FILED
United States Court of Appeals
Tenth Circuit

September 14, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ZACHARY CLARK, a/k/a Little Rue,

Defendant - Appellant.

No. 21-6034
(D.C. No. 5:18-CR-00260-SLP-46)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **MATHESON** and **EID**, Circuit Judges.

After entering into a plea agreement that included a waiver of his right to appeal, Zachary Clark pleaded guilty to conspiring to possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 846. The district court sentenced Clark to 480 months in prison. Clark has appealed, and the government has moved to enforce the appeal waiver under *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam). We grant the government's motion.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Clark agreed in the plea agreement to waive his right to appeal his plea, his sentence, "and the manner in which the sentence is determined"—provided the sentence was not above the advisory guideline range. R. vol. I at 186. In exchange, the government agreed to dismiss several counts. The plea agreement contained the following stipulation: "The parties also agree that the time Defendant has spent in the custody of the U.S. Marshal Service since his arrest on December 19, 2018, should count towards any sentence imposed as a result of his conviction in this case." *Id.* at 184.

At a change-of-plea hearing, the district court accepted Clark's guilty plea and found: (1) that he was competent to enter the plea, (2) that he did so voluntarily and understood fully the rights he agreed to waive, and (3) that there was a factual basis for the plea. The advisory sentence under the Sentencing Guidelines was life in prison, but the district court sentenced Clark to 480 months.

Hahn sets forth three factors to evaluate an appeal waiver: "(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. A defendant's waiver is not knowing and voluntary if it is the product of a material misrepresentation, *United States v. Williams*, 919 F.2d 1451, 1456 (10th Cir. 1990), or if there was a mutual mistake relating to the basic assumption on which the plea agreement was made, *United States v. Frownfelter*, 626 F.3d 549, 555 (10th Cir. 2010). Clark contends the plea agreement contained a material misrepresentation or

at the very least a mutual mistake. We hold there was no such misrepresentation or mistake here.[1]

The stipulation that Clark's pre-sentence detention "should count towards any sentence imposed," R. vol. I at 184, was followed by a caveat in the very next numbered paragraph:

> Defendant acknowledges and understands that the Court is not bound by, nor obligated to accept, these stipulations, agreements, or recommendations of the United States or Defendant. And, even if the Court rejects one or more of these stipulations, agreements, or recommendations, that fact alone would not allow Defendant to withdraw [his] plea of guilty.

Id. The district court reiterated this same point at the change-of-plea hearing. R. vol. 3 at 22 ("THE COURT: And do you understand that you do not have a right to withdraw your plea of guilty if I don't go along with any suggestions in regard to sentencing in the plea agreement? THE DEFENDANT: Yes, sir.").

Despite Clark's understanding that the district court was not bound by the stipulation, he argues it was still a misrepresentation, or at the very least a mutual mistake, because the parties stipulated to a legal impossibility. Clark maintains it was not legally possible for his pre-sentence detention to count toward his federal sentence because federal law prohibits a defendant from receiving credit for a pre-sentence detention that has already been credited against another sentence.

[1] The parties' briefs spent considerable time debating whether Clark's arguments are subject to plain error review. We hold only that Clark has failed to carry his burden of proving that his plea was not knowing and involuntary. *See Hahn*, 359 F.3d at 1329.

See 18 U.S.C. § 3585(b). He argues the government knew when it entered the plea agreement that Clark was receiving credit towards a state sentence while his federal case was pending, so he could not have received any credit toward his federal sentence as the plea agreement contemplated.

We reject Clark's argument. It was not legally impossible for Clark's pre-detention time to count towards his sentence. As the Presentence Report observed, if the district court wished to honor the parties' stipulation, it could have granted a downward departure under the Sentencing Guidelines. R. vol. 2 at 41 (explaining that USSG § 5G1.3(d) allows for a downward departure in an extraordinary case involving pre-sentence detention served in connection with a separate conviction). Indeed, the district court chose to do exactly that for two of Clark's co-defendants. Although it chose not to do so in Clark's case, Clark knowingly took that risk. We therefore reject Clark's assertion that the plea agreement contained a misrepresentation or mistake.

Clark concedes that his appeal falls within the scope of the appellate waiver, and he does not address the miscarriage-of-justice factor. We therefore need not address those factors. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005).

The government's motion to enforce the appellate waiver is granted and this appeal is dismissed.

Entered for the Court
Per Curiam