no person put any pressure on him to force him to plead guilty and no person threatened him to force him to plead guilty [*See id.*]. Defendant swore that he understood what he was pleading guilty to [*See id.*]. The United States advised Defendant that he was subject to up to thirty (30) years' imprisonment for each of Counts Two and Three and Defendant swore that he understood those maximum penalties [*See id.*]. Defendant swore that he understood that the Court would calculate the applicable Guideline Range [*See id.*]. Finally, Defendant swore that he understood that he would not be permitted to withdraw his guilty plea on the basis of the sentence that he might receive [*See id.*]. The Court also confirmed that Defendant's mental health challenges did not affect his ability to understand the proceedings [*See id.*]. And the Court confirmed that Defendant's prescription medications did not inhibit his ability to understand the proceedings [*See id.*]. Having observed the Defendant at his plea hearing, both the undersigned and Defendant's own attorney concluded that Defendant was competent to enter a guilty plea [*See id.*]. The Court set a sentencing hearing for September 16, 2022 [Doc. 24].

On August 5, 2022, the United States Probation Office filed a Presentence Investigation Report, assessing a Total Offense Level of forty-three (43) and an advisory Guideline Range of 720 months' imprisonment for Defendant [Doc. 26 at 23, *sealed]. Any objections to the Presentence Investigation Report were due on or before August 19, 2022. *See* Fed. R. Crim. P.

32(f)(1); E.D. Tenn. L.R. 83.9(c). On August 18, 2022, the United States filed a Notice of Objections to the Presentence Investigation Report, noting missing restitution information [Doc. 27]. Defendant failed to file any objection by the August 19 deadline. But on September 6, 2022, Defendant filed a "Motion to Continuance [sic] Sentencing" [Doc. 32]. On September 9, 2022, the Court granted Defendant's Motion and continued the sentencing hearing [Doc. 35]. On that same day, the United States Probation Office responded to the United States's objections in an "Addendum to the Presentence Report" [Doc. 33, *sealed] and issued a "Revised Presentence Investigation Report" [Doc. 34, *sealed]. That Revised Presentence Investigation Report included the same Total Offense Level and advisory Guideline Range as the initial Presentence Investigation Report [Docs. 26 at 23, *sealed; 34 at 23, *sealed].

On November 8, 2022, Defendant filed a "Second Motion to Continue Sentencing" [Doc. 37]. In that Motion, Defendant, for the first time, identified "a pre-plea guideline calculation" that was "very different" from the "final PSR" [*Id.* at 1]. The Court again granted Defendant's Motion and continued the sentencing hearing at his request, this time to January 6, 2023 [Doc. 38].

On December 27, 2022, Defendant filed objections to the Revised Presentence Investigation Report [Doc. 39, *sealed]. One of Defendant's objections was that "a pre-plea guideline calculation" yielded an estimated Total Offense Level of forty (40) but that the Revised Presentence Investigation Report calculated Defendant's Total Offense Level to be forty-three (43) [*Id.* at 1-2.]. As a result, Defendant's advisory Guideline Range was more than he expected [*Id.* at 2]. In the "Second Addendum to the Presentence Report," the United States Probation Office adjudicated the objection and determined that the "Total Offense Level and resulting guideline sentencing range for imprisonment is calculated correctly" [Doc. 42 at 1,

*sealed]. Because Defendant filed this and other objections late and within eleven (11) days of the sentencing hearing, the Court reset Defendant's sentencing hearing once more to February 3, 2023, to "permit the Parties and the Court to fully consider those late-filed objections" [Doc. 43]. Defendant filed his "Motion to Withdraw Plea" on the eve of his sentencing hearing [Doc. 45].

In the "Motion to Withdraw Plea," Defendant states that he "entered his plea" based on the pre-plea advisory guideline calculation, which produced an advisory Guideline Range starting at 292 months' imprisonment [*Id.* at 1]. In contrast, the Revised Presentence Investigation Report calculated an advisory Guideline Range starting at 720 months' imprisonment [*See* Doc. 34 at 23, * sealed]. Defendant argues that based on this delta, he "should be allowed to withdraw his guilty plea" [Doc. 45 at 1].

The United States filed a "Response in Opposition to Defendant's Motion to Withdraw His Guilty Plea" [Doc. 47]. It argues that "Defendant has the burden to show a 'fair and just reason' for withdrawing his guilty plea and has failed to do so pursuant to Fed. R. Crim. P. 11(d)(2)(B)" [*Id.* at 1].

After the Court accepts a guilty plea, but before a sentence is imposed, a defendant may withdraw his plea if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). Defendant has the burden of showing that "proper grounds exist" to withdraw a guilty plea. *United States v. Dixon*, 479 F.3d 431, 436 (6th Cir. 2007). The Court evaluates several factors when considering whether it is fair and just to set aside a guilty plea, including:

> (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had

> prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted.

United States v. Bashara, 27 F.3d 1174, 1181 (6th Cir. 1994), *superseded by statute on other grounds as recognized by United States v. Caseslorente*, 220 F.3d 727, 734 (6th Cir. 2000). The rationale behind Rule 11(d) is to allow the Court to "undo a plea that was unknowingly made at the time it was entered." *United States v. Spencer*, 836 F.2d 236, 239 (6th Cir. 1987) (quoting *United States v. Carr*, 740 F.2d 339, 345 (5th Cir. 1984)). "The purpose is not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty." *Spencer*, 836 F.2d at 239 (quoting *Carr*, 740 F.2d at 345). Withdrawal of a plea is appropriate when a defendant has "real confusion or misunderstanding of the terms of the agreement." *United States v. Ellis*, 470 F.3d 275, 281 (6th Cir. 2006). But, "[i]f a plea has been entered knowingly and voluntarily, 'the occasion for setting aside a guilty plea should seldom arise.'" *United States v. Williams*, 852 F. App'x 992, 995 (6th Cir. 2021) (quoting *Ellis*, 470 F.3d at 280).

Here, Defendant pled guilty to Counts Two and Three knowingly and voluntarily, and he presents no fair and just reason to permit withdrawal of his guilty plea. First, the significant time elapsed between Defendant's guilty plea and the motion to withdraw weighs against him. Defendant pled guilty on May 5, 2022, and moved to withdraw from that guilty plea nearly nine (9) months later, on February 2, 2023 [*See* Docs. 25, 45]. Defendant received the initial Presentence Investigation Report, which contained the Total Offense Level and advisory Guideline Range that allegedly differed from his "pre-plea calculations," on August 5, 2022 [Doc. 26, *sealed]. So, Defendant was on notice of any divergence nearly six (6) months before he moved to withdraw his guilty plea [*See* Doc. 45]. Further, Defendant raised an issue related to a "pre-plea guideline calculation" in the "Second Motion to Continue Sentencing" on November 8, 2022 [Doc.

37 at 1]. So, at a minimum, Defendant was definitively aware of the alleged variation nearly three (3) months before filing his "Motion to Withdraw Plea" [*See* Doc. 45]. Defendant ultimately waited to move to withdraw until the eve of his sentencing [*See* Docs. 43, 45]. Defendant's significant delay in filing a motion to withdraw his guilty plea strikes against him. *See Spencer*, 836 F.2d at 239 (citing with approval language stating that defendant's filing of a motion for withdrawal twenty-two (22) days after pleading guilty and three (3) days before sentencing weighed against defendant); *see also United States v. Rankin,* Nos. 95-3112, 1996 WL 464982, at *3 (6th Cir. Aug. 14, 1996) (affirming the denial of defendant's motion for withdrawal filed three (3) days after defendant pled guilty).

Second, Defendant provides no reason for the failure to move for withdrawal earlier in the proceedings [*See* Doc. 45]. He was specifically on notice of the precise basis for his motion to withdraw by August 5, 2022 [*See* Doc. 26 at 23, *sealed]. A defendant's "failure to excuse his delay works soundly against him." *United States v. Baez*, 87 F.3d 805, 808-09 (6th Cir. 1996).

Third, Defendant has repeatedly admitted his guilt of Counts Two and Three since March 29, 2022 [*See* Doc. 18]. In his Plea Agreement, Defendant agreed and stipulated to facts sufficient to satisfy the elements Count Two and Three [*Id.* at 1-4]. Defendant confirmed that he "is in fact guilty" of those offenses [*Id.* at 4]. And Defendant pled guilty to both counts before the Court, while under oath at his change of plea hearing [*See* Doc. 25]. Defendant agreed with the United States's summary of his criminal acts [*See id.*]. And he agreed that he was pleading guilty because he was, in fact, guilty [*See id.*]. Moreover, even now, Defendant does not argue that he is innocent [*See* Doc. 45; *see also* Docs. 32, 37, 39, 40]. "This . . . is a far cry from the 'vigorous and repeated protestations of innocence' that would support a motion to withdraw a guilty plea." *See Dixon*, 479 F.3d at 437 (quoting *Baez*, 87 F.3d at 809). Indeed, when a Defendant "does not assert his

innocence and has repeatedly acknowledged his guilt" that weighs against granting a motion to withdraw. *Ellis*, 470 F.3d at 285.

Fourth, the circumstances underlying Defendant's guilty plea support its validity. In his Plea Agreement, Defendant agreed that:

> Any estimates or predictions made to the defendant by defense counsel or any other person regarding any potential sentence in this case are not binding on the Court, and may not be used as a basis to rescind this plea agreement or withdraw the defendant's guilty pleas.

[Doc. 18 at 4-5]. At Defendant's change of plea hearing, the Court diligently complied with every requirement of Federal Rule of Criminal Procedure 11, giving Defendant all of the information that he needed to make a knowing and voluntary decision to plead guilty [*See* Doc. 25]. Defendant swore that he understood the charges against him, was not under any undue pressure to plead guilty, and understood what he was pleading guilty to [*See id.*]. And perhaps most importantly, Defendant was advised that he was subject to up to thirty (30) years' imprisonment for each of Counts Two and Three, and Defendant swore to the Court that he understood those maximum penalties [*See id.*]. *See United States v. Luczak*, 370 F. App'x 3, 4 (11th Cir. 2010) (finding there exists no fair and just reason for withdrawal where, *inter alia*, a defendant is aware that the court can impose any sentence up to the statutory maximum). The fact that those maximum penalties are consistent with the advisory Guideline Range in the Revised Presentence Investigation Report cannot come as an unfair surprise. *See id.* (finding there exists no fair and just reason for withdrawal where, *inter alia*, defendant was aware that he would not be allowed to withdraw his plea if his attorney's predictions about the sentencing range proved inaccurate). And Defendant confirmed, under oath, that he understood that he would not be permitted to withdraw his guilty plea on the basis of the sentence that he might receive [*See* Doc. 25]. Under these circumstances, the mere possibility of receiving a harsher sentence than anticipated based on an advisory

Guideline Range that is not binding on the Court does not constitute a "fair and just reason" to withdraw a plea. *See Wellnitz v. Page*, 420 F.2d 935, 936 (10th Cir. 1970) ("An erroneous sentence estimate by defense counsel does not render a plea involuntary.").

Fifth, nothing before the Court in Defendant's nature and background suggests that he has any challenges that would justify permitting him to withdraw his plea. At the change of plea hearing, the Court confirmed that Defendant was not experiencing any challenges that would affect his ability to understand the proceedings [*See* Doc. 25]. Both the undersigned and Defendant's attorney concluded that Defendant was competent to enter a guilty plea [*See id.*].

Sixth, Defendant has significant prior experience with the criminal justice system, including six (6) prior adult criminal convictions [Doc. 34 at 17-19, *sealed]. He is not a novice. Finally, the United States need not demonstrate any prejudice from the potential withdrawal of a guilty plea unless Defendant first establishes a fair and just reason for allowing the withdrawal. *See Williams*, 852 F. App'x at 997; *Spencer*, 836 F.2d at 240. The Defendant has not met his burden. Therefore, the Court need not analyze this factor further.

Because Defendant failed to demonstrate a fair and just reason for withdrawing his guilty plea, the Court **DENIES** his "Motion to Withdraw Plea" [Doc. 45].

IT IS SO ORDERED.

s/ Katherine A. Crytzer
KATHERINE A. CRYTZER
United States District Judge