FILED
United States Court of Appeals
Tenth Circuit

January 8, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LOS ROVELL DAHDA,

Defendant - Appellant.

No. 19-3283
(D.C. No. 2:12-CR-20083-KHV-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **EID**, Circuit Judges.

In Los Dahda's first direct criminal appeal, this court vacated his fine and remanded for reconsideration of the fine amount. *See United States v. Dahda* (*Dahda I*), 853 F.3d 1101, 1118 (10th Cir. 2017), *aff'd*, 138 S. Ct. 1491 (2018). On remand, the district court not only waived the fine, but also resentenced Dahda to a lower term of imprisonment based on this court's ruling in a co-defendant's appeal. Proceeding pro se, Dahda brings this second direct appeal. We affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

A jury convicted Dahda and other defendants of numerous counts arising out of a drug distribution operation in Kansas. *See Dahda I*, 853 F.3d at 1106. The district court sentenced him to 189 months of imprisonment and imposed a fine of $16,985,250. *See id.* at 1105-06. On appeal, we affirmed the sentence of imprisonment, but reversed the fine and remanded for reconsideration of the amount. *See id.* at 1118.[1]

One of Dahda's co-defendants was his brother, Roosevelt Dahda. In Roosevelt Dahda's direct appeal, we held that the district court clearly erred in estimating the quantity of marijuana attributable to him for purposes of sentencing. *United States v. Dahda* (*Roosevelt Dahda*), 852 F.3d 1282, 1294 (10th Cir. 2017), *aff'd*, 138 S. Ct. 1491 (2018). Because the district court had used the same method to calculate the quantity of marijuana attributable to Dahda, on remand the court expanded the scope of Dahda's resentencing to apply this portion of *Roosevelt Dahda* as well. Therefore, in addition to addressing the fine, the district court reconsidered the quantity of marijuana attributable to Dahda, which resulted in a lower sentencing range.[2] But it refused to further expand the scope of the resentencing. Ultimately, it resentenced Dahda to 135 months of imprisonment and waived the fine.

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[1] The Supreme Court granted certiorari and affirmed *Dahda I*'s discussion of wiretapping issues. *See Dahda v. United States*, 138 S. Ct. 1491, 1494, 1500 (2018). Those issues are not relevant to the resentencing or this appeal.

[2] Neither party argues that the district court erred in applying this portion of *Roosevelt Dahda* to Dahda's resentencing.

DISCUSSION

I. Imposing Sentence Without a Jury Finding on Drug Quantity

Dahda first challenges the 135-month sentence. Count one, which carries the controlling sentence, charged a conspiracy to distribute 1,000 kilograms or more of marijuana and to maintain drug-involved premise(s) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii) and (b)(1)(A)(vii), 846, and 856 and 18 U.S.C. § 2. The jury explicitly found Dahda guilty of all four proposed objectives of the conspiracy—(1) manufacturing marijuana; (2) processing marijuana with the intent to distribute it; (3) distributing marijuana, and (4) maintaining a drug-involved premise(s). But it was not asked to (and did not) make any findings as to the quantity of marijuana attributable to him individually. Renewing an argument he made in *Dahda I*, Dahda challenges the district court's ability to impose the 135-month sentence in the absence of a jury finding as to the specific quantity of marijuana attributable to him. We review this issue de novo. *Dahda I*, 853 F.3d at 1116.

Dahda I explained the foundation of the argument:

> The penalties for violating § 841(a) appear in subsection (b). Subsection (b)(1)(D) provides a maximum sentence of 5 years' imprisonment if the total marijuana weight was less than 50 kilograms. 21 U.S.C. § 841(b)(1)(D). Subsection (b)(1)(C) provides a maximum sentence of 20 years' imprisonment when no specific amount is charged. And subsections (b)(1)(A) and (B) provide higher maximum sentences depending on the type and quantity of the substance; in cases involving 1,000 kilograms or more of marijuana, subsection (b)(1)(A) imposes a mandatory minimum sentence of 10 years and a maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(vii).
>
> Although [Dahda] was found guilty of participating in a conspiracy involving 1,000 kilograms or more of marijuana, the government agreed to

> waive the 10-year mandatory minimum under § 841(b)(1)(A). Thus, [Dahda] was sentenced under § 841(b)(1)(C).
>
> But he argues that he should have been subject to the 5-year maximum under § 841(b)(1)(D) because the verdict form did not require a specific determination of the marijuana quantity.

Id. We "reject[ed] this argument because the marijuana quantity, 1,000 kilograms, was an element of the charged conspiracy." *Id.*

Shortly after *Dahda I*, this court held that a district court erred under *Alleyne v. United States*, 570 U.S. 99, 114-16 (2013), by sentencing a defendant under § 841(b)(1)(A)—the mandatory-minimum provision—where the jury had not made a specific finding as to the quantity of drugs individually attributable to that defendant. *United States v. Ellis*, 868 F.3d 1155, 1170 (10th Cir. 2017). *Ellis* vacated the sentence imposed under § 841(b)(1)(A) and remanded for resentencing under § 841(b)(1)(C). 868 F.3d at 1178-79, 1181.

Relying on *Ellis*, Dahda argued on remand that in the absence of a jury finding on the drug quantity individually attributable to him, he should be resentenced to a maximum of five years under § 841(b)(1)(D). The district court, however, applied the law of the case doctrine and held that the twenty-year maximum under § 841(b)(1)(C) continued to control.[3] Dahda challenges this determination, again

[3] At times, the district court indicated that regardless of § 841(b)(1), count one could carry a twenty-year statutory maximum because, besides the other objectives of the conspiracy, the jury found Dahda guilty of conspiracy to maintain a drug-involved premise(s). *See* 21 U.S.C. §§ 846 (providing that conspiracy carries the same punishment as the substantive offense), 856(b) (establishing 20-year statutory maximum, without mentioning drug quantity, for maintaining a drug-involved premise(s)). After the sentencing hearing, however, the district court issued a written

arguing that he must be resentenced to no more than five years' imprisonment under § 841(b)(1)(D).

We agree with the district court that *Dahda I* is the law of the case. *See United States v. Parada*, 577 F.3d 1275, 1279-1280 (10th Cir. 2009) ("The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (internal quotation marks omitted)). "We depart from the law of the case doctrine [only] in exceptionally narrow circumstances." *Id.* at 1280 (internal quotation marks omitted). One exception is "when controlling authority has subsequently made a contrary decision of the law applicable to such issues." *Id.* (internal quotation marks omitted).

Alleyne would be "controlling authority," as would the other Supreme Court case Dahda cites, *Burrage v. United States*, 571 U.S. 204 (2014). But because both of those decisions pre-date Dahda's first sentencing and *Dahda I*, they did not "subsequently" change the law. And *Ellis* does not qualify as "controlling authority" that would change *Dahda I*'s result. As a panel decision, *Ellis* could not overrule *Dahda I*. *See Parada*, 577 F.3d at 1280 ("[I]t is almost axiomatic that one panel of this court cannot overrule another panel." (internal quotation marks omitted)). To the contrary, if *Ellis* and *Dahda I* conflict, *Dahda I* would control. *See United States v. Reese*, 745 F.3d 1075, 1083 (10th Cir. 2014) ("[W]e have held that where . . . an outlier exists—that is, when two panel decisions conflict—the earlier decision

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Sentencing Memorandum clarifying that the sentence on count one was imposed under § 841(b)(1)(C) and the law of the case doctrine.

controls."). Moreover, *Ellis*'s result is consistent with the result of *Dahda I*. Although the *Ellis* jury did not attribute a specific quantity of drugs to the defendant, *Ellis* held that "at the very least, Ellis stands properly convicted under 21 U.S.C. § 841(a)(1), *(b)(1)(C)*." *Ellis*, 868 F.3d at 1168 (emphasis added). And *Ellis* remanded for resentencing under § 841(b)(1)(C), not § 841(b)(1)(D). *See id.* at 1178-79, 1181.

For these reasons, we affirm the district court's decision to resentence Dahda under § 841(b)(1)(C) rather than § 841(b)(1)(D).

II. Amendment 790

Dahda next argues that the district court failed to engage in the three-step analysis required by Amendment 790, which amended Sentencing Guideline § 1B1.3 (relevant conduct) just after his first sentencing. Under § 1B1.3(a)(1)(B), in cases involving jointly undertaken criminal activity, the district court can consider acts or omissions of other persons that were (1) within the scope of the joint activity, (2) in furtherance of the activity, and (3) reasonably foreseeable in connection with the activity. Dahda complains that the district court did not recognize that Amendment 790 was applicable on remand and did not make findings on each of the three prongs in determining whether certain pallets of marijuana shipped by other defendants were attributable to him.

The district court, however, did not refuse to apply the amended § 1B1.3. The revised presentence report used for Dahda's resentencing calculated his sentence using the 2018 Guidelines, which incorporated Amendment 790. And the district

court noted that it had "implicitly, if not explicitly, addressed" the prongs at the first sentencing, R. Vol. IV at 30, and explained that it did not "think that Amendment 790 changed the law in any way that would require a different result in this re-sentencing," *id.* at 37. Further, for clarity, it specifically found that the disputed pallets and crates "were acts in furtherance of the jointly-undertaken criminal conspiracy of shipping marijuana to Kansas for resale." *Id.* at 30-31.

To the extent that Dahda argues that the district court's findings were procedurally inadequate, he did not raise any such objection before the district court at sentencing, and he does not argue for plain error before this court. He therefore has waived this argument. *See United States v. Oldman*, 979 F.3d 1234, 1255 (10th Cir. 2020). And to the extent that he challenges the substance of the district court's findings, his opening brief makes only cursory statements that the government failed to carry its burden of proof. Inadequately briefed arguments are waived. *See United States v. Yurek*, 925 F.3d 423, 436 n.10 (10th Cir. 2019).

III. Ineffective Assistance of Appellate Counsel

Finally, Dahda alleges that his counsel in his first direct appeal was ineffective. This court, however, generally defers ineffective-assistance claims to collateral proceedings under 28 U.S.C. § 2255. *See United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc) ("Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed."). This is not one of those "rare instances" in which "an ineffectiveness

of counsel claim may need no further development prior to review on direct appeal." *Id.*

CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge