UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
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UNITED STATES OF AMERICA,

    Plaintiff - Appellee,

v.

JUAN CARLOS BERNAL SALAZAR,

    Defendant - Appellant.

No. 19-6081
(D.C. No. 5:18-CR-00006-F-3)
(W.D. Okla.)

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ORDER AND JUDGMENT[*]
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Before **BRISCOE**, **PHILLIPS**, and **McHUGH**, Circuit Judges.
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This matter is before the court on the government's motion to enforce the

appeal waiver in Juan Carlos Bernal Salazar's plea agreement. We grant the motion

and dismiss the appeal.

Salazar pleaded guilty to possession of 500 grams or more of a mixture or

substance containing a detectable amount of methamphetamine with the intent to

distribute and being an alien in possession of a firearm. In the plea agreement, he

"knowingly and voluntarily . . . waive[d] his right to appeal his guilty plea, and any

other aspect of his conviction, including but not limited to any rulings on pretrial

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[*] This order and judgment is not binding precedent, except under the doctrines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.

suppression motions or any other pretrial dispositions of motions and issues; [and]

. . . his right to appeal his sentence as imposed by the Court, including any

restitution, and the manner in which the sentence is determined." Mot. to Enforce,

Ex. 1 at 8. But he preserved his right to appeal "the substantive reasonableness of his

sentence" "[i]f the sentence is above the advisory guideline range determined by the

Court to apply to his case." *Id.* The district court sentenced Salazar to 240 months'

imprisonment, a downward variance from the advisory guideline range of 262 to 327

months.

Despite his appeal waiver, Salazar filed an appeal seeking to challenge (1) his

sentence and (2) the district court's order detaining him pending his trial. The

government filed a motion to enforce the appeal waiver under *United States v. Hahn*,

359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam). In evaluating a motion to

enforce a waiver, 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.

In response to the government's motion, Salazar does not argue that his appeal

falls outside the scope of the appeal waiver. We therefore need not address that

issue. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005). Salazar

contends that (1) his appeal waiver—and his guilty plea—were not knowing and

voluntary, and (2) enforcement of the waiver will result in a miscarriage of justice.

Salazar asserts that "[t]he transcript from his plea hearing *suggests* reasons for why he *may have* failed to understand the full import of [his] waiver." Resp. at 1 (emphasis added). He points to his completion of only ten years of education and the fact he does not speak English. We have reviewed the transcript of Salazar's change-of-plea hearing and find that neither of these factors suggests, much less demonstrates, that he did not understand his appeal waiver. An interpreter was present at the hearing, during which the district court emphasized that Salazar could stop the proceedings at any point to ask a question if there was anything he did not understand. Salazar asked no questions, and he affirmed his understanding of the terms of the plea agreement, including the appeal waiver. Salazar has not demonstrated that his appeal waiver was unknowing or involuntary.

Salazar also argues that enforcing his appeal waiver will result in a miscarriage of justice. We will find a miscarriage of justice only "[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327 (internal quotation marks omitted). "This list is exclusive: enforcement of an appellate waiver does not result in a miscarriage of justice unless enforcement would result in one of [these] four situations . . . ." *United States v. Polly*, 630 F.3d 991, 1001 (10th Cir. 2011) (internal quotation marks omitted).

Salazar bears the burden to demonstrate that enforcement of his appeal waiver would result in a miscarriage of justice. *See United States v. Anderson*, 374 F.3d 955, 959 (10th Cir. 2004). He argues that his 240-month sentence is unlawful and unreasonable because the district court erroneously overruled his objection to a sentencing enhancement for maintaining a drug house without making findings regarding his control of the house. Salazar's contention fundamentally misunderstands "what must be 'unlawful' for a waiver to result in a miscarriage of justice." *United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007).

> Our inquiry is not whether the sentence is unlawful, but whether the waiver itself is unlawful because of some procedural error or because no waiver is possible. An appeal waiver is not 'unlawful' merely because the claimed error would, in the absence of waiver, be appealable. To so hold would make a waiver an empty gesture.

Id. (citation omitted). "The whole point of a waiver . . . is the relinquishment of claims *regardless* of their merit." *Id.* (internal quotation marks omitted). Having failed to challenge the lawfulness of his appeal waiver, Salazar has not met his burden to demonstrate that its enforcement will result in a miscarriage of justice.

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

Entered for the Court
Per Curiam

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