NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1273

UNITED STATES OF AMERICA

v.

THEODORE M. MCLALLEN,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Criminal No. 00-cr-00018)
District Court Judge: Honorable Maurice B. Cohill, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a)
on December 17, 2002

Before: SLOVITER, RENDELL and GREENBERG, Circuit Judges

(Filed: December 17, 2002)

OPINION OF THE COURT

RENDELL, Circuit Judge.

Defendant Theodore M. McLallen appeals his sentence of imprisonment. He argues that the District Court erred in holding that his prior conviction for statutory rape triggered the statutory mandatory minimum sentence of 60 months imprisonment under 18 U.S.C. § 2252. We agree with the District Court and will affirm.

On February 2, 2000, a grand jury issued a two-count indictment against McLallen. Count 1 alleged receipt of material depicting the sexual exploitation of a minor in violation of 18 U.S.C. § 2252(a)(2). Count 2 alleged possession of material depicting the sexual exploitation of a minor in violation of 18 U.S.C. § 2252(a)(4)(B). McLallen plead guilty to Count 1, and, on the Government's motion and as a part of a plea agreement, the District Court dismissed Count 2. On December 11, 2001, the District Court sentenced McLallen to 60 months imprisonment, five years of supervised release, and imposed a special assessment of $100. Over McLallen's objection, the Court held that the 60 month mandatory minimum sentence found in a subsection of § 2252 applied to McLallen. That subsection reads:

> Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, *but if such person has a prior conviction* under this chapter, chapter 109A, chapter 117 or *under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, *such person shall be fined under this title and imprisoned for not less than 5 years* nor more than 30 years.

18 U.S.C. § 2252(b)(1) (emphasis added). According to the District Court, McLallen's 1982 conviction for statutory rape under Pennsylvania law triggered the 60 months mandatory minimum sentence. As a result, the Court did not consider McLallen's request for downward departure from the Sentencing Guidelines.

McLallen filed a motion for reconsideration of his sentence before the District Court. He argued that the Court erroneously interpreted the mandatory minimum

sentencing provision of the statute and that the Court should have considered his request for a downward departure from the sentencing guidelines. McLallen contended that his prior conviction for statutory rape was not under a law "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor," as was required to trigger the mandatory minimum. The District Court granted McLallen's motion to reopen. After considering McLallen's motion at a hearing on January 22, 2002, however, the Court declined to reconsider the sentence.

McLallen now appeals his sentence, arguing that the District Court erred in holding that his conviction for statutory rape triggered the mandatory minimum provision of 18 U.S.C. § 2252(b)(1). The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We exercise jurisdiction under 18 U.S.C. §§ 1291 and 3742(a). Because we must interpret a statute in order to decide the issue, our review of the District Court's ruling is plenary. Kapral v. United States, 166 F.3d 565, 567 (3d Cir. 1999).

Both parties point to our opinion in United States v. Galo, 239 F.3d 572 (3d Cir. 2001), as the guide to resolving the issue before us. In Galo, we addressed the sentencing enhancement provision of 18 U.S.C. § 2251(d). Under § 2251(d), a court must impose a mandatory minimum sentence of 15 years imprisonment if a defendant has a "prior conviction . . . under the laws of any State relating to the sexual exploitation of children." We held that the district court in Galo improperly determined that this sentencing enhancement provision was triggered by the defendant's conduct that resulted in his past convictions for corruption of minors, endangering the welfare of a child, and indecent

assault. Galo, 239 F.3d at 577. The district court failed to apply the "categorical approach" to interpreting sentencing enhancement provisions based on prior convictions, as laid out by the Supreme Court in Taylor v. United States, 495 U.S. 575, 602 (2001).[1]

Subject to a narrow exception that we assume is not relevant to this case, the categorical approach requires that, in order to determine if the enhancement provision of a statute was triggered by a defendant's prior conviction, a court look only to the fact of conviction and the statutory definition of the prior offense, and not to the conduct giving rise to the offense. Id.; Galo, 239 F.3d at 577. Applying the categorical approach in Galo, we analyzed the statutory definitions of the crimes for which the defendant was convicted and determined that they each prohibited conduct much broader than the sexual exploitation of children. Therefore, they did not qualify as prior convictions "under the laws of any State relating to the sexual exploitation of children." Id. at 582-83. Thus, we found that the district court erroneously applied the mandatory minimum. Id. at 582-83. We noted, however, that a conviction for the violation of the current version of Pennsylvania's statutory rape prohibition, found within the ambit of the general rape statute, did relate to the sexual exploitation of children.[2] Galo, 239 F.3d at 583. The District Court relied upon

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[1] In Taylor, the Supreme Court employed the "categorical approach" in interpreting the term "burglary" for purposes of the sentencing enhancement provision of 18 U.S.C. § 922(g)(1). Taylor, 495 U.S. at 602. We note that the Court seemed to confine its analysis to that statute, id., and we do not consider whether the approach generally applies to statutory enhancement provisions.

[2] The version of the Pennsylvania statutory rape prohibition discussed in Galo reads: "A person commits a felony of the first degree when he or she engages in sexual intercourse with a complainant . . . [w]ho is less than 13 years of age." 18 Pa. C.S.A. §

this statement in determining that McLallen's prior conviction triggered the mandatory-minimum provision of § 2252(b)(1).

McLallen argues that his prior conviction for statutory rape was not under a state law "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor," and, therefore, did not trigger the sentencing enhancement provision. He contends that the District Court, in concluding otherwise, failed to utilize the categorical approach and, instead, looked beyond the definition of the statutory rape statute and to the underlying conduct of that conviction. Also, he argues that the statement we made in Galo – that a conviction for statutory rape related to the state laws prohibiting the sexual exploitation of children – does not color our decision here. We reject these arguments.

McLallen was convicted of statutory rape under Pennsylvania law. The statute, since repealed, defined the offense as follows: "A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age." 18 Pa. C.S.A. § 3122 (repealed 1995). McLallen's argument that this definition encompasses a much broader range of conduct than "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor" is unavailing. The definition of statutory rape, as contained in the repealed Pennsylvania statute, clearly relates to sexual abuse or abusive sexual conduct involving a minor – it focuses on sexual intercourse with a person less than

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3121(a)(6).

14 years of age. Our conclusion in Galo that statutory rape relates to the sexual exploitation of children – a conclusion that McLallen notes his agreement with in his brief – certainly seems to support this conclusion.[3] Moreover, McLallen incorrectly reads Galo as requiring in this case that the predicate offense contain the elements of either aggravated sexual abuse, sexual abuse, or abusive sexual conduct. The term "relating to" – contained in the statue at issue in Galo, but not contained in the statute at issue in Taylor – is more flexible than McLallen would have us read it.

McLallen's prior conviction for statutory rape in Pennsylvania certainly constituted a conviction under the laws of a state "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor" and the District Court correctly determined that the conviction triggered the mandatory minimum sentence under 18 U.S.C. § 2252(b)(1). Accordingly, we will affirm the judgment of the District Court.

[3] As can be readily discerned from reading the two versions of the statutory rape prohibition, the differences between the version of the statute under which McLallen was convicted and the one we discussed in Galo are not material for the purposes of our discussion.

TO THE CLERK OF COURT:

Please file the foregoing opinion.

/s/ Marjorie O. Rendell
Circuit Judge