FILED
United States Court of Appeals
Tenth Circuit

August 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARLOS PERALTA,

Defendant - Appellant.

No. 18-7054
(D.C. No. 6:18-CR-00015-RAW-1)
(E.D. Okla.)

ORDER AND JUDGMENT*

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

Defendant-Appellant Carlos Peralta pled guilty to possession with intent to distribute 500 grams or more of a substance or mixture containing methamphetamine, 21 U.S.C. § 841(a)(1), (b)(1)(A). ROA Vol. 1 at 9, 14. The offense carried a mandatory minimum sentence of ten years' imprisonment. 21 U.S.C. § 841(b)(1)(A). Peralta was sentenced to the mandatory minimum. ROA Vol. 1 at 15. He appealed. *Id.* at 21. Appellate counsel filed an *Anders* brief arguing that there is no non-frivolous basis for appeal and seeking leave to withdraw from representation. *See Anders v. California*, 386

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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. Oral argument is not necessary because the appeal is frivolous. Fed. R. App. P. 34(a)(2)(A).

U.S. 738 (1967). After carefully assessing the record, we agree that there are no non-frivolous arguments to be made on appeal. We therefore grant counsel's motion to withdraw and dismiss the appeal.

I.

Peralta was charged with possessing 500 grams or more of a substance containing methamphetamine with intent to distribute. ROA Vol. 1 at 9. On March 28, 2018, Peralta entered an unconditional guilty plea to the single charge in the indictment. *See* ROA Vol. 2 at 10–32. Peralta was assisted at the change of plea hearing by an interpreter. *Id.* at 10. Among other things, the court informed Peralta that the charged offense was punishable by at least ten years' imprisonment and five years' supervised release. *Id.* at 14–15. Peralta affirmed that he fully understood the charges against him. *Id.* at 15.

A Presentence Investigation Report (PSR) was filed with the district court. ROA Vol. 3 at 1–14 (sealed). The PSR calculated Peralta's offense level at 28 and found that his criminal history category was Category I. *Id.* at 9. The resulting advisory sentencing guidelines under the United States Sentencing Guidelines (USSG) was 78 to 97 months' imprisonment. *Id.* The PSR noted that the guidelines range was below the statutory minimum sentence of ten years' (120 months') imprisonment. *Id.* Thus, under USSG § 5G1.1(b), the statutory minimum sentence became the guidelines sentence.

Peralta raised only one objection to the PSR. He argued that he was eligible for a mitigating role offense level reduction under USSG § 3B1.2. ROA Vol. 2 at 36. At the sentencing hearing, the district court rejected this argument, finding that a mitigating role

reduction was not appropriate. *Id.* at 37. When Peralta was invited to allocute, he stated that his rights were violated during the criminal investigation. *Id.* at 39–40. These statements notwithstanding, Peralta did not seek to withdraw his plea. *See id.* at 46–47. The court sentenced Peralta to the statutory minimum of ten years' imprisonment and five years' supervised release. *Id.* at 47–48.

II.

Under *Anders v. California*, 386 U.S. 738 (1967), appellate counsel may "request permission to withdraw where counsel conscientiously examines a case and determines that any appeal would be wholly frivolous." *United States v. Calderon*, 428 F.3d 928, 930 (10th Cir. 2005). Counsel is required to file an *Anders* brief indicating any potential appealable issues and provide a copy of the brief to the client. *Id.* The client may submit his own arguments to the court. *Id.* "The Court must then conduct a full examination of the record to determine whether defendant's claims are wholly frivolous." *Id.* If the court concludes that the appeal is frivolous, it may grant counsel's motion to withdraw and dismiss the appeal.

Here, counsel filed an *Anders* brief arguing that there is no arguably meritorious basis for appeal. Counsel argued that there was no basis to overturn Peralta's guilty plea, and that any fault in the guidelines calculations was clearly harmless because the guidelines range of 78 to 97 months was well below the statutory minimum of ten years (120 months). *Anders* Br. at 5–6. Finally, counsel argued that there is no basis to

overcome the presumption of reasonableness of Peralta's sentence. *Id.* at 6. Peralta did not file a response brief.[1]

We agree that this appeal is frivolous. Peralta pled guilty to the single-count indictment, which charged him with possession with intent to distribute 500 grams or more of a substance or mixture containing a detectable amount of methamphetamine. ROA Vol. 1 at 9. Under 21 U.S.C. § 841(b)(1)(A), this offense is subject to a statutory minimum sentence of ten years' imprisonment. In *United States v. Roe*, 913 F.3d 1285 (10th Cir. 2019), we held that a knowing and voluntary guilty plea to a drug charge with an attendant quantity element subjects the defendant to any enhanced penalties associated with that element. *Id.* at 1293–94; *see also McCarthy v. United* States, 394 U.S. 459, 466 (1969) ("[A] guilty plea is an admission of all the elements of a formal criminal charge."). Because the 500-gram drug quantity charged in the indictment subjected Peralta to a statutory minimum sentence, the drug quantity was an element of the charged offense. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013) (holding that drug quantity that increases the statutory minimum is an element of the offense). Peralta's guilty plea therefore subjected him to the statutory minimum sentence of ten years, which

[1] Peralta did send the court a letter containing various arguments about his plea and sentence. This letter was dated "1-21-19" and so was sent before counsel filed his *Anders* brief. Peralta's letter is not responsive to the issues raised in the *Anders* brief. Moreover, the Clerk of the Court mailed Peralta a notice of deficiency instructing Peralta to file his brief or risk dismissal. Peralta did not file a brief or otherwise respond to the notice.

is the sentence he received. To escape the ten-year sentence, Peralta would have to ask this court to vacate his guilty plea.[2]

After a careful examination of the record, we see no basis to set aside the guilty plea. Peralta never sought to withdraw his plea, so appellate review is limited to plain error. *See United States v. Vonn*, 535 U.S. 55, 62 (2002); *United States v. Rollings*, 751 F.3d 1183, 1191 (10th Cir. 2014). Plain error exists if there is (1) an error (2) that is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Rollings*, 751 F.3d at 1191.

As counsel points out, the district court did not strictly comply with Federal Rule of Criminal Procedure 11 during the sentencing hearing. Rule 11(b)(1)(M) requires the court to inform the defendant that the court will "calculate the applicable sentencing-guideline range and [ ] consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." Fed. R. Crim. P. 11(b)(1)(M). Although the court discussed the applicable guidelines range with Peralta, the court never explicitly informed Peralta that it would consider possible departures under the sentencing guidelines and sentencing factors under § 3553(a).

[2] During the plea hearing, defense counsel raised the possibility that Peralta might be safety-valve eligible. ROA Vol. 2 at 16–17, 24. The so-called safety-valve provision, 18 U.S.C. § 3553(f), permits the court to disregard the mandatory minimum when certain criteria are met. At the sentencing hearing, however, Peralta's counsel acknowledged that Peralta was not safety-valve eligible. ROA Vol. 2 at 38–39. There is no factual basis in the record to undermine the conclusion that Peralta was not eligible for the safety valve.

The district court's failure to follow Rule 11(b)(1)(M) is an obvious error, but it did not affect Peralta's substantial rights. In the context of Rule 11 error, substantial rights are affected only if the defendant can "show a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2002). Peralta cannot make that showing. At the sentencing hearing, Peralta was repeatedly informed that he would be subject to at least ten years' imprisonment, assuming the safety valve did not apply. *Id.* at 14–16. In light of those warnings, it is difficult to imagine that Peralta would have made a different decision had he been informed that the court would consider possible guidelines departures and the § 3553(a) factors. *See United States v. Ferrel*, 603 F.3d 758, 765 (10th Cir. 2010) (defendant's substantial rights were not affected when he "cannot argue that the court's error led him to expect a sentence other than the one he received").

This conclusion is reinforced by the nature of the evidence against Peralta. Peralta was discovered transporting over 500 grams of methamphetamine. ROA Vol. 3 at 4. Given this evidence, Peralta could not have hoped to gain much by rejecting the plea and going to trial. *See Dominguez Benitez*, 542 U.S. at 85. In contrast, by pleading guilty, Peralta apparently hoped to benefit from a reduced Guidelines range. Peralta's counsel believed that he might be eligible for the safety valve, and by pleading guilty Peralta obtained a two-level offense level reduction for acceptance of responsibility. *See* ROA Vol. 2 at 24, ROA Vol. 3 at 6. Although Peralta did not end up being safety-valve eligible, he believed at the time of sentencing that he stood to gain from a guilty plea. By contrast, if he went to trial he faced near-certain conviction and no acceptance-of-

responsibility reduction. The district court's omission of the warning that the court might consider Guidelines departures and the § 3553(a) factors would not have impacted this calculus. *See Dominguez Benitez*, 542 U.S. at 85 ("[I]t is hard to see here how the warning could have had an effect on [the defendant's] assessment of his strategic position."); *see also United States v. Ruiz-Bautista*, 466 F. App'x 741, 749 (10th Cir. 2012). In sum, Peralta cannot show a "reasonable probability" that he would not have entered his plea had he been informed that the court would consider possible departures and the § 3553(a) factors. *See Dominguez Benitez*, 542 U.S. at 76.

Peralta's valid plea renders any argument regarding the sentencing guidelines calculations irrelevant. As noted above, Peralta was subject to the 120-month mandatory minimum based on his plea agreement alone. Peralta received the lowest sentence he possibly could under the circumstances. Any errors in the district court's guidelines calculations—including the court's refusal to apply the mitigating role reduction—did not affect the sentence and therefore could not have affected Peralta's substantial rights.

Finally, Peralta's sentence was not substantively unreasonable. Peralta received the statutory minimum sentence of imprisonment and the statutory minimum term of supervised release. The conditions of supervised release are reasonable. We therefore agree with counsel that there is no non-frivolous argument that the sentence or terms of supervised release could be overturned on appeal.

III.

Because we see no non-frivolous basis for appeal, we GRANT counsel's motion to withdraw and DISMISS the appeal.

Entered for the Court

Allison H. Eid
Circuit Judge