

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-4306

United States of America,

Appellee,

v.

Richard Eugene Eddy,

Appellant.

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Appeal from the United States
District Court for the
District of Nebraska.

[UNPUBLISHED]

Submitted: January 4, 2001

Filed: January 12, 2001

Before RICHARD S. ARNOLD, HANSEN, and BYE, Circuit Judges.

PER CURIAM.

Richard Eddy pleaded guilty to causing a videotape of child pornography to be mailed and delivered to him, in violation of 18 U.S.C. § 1461, and was sentenced to fifty-two months imprisonment and three years supervised release. For the reasons discussed below, we reject each of the arguments he raises on appeal, and we affirm.

First, Eddy argues that the district court¹ erred in setting his base offense level under U.S.S.G. § 2G2.2 rather than U.S.S.G. § 2G2.4. We disagree: the proper Guideline was applied because Eddy received through the mail a videotape involving the sexual exploitation of a minor.

Next, Eddy argues that his offense level should not have been increased by two under U.S.S.G. § 2G2.2(b)(1) because there was insufficient evidence that the videotape depicted a prepubescent minor or a minor under the age of twelve years. We conclude that the district court--having personally viewed the videotape, and having considered the affidavit of a pediatrician who opined that the girl was prepubescent and younger than eleven--did not clearly err. See United States v. Marquardt, 949 F.2d 283, 286-87 (9th Cir. 1991) (per curiam) (district court did not clearly err in determining that subject was prepubescent where postal inspector so opined, films were furnished to court, and defendant did not present any evidence to contrary).

Finally, Eddy argues that the district court erroneously denied his entrapment-based downward-departure motion. The matter is unreviewable, however, because the court was aware of its authority to depart and discretionarily declined to do so. See United States v. Turechek, 138 F.3d 1226, 1228 (8th Cir. 1998) (district court's discretionary decision not to depart downward from Guidelines is unreviewable so long as court was aware of its authority to do so).

Accordingly, we affirm the judgment of the district court.

¹The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.