FILED
United States Court of Appeals
Tenth Circuit

September 7, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

VILIAMI LOUMOLI,

Defendant - Appellant.

No. 20-4091

Appeal from the United States District Court for the District of Utah (D.C. Nos. 2:08-CR-00499-TC-1 & 2:16-CV-00713-TC)

Dean Sanderford, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

Ryan D. Tenney,[*] Assistant United States Attorney (Andrea T. Martinez, Acting United States Attorney, with him on the brief), District of Utah, Salt Lake City, Utah, for Plaintiff-Appellee.

Before **MATHESON**, **MURPHY**, and **MORITZ**, Circuit Judges.

MURPHY, Circuit Judge.

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[*]Ryan D. Tenney argued on behalf of Plaintiff-Appellee but has since filed a motion to withdraw as attorney of record. The court granted that motion in an Order dated September 3, 2021.

I. Introduction

Proceeding under 28 U.S.C. § 2255, and relying on *United States v. Davis*, 139 S. Ct. 2319 (2019), Defendant-Movant Viliami Loumoli challenges his conviction for using or carrying a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c). The government moved to dismiss Loumoli's § 2255 motion, arguing any collateral attack on his conviction is foreclosed by a waiver contained in his plea agreement. The district court granted the government's motion to dismiss, concluding Loumoli's challenge fell within the scope of the waiver even though the waiver expressly references only challenges to his sentence.

Exercising jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c), we **reverse** and **remand** for further proceedings.

II. Background

In September 2008, Loumoli pleaded guilty to (1) Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); (2) using or carrying a firearm during the commission of Hobbs Act robbery, in violation of 18 U.S.C. § 924(c); (3) assault on a federal officer, in violation of 18 U.S.C. § 111(a) and (b); and (4) using or carrying a firearm during the commission of an assault on a federal officer, in violation of 18 U.S.C. § 924(c). His 420-month sentence included 120 months for the § 924(c) violation associated with the Hobbs Act robbery. Loumoli did not

file a direct appeal and his pro se 28 U.S.C. § 2255 habeas motion was dismissed as untimely. *United States v. Loumoli*, 486 F. App'x 732, 733–34 (10th Cir. 2012).

After the Supreme Court decided *Davis*, this court granted Loumoli permission to file a second or successive § 2255 motion. In his successive motion, Loumoli argued Hobbs Act robbery cannot serve as the predicate crime-of-violence for a 18 U.S.C. § 924(c) conviction because it is not categorically a crime of violence under § 924(c)(3)(A) (requiring a predicate crime to have, as an element, "the use, attempted use, or threatened use of physical force against the person or property of another"). The government moved to dismiss Loumoli's § 2255 motion, arguing Loumoli's plea agreement contains a waiver of his right to challenge his § 924(c) conviction in a collateral proceeding (the "Appeal Waiver"). The district court granted the government's motion to dismiss, rejecting Loumoli's argument that he only waived the right to collaterally attack his sentence, not his convictions. The court ruled Loumoli's challenge to his § 924(c) conviction fell within the scope of the Appeal Waiver because the waiver encompassed challenges to his conviction.

On November 23, 2020, this court granted Loumoli a certificate of appealability on the question of whether the collateral challenge to his § 924(c) conviction was outside the scope of the Appeal Waiver. We conclude the claims

raised in Loumoli's successive § 2255 motion fall outside the scope of the Appeal Waiver.

III. Discussion

In determining whether to enforce an appeal waiver, this court considers: "(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." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam). At the first step of this process—determining the scope of the waiver—we "strictly construe" the waiver and read any ambiguities "against the Government and in favor of a defendant's appellate rights." *Id.* (quotations and alteration omitted). In pertinent part, the Appeal Waiver reads as follows:

> I also knowingly, voluntarily and expressly waive my right to challenge my sentence, and the manner in which the sentence is determined, in any collateral review motion, writ or other procedure, including but not limited to a motion brought under 28 U.S.C. § 2255.

Loumoli argues this provision only prohibits him from collaterally attacking his sentence, not his convictions. We agree,[1] but several arguments merit discussion.

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[1] Because Loumoli's § 2255 motion falls outside the scope of the Appeal Waiver, it is not necessary to address whether the waiver was made knowingly and voluntarily, or whether enforcement of the waiver would constitute a miscarriage of justice.

We first address the district court's conclusion that the scope of the Appeal Waiver is controlled by this court's decision in *United States v. Pam*, 867 F.3d 1191 (10th Cir. 2017), *overruled on other grounds*, *Borden v. United States*, 141 S. Ct. 1817 (2021). In *Pam*, we held that a waiver of the right to collaterally attack a conviction did not bar a collateral challenge to the sentence imposed. *Id.* at 1201. This holding would seemingly support Loumoli's position because his argument seems to be the mirror image of the argument made in *Pam*. But the district court concluded to the contrary based on its belief the issues in the two matters were "similar" because, "[i]n both cases, the defendants were originally sentenced under 18 U.S.C. § 924(c), and both defendants filed motions arguing that their sentences were improper in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015)." This mischaracterization of the two cases led the district court to incorrectly conclude "[i]t would be contradictory . . . to characterize Mr. Loumoli's motion as a challenge to his conviction, rather than his sentence, when a similar motion in *Pam* has already been characterized by the Tenth Circuit as a challenge to the defendant's sentence, not his conviction."

The § 2255 motion at issue in *Pam* is not similar to the motion filed by Loumoli. Mr. Pam was sentenced based on the understanding he was "an armed career criminal . . . and therefore . . . subject to a mandatory minimum sentence of fifteen years' imprisonment pursuant to 18 U.S.C. § 924(e)(1)." *Pam*, 867 F.3d at

1195, 1196. In his § 2255 motion, Mr. Pam challenged his *sentence*, arguing it was unconstitutional in light of the Supreme Court's decision in *Johnson v. United States*, which struck down the residual clause of the Armed Career Criminal Act as unconstitutionally vague. 576 U.S. 591, 606 (2015) ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process."). Loumoli, on the other hand, was not sentenced as an armed career criminal. In his § 2255 motion, he challenged his *conviction* for using or carrying a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c), relying on the Supreme Court's opinion in *Davis* which invalidated the residual clause of 18 U.S.C. § 924(c) as unconstitutionally vague. 139 S. Ct. at 2326–32. Thus, *Pam* involved a challenge to an ACCA sentence and this matter involves a challenge to a § 924(c) conviction. *Compare United States v. Driscoll*, 892 F.3d 1127, 1129 (10th Cir. 2018) (describing application of the ACCA as a "sentencing enhancement"), *with Rosemond v. United States*, 572 U.S. 65, 75 (2014) (describing § 924(c) as a "freestanding offense"). Because of the fundamental differences in the claims made by Mr. Pam and Loumoli, our holding in *Pam* provides no support for the district court's conclusion that the claims raised in Loumoli's § 2255 motion fall within the scope of the Appeal Waiver.

The government's principal appellate argument is that the Appeal Waiver cannot be read in isolation, but must be considered in the context of the plea agreement as a whole. According to the government, other provisions in the plea agreement show the parties intended for challenges to Loumoli's convictions to fall within the scope of the Appeal Waiver. *See Pam*, 867 F.3d at 1201 ("In determining the scope of waiver, we apply principles of contract law and examine the plain language of the plea agreement."). In support, the government relies on a clause in the plea agreement stating that the term "sentence" was "being used broadly" and "applies to all aspects" of the district court's "sentencing authority."

The government's argument is unpersuasive. The relevant provision of the plea agreement contains the following illustrations of aspects of a district court's sentencing authority that are within the scope of the Appeal Waiver: "(1) sentencing determinations; (2) the imposition of imprisonment, fines, supervised release, probation and any specific terms and conditions thereof; and (3) any orders of restitution." According to the government, a conviction is an aspect of a district court's sentencing authority because the district court cannot sentence a defendant until he has been convicted. But the examples contained in the plea agreement, while not exclusive, all involve decisions made by a district court *after* the issue of guilt is resolved, i.e., after conviction. They describe components of Loumoli's sentence, including the type and extent of his

punishment and the amount of any monetary penalties. They do not relate in any way to the determination of Loumoli's guilt. Further, the government has not provided this court with any authority for the proposition a district court has broad powers to modify or alter a defendant's conviction as part of its sentencing authority. Accordingly, no defendant would have "reasonably understood" the term "sentence," as used in this plea agreement, to include convictions. *United States v. Wilken*, 498 F.3d 1160, 1168 (10th Cir. 2007) ("[W]e must construe the waiver narrowly, according to what the defendant reasonably understood when he entered his plea." (quotation and alteration omitted)).

We also reject the government's assertion that a collateral challenge to a conviction should be treated as a challenge to the defendant's sentence because a successful attack on a conviction necessarily invalidates the sentence. First, this argument is in conflict with the plain language of the plea agreement which states only that Loumoli is prohibited from challenging his sentence. Second, the government has not identified any precedent for this proposition. To the contrary, two Circuit Courts of Appeals have held that a defendant is not barred from challenging his conviction if he waives only his right to challenge his sentence. *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006) ("A defendant's waiver of his right to appeal a sentence is just that: it does not also constitute a waiver of his right to challenge a conviction."); *United States v. Spear*, 753 F.3d

964, 970 (9th Cir. 2014) ("[A] defendant's knowing and voluntary waiver of his right to appeal his *sentence* does not inherently encompass a knowing and voluntary waiver of his right to appeal his *conviction*."). Finally, our case law is replete with cases involving plea agreements wherein defendants waive their right to appeal or collaterally attack their convictions *and* sentences. *See*, *e.g.*, *United States v. E.F.*, 920 F.3d 682, 689 (10th Cir. 2019); *United States v. Lopez-Aguilar*, 912 F.3d 1327, 1328 (10th Cir. 2019); *United States v. Miles*, 902 F.3d 1159, 1160 (10th Cir. 2018) (per curiam). The government's apparent long-standing practice of entering into plea agreements containing express waivers of a defendant's right to appeal both conviction *and* sentence supports the proposition that no defendant would reasonably understand he was waiving his right to collaterally challenge his conviction by waiving the right to collaterally challenge his sentence.

Lastly, we hold the language of 28 U.S.C. § 2255 does not compel the conclusion that the term "sentence" includes convictions. According to the government, the word "sentence," as used in the context of a § 2255 motion, is a term of art that "refers both to the sentence and the underlying conviction." The government's argument is based on the fact a defendant can collaterally challenge his conviction under § 2255 even though the text of the statute only references sentencing challenges. 28 U.S.C. § 2255(a) (providing a federal prisoner

claiming his "sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."); *Sandusky v. Goetz*, 944 F.3d 1240, 1246 (10th Cir. 2019) (noting that § 2255 motions "are used to collaterally attack the validity of a conviction and sentence" (quotation omitted)).

Again, however, we turn to the standard by which we analyze the scope of the Appeal Waiver. The government's § 2255 argument is novel, and the authorities it cites hold only that a § 2255 motion can be used to challenge either a conviction or a sentence, not that the term "sentence" means both sentence and conviction or that a defendant would reasonably understand it to mean both his sentence and his conviction. Without such precedent, the government has shown, at best, that the term "sentence" as used in the Appeal Waiver is ambiguous. And this court has repeatedly held that any ambiguity in an appeal waiver should be construed against the government and in favor of appeal rights. *See*, *e.g.*, *Wilken*, 498 F.3d at 1168–69.

IV. Conclusion

Loumoli's collateral attack on his § 924(c) conviction is outside the scope of the collateral attack waiver contained in his plea agreement. Accordingly, the

district court's judgment granting the government's motion to dismiss Loumoli's successive § 2255 motion is **reversed** and the matter **remanded** for further proceedings not inconsistent with this opinion.[2]

[2]We express no views on the merits of the claim raised in Loumoli's § 2255 motion other than to note the issue was recently argued before this court in *United States v. Baker*, No. 20-3062, a matter that was abated on July 26, 2021, pending the outcome of the Supreme Court's issuance of a decision in *United States v. Taylor*, No. 20-1459.