FILED
United States Court of Appeals
Tenth Circuit

October 10, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONNY DESHON CURRY,

Defendant - Appellant.

No. 18-6106
(D.C. No. 5:16-CR-00120-R-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, **McHUGH**, and **MORITZ**, Circuit Judges.

Donny Deshon Curry pleaded guilty to one count of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). He was sentenced to serve 188 months in prison. Although his plea agreement contained a waiver of his appellate rights, he filed a notice of appeal.[1] The government has

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Counsel for Mr. Curry initially failed to file an appeal. Mr. Curry then filed a pro se 28 U.S.C. § 2255 motion, asserting his counsel was ineffective for failing to file an appeal when Mr. Curry had requested that counsel do so. The district court granted the motion on that issue, vacated the prior judgment, and then reentered the judgment so Mr. Curry could perfect an appeal. The district court also appointed the Office of the Federal Public Defender to represent Mr. Curry for the purposes of filing his notice of appeal.

moved to enforce the appeal waiver in Mr. Curry's plea agreement pursuant to *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam).

Under *Hahn*, we consider "(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." *Id*. at 1325. Mr. Curry contends that his appeal is outside of the scope of the appellate waiver, his waiver was not knowing and voluntary, and enforcing the waiver would result in a miscarriage of justice.

Scope of the Waiver

Mr. Curry's docketing statement indicates that he seeks to challenge the constitutionality of the sentence increase he received pursuant to the Armed Career Criminal Act (ACCA). In his plea agreement, Mr. Curry waived his right "to appeal his sentence as imposed by the Court . . . and the manner in which the sentence is determined," unless "the sentence is *above* the advisory guideline range determined by the Court to apply to his case." Mot. to Enf., Attach. 1 at 8 (emphasis added). The government therefore argues that "the only issue the defendant preserved for appellate review is the substantive reasonableness of an above-guideline sentence." Mot. to Enf. at 5. Because Mr. Curry's sentence of 188 months in prison is within the advisory guideline range of 188 to 235 months, the government asserts that the exception to the broad waiver noted above does not apply and Mr. Curry's appeal falls within the scope of his plea agreement.

Mr. Curry admits in his response that "[t]he written waiver is broad, and prohibits direct appeal by [him] unless, the sentence is above the applicable guideline range determined by the court to apply to his case." Resp. at 6. He also "concedes that [he] was sentenced to 188 months, which is within the guideline range found by the court at sentencing." *Id*. He further admits that "[t]he waiver does state that [he] waives 'the manner in which the sentence is determined.'" But he contends "there was no mutual assent or meeting of the minds regarding the application of the waiver to the application of the [ACCA]." *Id*. at 7.

We have explained that "[w]hen construing an appellate waiver, we apply well-established contract principles and examine the plain language of the plea agreement." *United States v. Taylor*, 413 F.3d 1146, 1151 (10th Cir. 2005). "In addition, we strictly construe the scope of the appellate waiver and interpret any ambiguities . . . against the Government and in favor of a defendant's appellate rights." *Id*. at 1151-52 (internal quotation marks and brackets omitted). Mr. Curry has failed to point to any language in the agreement that would show there was any ambiguity in the scope of the appellate waiver. He admits the waiver was broad, that it prohibited him from appealing his sentence unless it was above the guideline range, and that he waived any challenge to the manner in which his sentence was determined. There is nothing in the plain language of the agreement that would support the conclusion that Mr. Curry could challenge the district court's decision to impose an increased sentence under the ACCA. We therefore conclude that Mr. Curry's appeal falls within the scope of his appeal waiver.

Knowing and Voluntary Waiver

Mr. Curry contends his waiver was not knowing and voluntary. The government disagrees, asserting that Mr. Curry did knowingly and voluntarily waive his appellate rights. In determining whether a defendant knowingly and voluntarily waived his appellate rights, we focus on two factors: "whether the language of the plea agreement states that the defendant entered the agreement knowingly and voluntarily" and "whether there was an adequate Federal Rule of Criminal Procedure 11 colloquy." *United States v. Tanner*, 721 F.3d 1231, 1233 (10th Cir. 2013) (internal quotation marks omitted). Mr. Curry bears the burden of establishing that his waiver was not knowing and voluntary. *See id*.

Mr. Curry concedes that the "[t]he plea agreement contains, in the pertinent paragraphs, that the defendant is 'knowingly and voluntarily' waiving his right to appeal." Resp. at 9 (quoting Plea Agreement at 7). He argues, however, that "[a]t the change of plea hearing, [he] did not understand, or at least, counsel did not know if the Defendant understood[,] the waiver of appeal as it was contained in the plea agreement." *Id*. But then Mr. Curry notes that during the plea colloquy, "the Court does make a finding that so long as the sentence is within the sentencing guideline, it's not appealable" and then "[he] responds that he understands and does not have any questions." *Id*. He then makes the conclusory assertion that "the colloquy was

not sufficient to overcome the lack of understanding by [Mr. Curry]," *id*., but he fails to explain how the colloquy was insufficient.

Here is the full exchange when the district court questioned Mr. Curry during the plea colloquy about his understanding of the specific appellate rights he was giving up:

> THE COURT: Does [the plea agreement] also include the waiver of right to appeal?
>
> MR. COYLE [Counsel for Mr. Curry]: Yes, sir.
>
> THE COURT: Do you understand, Mr. Curry, that with some limited exceptions you are foregoing your rights to appeal?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you have any questions about that?
>
> THE DEFENDANT: No. No, sir.
>
> MR. COYLE: The question is, is whether he's found as an Armed Career Criminal.
>
> THE COURT: I'm sorry?
>
> MR. COYLE: The question is, if he's found to be an Armed Career Criminal by this Court, could he appeal the Armed Career Criminal portion.
>
> THE COURT: And I take it he could appeal that; is that correct?
>
> MR. COYLE: Well, that's – that's what he's going to say. What they're using to determine his Armed Career Criminal status is the fact that in 2006 he took a distribution in federal court, but that distribution involved two counts, and so they want to use that for -- for purposes –
>
> THE COURT: Well, actually, we don't need to argue it right now. My only question is -- or not argue it, but discuss it. Is a finding in that regard, is that appealable under the agreement?
>
> MR. DILLON [Counsel for the Government]: Your Honor, we discussed this ahead of time. I don't believe it's appealable. He can obviously argue that to the sentencing Court, but the agreement is specific as to the manner in which the Court determines the appropriate guideline and the range of

punishment in this case is -- he has signed a waiver. However, I did advise the defendant, through counsel, that there are a number of these issues that are up on appeal with the Tenth Circuit right now, and presumably even -- potentially with the Supreme Court, that should a situation arise that is analogous to Mr. Curry, including his predicate, and if a Court were to determine that Mr. Curry's predicate in another defendant's case were not applicable to the Armed Career Criminal Act, that he could apply under 2255. The Department of Justice's current policy is such that we do not seek to enforce that waiver against him in that circumstance, even though we believe it would be applicable if that sole predicate is the lone predicate that would change that range of punishment from zero to ten to 15 to life. They have instructed us not to ask to enforce that waiver. So we do not believe that he is in a position to seek direct appeal on the Court's ruling. However, in that limited circumstance, should that situation arise, we believe that he would have that avenue to pursue.

THE COURT: Is that your understanding of it, Mr. Coyle?

MR. COYLE: Yes.

THE COURT: And –

MR. COYLE: But I don't know if Donny understands that or not.

THE COURT: Do you understand that, Mr. Curry?

THE DEFENDANT: Basically saying I can't appeal it unless I file, what, 2255?

THE COURT: That is correct -- well, a part of it is determined by whether or not I find that you are an Armed Career Criminal. That's the first step.

THE DEFENDANT: Right.

[THE COURT]: And then, should I make that finding, as I understand the plea agreement, that so long as my sentence is within the sentencing guidelines, it's not appealable. But the Government represents to you on the record that should a higher court determine that you are not an Armed Career Criminal in an analogous case, you would be able to file a 2255.

THE DEFENDANT: Okay.

THE COURT: Do you understand now?

THE DEFENDANT: Yes. I'm kind of familiar with 2255.

THE COURT: Do you have any questions?

> THE DEFENDANT: No, sir.
>
> THE COURT: All right. With that understanding, the Court will accept the plea agreement.

Mot. to Enf., Attach. 2 at 8-11.

Mr. Curry has failed to meet his burden of showing that his waiver was not knowing and voluntary. He has not pointed to anything in the above exchange that shows he did not understand the waiver or that the court's plea colloquy was inadequate.

Miscarriage of Justice

Finally, Mr. Curry asserts that enforcing the appeal waiver would result in a miscarriage of justice because he received "ineffective assistance of counsel in the negotiation and execution of his plea agreement resulting in a plea that was not knowingly made and with a misunderstanding of the scope of the waiver." Resp. at 12. Although ineffective assistance of counsel in the negotiation of the plea agreement is one of the four circumstances that could establish that enforcing the appeal waiver would result in a miscarriage of justice, *Hahn*, 359 F.3d at 1327, such a claim should generally be brought in a collateral proceeding, not on direct appeal, *United States v. Porter*, 405 F.3d 1136, 1144 (10th Cir. 2005) (explaining that "a defendant must generally raise claims of ineffective assistance of counsel in a collateral proceeding, not on direct review" and noting that "[t]his rule applies even where a defendant seeks to invalidate an appellate waiver based on ineffective assistance of counsel."). Mr. Curry appears to argue that there is "sufficient evidence" for the court to determine his claim of ineffective assistance of counsel on

direct appeal, but he fails to actually cite to any evidence and instead simply references the "totality of circumstances." Resp. at 12. We see no basis to depart from our general practice that a claim of ineffective assistance of counsel should be raised on collateral review. We therefore decline to consider this claim on direct appeal. And we conclude that this potential claim does not provide a reason to deny the government's request to enforce the appellate waiver in Mr. Curry's plea agreement at this time. Mr. Curry has failed to show that enforcing the waiver would result in a miscarriage of justice.

Accordingly, we grant the government's motion to enforce the appellate waiver and we dismiss this appeal.

Entered for the Court
Per Curiam