

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE RICARDO ASECIO, JR.,

Defendant - Appellant.

No. 19-3111
(D.C. No. 6:15-CR-10081-EFM-3)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES, KELLY, and MATHESON**, Circuit Judges.

Jose Ricardo Asencio, Jr., pleaded guilty to unlawfully using a communication facility to facilitate a drug transaction, in violation of 21 U.S.C. § 843(b). He was sentenced to the statutory maximum of 48 months' imprisonment. Mr. Asencio did not file a direct appeal, but he did file a post-judgment "Motion for Clarification," seeking to modify his sentence to account for time served in federal custody on state charges during the pendency of his federal proceedings. The district court denied the motion initially and on reconsideration. Although his plea agreement contained an appeal waiver, he filed a pro se notice of appeal. The government has moved to

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

enforce the appeal waiver in Mr. Asencio's plea agreement pursuant to *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam). We grant the motion and dismiss the appeal.

Mr. Asencio first argues that the government's motion to enforce should be denied as untimely. We reject Mr. Asencio's argument and accept the motion for consideration in the interest of judicial efficiency. *See* 10th Cir. R. 2.1 (permitting this court to "suspend any part of these rules in a particular case on its own . . . motion"); *see also* Fed. R. App. P. 2 (permitting courts of appeals to suspend any provision of the rules in a particular case to expedite its decision or for other good cause).

We now turn to the substance of the motion. 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." 359 F.3d at 1325. Mr. Asencio's sole argument is that the collateral-attack waiver in his plea agreement is "inapplicable and unenforceable," Mot. to Enforce at 3, which appears to be an argument that his appeal falls outside the scope of the waiver. In relevant part, the appeal waiver in Mr. Asencio's plea agreement states:

The defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution, his conviction, or the components of the sentence to be imposed. . . . The defendant also waives *any right to challenge his sentence, or the manner in which it was determined, or otherwise attempt to modify or change his sentence, in any collateral attack*

Mot. to Enforce, Attach. 1, at 4-5 (emphasis added).

In his response to the motion to enforce, Mr. Asencio argues that his post-judgment motion, which the district court construed as a motion to modify his sentence, “only sought clarification of the district court’s oral pronouncement of the sentence which stated that he would get credit for the time spent in custody during the federal prosecution,” Resp. at 3. However, Mr. Asencio’s post-judgment motion undoubtedly seeks to modify his sentence and is plainly barred by the collateral-attack waiver in his plea agreement. To the extent he was “only [seeking] clarification,” *id.*, regarding credit for his time spent in federal custody, the district court provided as much in its well-reasoned order. The district court explained that because Mr. Asencio was legally a *state* prisoner—only held in federal custody pursuant to a writ—he properly received credit against his *state* sentence and “had no time in *federal* custody which could be credited against his sentence in his *federal* case.” R. at 39-40 (emphasis added). The district court properly construed Mr. Asencio’s motion as one to modify his sentence, and because the plain language of Mr. Asencio’s plea agreement contains a waiver of his right to collaterally attack his sentence or the manner in which it was determined, Mr. Asencio’s appeal falls squarely within the scope of the waiver.

For the foregoing reasons, we grant the government’s motion to enforce the appeal waiver and dismiss this appeal.

Entered for the Court
Per Curiam