FILED
United States Court of Appeals
Tenth Circuit

April 7, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICKY HUNTLEY,

Defendant - Appellant.

No. 21-1332
(D.C. No. 1:19-CR-00461-CMA-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **McHUGH**, and **MORITZ**, Circuit Judges.

Ricky Huntley appeals from his sentence despite the appeal waiver in his plea agreement. The government now moves to enforce that waiver under *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam). Through counsel, Huntley responds that the appeal waiver does not encompass the argument he intends to make on appeal and the waiver otherwise should not be enforced. For the reasons explained below, 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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND & PROCEDURAL HISTORY

Huntley is a federal prisoner who was caught with a cell phone. The Bureau of Prisons (BOP) administratively punished him with "90 days[']loss of visitation privileges, 90 days[']loss of commissary privileges, and 41 days[']disallow good conduct time." Resp. to Gov't Mot. to Enforce an Appeal Waiver ("Response") at 2 (internal quotation marks omitted).

Soon after, a grand jury indicted Huntley based on the same conduct. More specifically, it charged him with one misdemeanor count of possessing a prohibited object in prison.

Huntley chose to plead guilty and signed a plea agreement to that effect. The plea agreement contains the following appeal waiver:

> Defendant knowingly and voluntarily waives the right to appeal any matter in connection with this prosecution, conviction, or sentence unless it meets one of the following criteria: (1) the sentence exceeds the maximum penalty provided in the statute of conviction; (2) the sentence exceeds the advisory guideline range that applies to a total offense level of 4; or (3) the Government appeals the sentence imposed.

Mot. to Enforce an Appeal Waiver ("Motion"), Attach. 1 ("Plea Agreement") ¶ 9.

At the change-of-plea hearing, the district court began its colloquy by asking Huntley if he would waive his right to remain silent so he could answer the court's questions. Huntley said yes and immediately began explaining that he had already been through the BOP's administrative punishment process. Referring to the Double Jeopardy Clause, he asked, "[I]s this considered as a double sentence[?]" Motion,

Attach. 2 ("Change-of-Plea Tr.") at 7. Huntley said he had already asked his attorney and she "explained it to me the best way she can . . . but I still wonder—I had told myself I was going to ask the judge myself whenever I get a chance." *Id.*

The district court offered its view that administrative and judicial proceedings regarding the same conduct do not raise a Double Jeopardy question. But the court ultimately referred Huntley to his attorney, stating, "That is not something I can give you any advice on." *Id.* at 8. Huntley responded, "All right." *Id.* The court also told Huntley he could ask to speak privately with his attorney at any time. From there, the court proceeded with the hearing.

As part of the plea colloquy, the court asked, "Do you understand that by entering into this plea agreement, you are giving up your right to appeal or otherwise challenge your prosecution, conviction, and sentence under the circumstances outlined in your plea agreement?" *Id.* at 19. Huntley answered, "Yes, ma'am." *Id.* After confirming Huntley's understanding of other rights he would be waiving, the court asked, "Do you need any more time to talk to [your attorney] about these rights or your waiver of these rights?" Huntley answered, "No, ma'am." *Id.* at 20.

Finally, at sentencing, the parties agreed that the advisory guidelines range was two to eight months' imprisonment, and the district court imposed a four-month sentence. As required by the relevant statute, the district court ordered that this sentence run consecutively to the sentence Huntley has been serving. *See* 18 U.S.C. § 1791(c).

II. ANALYSIS

Huntley intends to argue on appeal that his sentence violates the Double Jeopardy Clause because the BOP had already punished him for the same conduct. Huntley recognizes that our precedent is to the contrary. *See* Response at 4 n.2 (citing *Lucero v. Gunter*, 17 F.3d 1347, 1351 (10th Cir. 1994) ("Prison disciplinary hearings are not part of a criminal prosecution, and therefore do not implicate double jeopardy concerns." (citations omitted))). But he further intends to argue that a later Supreme Court decision abrogated that precedent.

A. Scope of the Waiver

Our first question when faced with a motion to enforce an appeal waiver is whether the defendant's appeal argument "falls within the scope of the waiver." *Hahn*, 359 F.3d at 1325. Huntley claims his Double Jeopardy argument falls outside the scope of the waiver given the exception for a "sentence [that] exceeds the maximum penalty provided in the statute of conviction." Plea Agreement ¶ 9. He reaches this position as follows:

1. a sentence that exceeds the statutory maximum is an illegal sentence—therefore, the appeal waiver contains an exception for any form of illegal sentences; and
2. a sentence in violation of the Double Jeopardy Clause is one form of illegal sentence—therefore, a Double Jeopardy argument falls outside the appeal waiver.

The argument fails at the first premise. Huntley offers no authority for the notion that an exception for one type of illegal sentence necessarily implies an exception for every type of illegal sentence.

Also, contrary to Huntley's argument, *see* Response at [6],[1] this is not a question of construing appeal waivers strictly against the government and construing ambiguities in the defendant's favor. The appeal waiver and the exception on which Huntley relies—"the sentence exceeds the maximum penalty provided in the statute of conviction," Plea Agreement ¶ 9—are not ambiguous.

Thus, Huntley's Double Jeopardy claim does not fit within any exception to the appeal waiver, so it "falls within the scope of the waiver," *Hahn*, 359 F.3d at 1325.

B. Knowing and Voluntary Waiver

We next ask "whether the defendant knowingly and voluntarily waived his appellate rights." *Id.* Here, the plea agreement states as much, *see* Plea Agreement ¶ 9, and the district court confirmed as much during the plea colloquy, *see* Change-of-Plea Tr. at 19. Huntley argues, however, that the "colloquy in this case [did] nothing to demonstrate that [he] was ever informed, let alone knowingly agreed, that he was waiving the right to challenge the legality of his sentence." Response at 8. But Huntley responded affirmatively when the district court asked, "Do you understand that . . . you are giving up your right to appeal or otherwise challenge

[1] The sixth page of the Response does not have a page number.

your prosecution, conviction, and sentence under the circumstances outlined in your plea agreement?" Change-of-Plea Tr. at 19. Huntley also told the district court that he did not need more time to discuss anything with his attorney. The record thus shows that Huntley knowingly and voluntarily waived his right to appeal.

C. Miscarriage of Justice

Last, we ask "whether enforcing the waiver would result in a miscarriage of justice." *Hahn*, 359 F.3d at 1325. A miscarriage of justice occurs "[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Id.* at 1327 (bracketed numerals in original; internal quotation marks omitted).

Huntley does not identify which of these four options applies here. He instead falls back on the argument that he received an illegal sentence and cites cases from this court excusing an appeal waiver in the context of sentences imposed beyond statutory maximums. *See United States v. Hudson*, 483 F.3d 707, 709–10 (10th Cir. 2007) (allowing defendant to appeal the legality of a restitution order that was beyond the amount authorized by the restitution statute despite an appeal waiver); *United States v. Gordon*, 480 F.3d 1205, 1210 (10th Cir. 2007) ("[T]he language of the plea agreement itself suggests Ms. Gordon did not intend to waive the right to appeal any aspect of her sentence or restitution that was beyond that authorized by the pertinent statutes."); *see also United States v. Cudjoe*, 634 F.3d 1163, 1165–66

(10th Cir. 2011) (stating that a term of supervised release beyond the statutory maximum would be "an illegal sentence [and] outside the scope of an appeal waiver," but concluding that the defendant's supervised release term was lawful).[2] Huntley asserts that "barring [an illegal-sentence] claim would create a miscarriage of justice." Response at 9.

None of the cases Huntley cites holds that an illegal sentence is a *per se* miscarriage of justice (*i.e.*, a fifth form of miscarriage of justice, in addition to the four established in *Hahn*). In *Gordon*, however, we stated in dicta that "*Hahn* implies [a] rule" that "a defendant cannot waive the right to appeal an unlawful sentence" because "an unlawful sentence . . . results in a miscarriage of justice." 480 F.3d at 1209–10.

Regardless, Huntley's illegal-sentence argument is materially different from the illegal-sentence arguments presented in *Hudson*, *Gordon*, and *Cudjoe*. In each of those cases, the defendant argued that the district court erred *at the sentencing phase*. Our decision to permit those appeals ultimately traces back to the principle that

[2] Huntley also cites *United States v. Groves*, 369 F.3d 1178 (10th Cir. 2004). There, we permitted the defendant to bring an Ex Post Facto Clause challenge—specifically, "use of a sentencing guideline that was not in effect at the time the offense was committed"—because he specifically reserved the right to challenge an "illegal sentence," and a sentence imposed in violation of the Ex Post Facto Clause is unconstitutional and therefore "illegal." *Id.* at 1182 (internal quotation marks omitted). Huntley did not similarly reserve the right to appeal any illegal sentence—only a "sentence [that] exceeds the maximum penalty provided in the statute of conviction," Plea Agreement ¶ 9. Moreover, as we explain below, Huntley's claim that he received an illegal sentence is ultimately a claim that he should not have been prosecuted, not that the court erred when it imposed his sentence.

"a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court." *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000) (internal quotation marks omitted). There are, rather, "public policy constraints" on appeal waivers, so defendants remain protected from certain sentencing errors despite those waivers, such as receiving a sentence beyond that statutory maximum. *Id.*

Huntley's claim is nothing like this. He does not claim that the district court erred at the sentencing phase, such as an error in the length or type of sentence imposed. Nor does he argue that the BOP administrative tribunal and the district court prosecution were a "single proceeding" through which he received two sentences for the same conduct. *See Jones v. Thomas*, 491 U.S. 376, 381 (1989) (noting that one purpose of the Double Jeopardy Clause is to "protect[] against multiple punishments for the same offense imposed in a single proceeding" (internal quotation marks omitted)). Though he phrases his argument in terms of an illegal *sentence*, Huntley's Double Jeopardy argument, if correct, is that the *prosecution* was unconstitutional from the outset because the BOP had already punished him for possessing the phone. *See id.* (noting that one purpose of the Double Jeopardy Clause is to "protect . . . against a second prosecution for the same offense after conviction"). Stated slightly differently, if Huntley's sentence is illegal, it is only because his prosecution was illegal—not because the district court committed an error at sentencing.

Unlike in the sentencing context, we have not imposed public policy constraints on defendants' ability to waive potential challenges to the prosecution. Rather, "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). This includes the protections afforded by the Double Jeopardy Clause. *See id.* (citing *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987)); *see also United States v. Broce*, 488 U.S. 563, 572–74 (1989) (holding that defendants' guilty pleas encompassed a general waiver of pre-guilty-plea rights, including any Double Jeopardy challenge, and counsel's failure to inform defendants about the possibility of bringing such a challenge was not a basis for setting aside their pleas). Thus, even if Huntley has a valid Double Jeopardy argument (about which we express no opinion), he fails to show that enforcing the waiver would be a miscarriage of justice.

III. CONCLUSION

This appeal falls within Huntley's appeal waiver, and no other *Hahn* factor counsels against enforcement of the waiver. We grant the government's motion to enforce the appeal waiver and dismiss this appeal.

Entered for the Court
Per Curiam