

NOT RECOMMENDED FOR PUBLICATION

No. 24-5348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Oct 10, 2024

KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellant,)	
)	ON APPEAL FROM THE UNITED
v.)	STATES DISTRICT COURT FOR
)	THE MIDDLE DISTRICT OF
JAMES JUSTICE, aka James Stewart Thomas,)	TENNESSEE
)	
Defendant-Appellee.)	

O R D E R

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

The government appeals the district court's judgment of sentence as to defendant James Justice. The parties have waived oral argument, and the panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we vacate the district court's judgment and remand for further proceedings.

In 2016, Justice, who at the time was working as a corrections officer, was assigned to guard a female inmate at a hospital while she recovered from surgery. Years later, allegations emerged that Justice had sexually assaulted the female inmate while she was sedated. Justice was asked to write a report responding to the allegations. After he did so, the government charged Justice with obstructing a federal investigation by falsifying a record in violation of 18 U.S.C. § 1519 because the report allegedly contained two false statements and one omission. A jury found Justice guilty of the offense, and the district court sentenced him to 15 months of imprisonment. The government now appeals that sentence, arguing that the district court miscalculated Justice's offense level under the United States Sentencing Guidelines.

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Whether a district court correctly calculated the applicable sentencing guidelines is a matter of procedural reasonableness. *See United States v. Mitchell*, 107 F.4th 534, 540 (6th Cir. 2024). “When evaluating a sentence’s procedural reasonableness, we review the district court’s interpretation of the Guidelines de novo” *United States v. Taylor*, 85 F.4th 386, 388 (6th Cir. 2023).

Section 2J1.2 of the United States Sentencing Guidelines applies to § 1519 offenses. USSG, Appx. A (Statutory Index). That section sets a base offense level of 14 for such offenses but instructs courts to increase the base offense level by three “[i]f the offense resulted in substantial interference with the administration of justice.” USSG § 2J1.2(a), (b)(2). The district court calculated Justice’s offense level under these subsections, setting his total offense level at 17. However, § 2J1.2 includes a “cross-reference” provision, which the probation office initially recommended applying to Justice’s Guidelines calculation. The cross-reference provision states, “[i]f the offense involved obstructing the investigation or prosecution of a criminal offense, apply [USSG] § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.” USSG § 2J1.2(c).

The district court considered the applicability of the cross-reference provision at sentencing and determined that it was inapplicable in Justice’s case. Specifically, the district court concluded that the cross-reference did not apply because Justice was not found guilty of the underlying sexual-assault offense that was the subject of the obstructed investigation. But the § 2X3.1 cross-reference applies even if the defendant was not convicted of the underlying offense and even if the prosecutor does not prove by a preponderance of the evidence that the crime occurred. *United States v. Pennington*, 78 F.4th 955, 964 (6th Cir. 2023); *United States v. Greer*, 872 F.3d 790, 798 (6th Cir. 2017); *United States v. Kimble*, 305 F.3d 480, 485 (6th Cir. 2002). “[P]roof of the underlying offense is immaterial, since the point of the cross-reference is to ‘punish more severely . . . obstruction of . . . prosecutions with respect to more serious crimes.’” *Kimble*, 305 F.3d at 485 (quoting *United States v. Arias*, 253 F.3d 453, 459 (9th Cir. 2001)). Furthermore, if the § 2X3.1 cross-reference applies, the district court is required to apply it. *Id.* at 486.

What remains to be determined is whether the cross-reference, by its own terms, applies here. Again, the provision applies if (1) the instant offense involved obstructing the investigation or prosecution of a criminal offense and (2) the resulting offense level, after applying USSG § 2X3.1, is greater than the defendant's otherwise calculated offense level. USSG § 2J1.2(c). Justice's offense meets the first requirement, because his conviction involved obstructing a federal investigation. *Id.*

To evaluate whether the second requirement is met, further explanation is required. Even where the first requirement has been satisfied, the cross-reference applies only if the application of § 2X3.1 would result in an offense level greater than 17, Justice's otherwise applicable offense level under the Guidelines. *Id.* Section 2X3.1 states that a defendant's base offense level should be "6 levels lower than the offense level for the underlying offense," with the caveat that the offense level cannot be less than four or greater than 30.¹ USSG § 2X3.1(a). The underlying offense is the offense that was the subject of the obstructed investigation. *United States v. Bailey*, 931 F.3d 558, 562 (6th Cir. 2019).

The probation office identified the underlying offense as "[v]iolation of [r]ights [u]nder [c]olor of [l]aw." The guideline for that offense is USSG § 2H1.1. *See* USSG § 2H1.1. Section 2H1.1, in turn, states that the base offense level is "the offense level from the offense guideline applicable to any underlying offense." USSG § 2H1.1(a)(1). That base offense level would then increase by six because Justice allegedly committed the offense "under color of law." USSG § 2H1.1(b)(1)(B). The underlying offense for this guideline is criminal sexual abuse, which is covered by USSG § 2A3.1. *See* USSG § 2A3.1. Under § 2A3.1, Justice's base offense level would be 30, and he would receive a two-level increase because the victim was "in the custody, care, or supervisory control of [Justice]." USSG § 2A3.1(a)(2), (b)(3). Adding the six-level increase under § 2H1.1(b)(1)(B) would result in a total offense level of 38. However, the analysis must then loop back to § 2X3.1, which states that the base offense level is "6 levels lower than the offense level

¹ The base offense level cannot exceed 20 if "the conduct is limited to harboring a fugitive," which is not the case here. USSG § 2X3.1(a)(3)(B).

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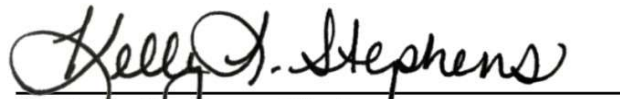
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for the underlying offense” and cannot exceed 30. USSG § 2X3.1(a). This analysis comports with the presentence report’s analysis and its recommendation to set Justice’s base offense level at 30, because that level exceeds the otherwise applicable level of 17. Given that the recalculated offense level of 30 is higher than the otherwise applicable offense level of 17, the cross-section’s second requirement is satisfied.

Because the district court was required to apply the cross-reference provision if applicable, *Kimble*, 305 F.3d at 486, the district court’s decision to sustain Justice’s objection to that calculation was procedurally unreasonable and constitutes reversible procedural error. Justice’s appellate argument that the guidelines are merely advisory is unavailing; the district court must still calculate the applicable guidelines range correctly even if it ultimately chooses to vary from the calculated range. *See United States v. Wittingen*, 519 F.3d 633, 637 (6th Cir. 2008).

We therefore **VACATE** the district court’s judgment and **REMAND** the case so that Justice can be resentenced.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk