FILED
United States Court of Appeals
Tenth Circuit

April 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN CARLOS VILLALOBOS-MACIAS,

Defendant - Appellant.

No. 22-2163
(D.C. No. 1:17-CR-00182-JCH-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **EID**, **EBEL**, and **KELLY**, Circuit Judges.

Juan Carlos Villalobos-Macias appeals from his sentence, but his plea agreement contains an appeal waiver. The government now moves to enforce that waiver under *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc). Through counsel, Villalobos responds that the appeal waiver is unenforceable because he claims the government misled him about a crucial fact that influenced his decision to accept a certain sentencing range as part of the plea agreement. He

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

therefore argues the entire agreement is tainted and the appeal waiver should not be enforced. We disagree and grant the government's motion.

I. BACKGROUND & PROCEDURAL HISTORY

In December 2016, Villalobos forced a woman out of her car at gunpoint at an Interstate 25 rest stop in southern Colorado. He then took the car and drove into New Mexico. While on the freeway north of Las Vegas, New Mexico, he decided—with no apparent motivation—to open fire on a nearby car driven by "J.K." One of those shots entered the car and grazed J.K.'s right hand, causing serious bleeding. J.K. pulled over. Villalobos made his way back to J.K.'s car, exited his own car, and approached J.K. with his gun drawn. J.K. accelerated away. Villalobos fired two more shots that struck J.K.'s car, but J.K. escaped.

Police later apprehended Villalobos and a federal grand jury in the District of New Mexico charged him with carjacking (referring to the car stolen in Colorado) and attempted carjacking causing serious bodily injury (referring to J.K. and his car). The grand jury also returned an 18 U.S.C. § 924(c) charge (using a firearm in connection with a crime of violence) for each carjacking charge, making four charges in total.

Villalobos eventually accepted a plea agreement. He agreed to plead guilty to attempted carjacking of J.K. causing serious bodily injury and the related § 924(c) charge. In exchange, the government agreed to dismiss the other charges. Per Federal Rule of Criminal Procedure 11(c)(1)(C), the parties stipulated to a sentencing range of 15 to 20 years. And, as particularly relevant here, Villalobos agreed to

waive his "right to appeal [his] conviction(s) and any sentence, including any fine, imposed in conformity with this Fed. R. Crim. P. 11(c)(1)(C) plea agreement." R. vol. I at 99, ¶ 20. After a hearing, the district court accepted Villalobos's plea and deferred its decision whether to accept the plea deal until sentencing.

Villalobos obtained a new attorney ahead of sentencing. Through this new attorney, he filed a sentencing memorandum arguing that the district court should accept the plea deal except for the 15 to 20-year sentencing range. Villalobos claimed the parties must have reached this sentencing range based on what he claimed was a lie by the government about the extent of J.K.'s injury. In the plea agreement, Villalobos admitted he fired a bullet that struck J.K.'s hand and "caused extreme physical pain and impairment of the function of a bodily member." R. vol. I at 97, ¶ 12. Villalobos asserted this language must have been inspired by the sentencing guidelines' definition of "permanent or life-threatening bodily injury," namely, "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent," U.S.S.G. § 1B1.1 cmt. n.1(K). When applying that definition and factoring in the other adjustments relevant to Villalobos's case, the guidelines yield a recommended sentencing range of roughly 15–18 years. But Villalobos found it significant that the presentence report noted J.K. had healed completely from his wound. The presentence report (PSR) also concluded that J.K. suffered "bodily injury," meaning, "any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought," *id.* n.1(B).

That conclusion, factored into the other sentencing calculations, yielded a recommended guidelines range in the PSR of about 13 years. So, in Villalobos's view, the government must have misled him during plea negotiations about the extent of J.K.'s injury, or else he would not have agreed that 15–20 years was the appropriate sentencing range.

Prompted by the sentencing memorandum, the government put J.K. on the stand at the sentencing hearing to testify about his injuries. He testified that, on a scale from 1 to 10, the pain to his hand from the bullet wound was an 8 or 8.5. After initial treatment at a hospital, the wound got infected and needed further treatment. In all, his hand was wrapped in a bandage for about six weeks. Since then, there have been no lingering effects.

Having heard this testimony, the district court concluded that J.K. in fact suffered "extreme physical pain and impairment of the function of a bodily member," as stated in the plea agreement, R. vol. I at 97, ¶ 12. The court accordingly rejected Villalobos's claim that the government had lied during plea negotiations. Ultimately, the court accepted the plea agreement, including its Rule 11(c)(1)(C) sentencing range, and sentenced Villalobos to the low end of that range (15 years).

This appeal followed.

II. ANALYSIS

A. *Hahn* Analysis

The government's motion to enforce would normally require us to ask three questions: "(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." *Hahn*, 359 F.3d at 1325. But we need not address a *Hahn* factor that the defendant does not dispute. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005). Villalobos does not dispute the first factor (scope of the waiver), so we deem that conceded. He claims instead that the government's alleged misrepresentation at the plea phase means the entire plea agreement, including the appellate waiver, was not knowing or voluntary. *See United States v. Rollings*, 751 F.3d 1183, 1189 (10th Cir. 2014) ("[I]f the defendant did not voluntarily enter into the agreement, the appellate waiver subsumed in the agreement also cannot stand."). He further claims that allowing the appeal waiver to stand would be a miscarriage of justice, given that it is part of a plea agreement he was allegedly deceived into accepting. Both arguments depend on establishing that the government deceived him into agreeing that J.K. suffered "extreme physical pain and impairment of the function of a bodily member," R. vol. I at 97, ¶ 12, and in turn deceived him into accepting 15–20 years as the appropriate sentencing range.

We are not persuaded. The key premise of Villalobos's argument is that the plea agreement's description of J.K.'s pain and impairment factored into the parties' deliberations when agreeing upon a sentencing range. Villalobos did not present evidence supporting this premise at the sentencing hearing (*e.g.*, testimony from the attorney that represented him during plea negotiations). Nor does he point us to any other evidence in the record that would support this theory. Rather, he supports the

premise with speculation about guidelines provisions the parties might have had in mind, given the language of those guidelines and the recommended sentences they yield. But he points to no evidence that the parties had in mind these guidelines (or any particular sentencing calculation) when they agreed to the language describing J.K.'s pain and impairment. Stated slightly differently, there is no evidence that the parties saw any connection between, on the one hand, the description of J.K.'s pain and impairment, and, on the other hand, their agreement that 15–20 years was an appropriate sentencing range.

In addition, after hearing testimony from J.K., the district court found that the plea agreement accurately described his injury. To this, Villalobos responds that "there is no credible evidence that J.K. suffered any impairment in his right hand as a result of the offense because, once his bandage was removed six weeks after the incident, J.K.'s right hand returned to normal." Resp. at 11. This assumes that when the plea agreement said, "impairment of the function of a bodily member," R. vol. I at 97, ¶ 12, it meant permanent impairment. The plea agreement does not say that. Villalobos speculates that the parties had the permanent-impairment guideline in mind, as noted above, but he has no supporting evidence.

For all these reasons, we reject Villalobos's claim that his plea agreement (including the appeal waiver) was not knowing or voluntary, or that enforcing the appeal waiver would be a miscarriage of justice.[1]

[1] Villalobos's miscarriage-of-justice argument reduces to a claim that it would be a miscarriage of justice to enforce an involuntary plea agreement. We are

B. Failure of an Element of the Crime

Villalobos claims that J.K.'s injury did not amount to "serious bodily injury," as that term is used in the carjacking statute: "bodily injury which involves . . . extreme physical pain . . . [or] protracted loss or impairment of the function of a bodily member, organ, or mental faculty," 18 U.S.C. § 1365(h)(3); *see also id.* § 2119(2) (adopting § 1365(h)(3) by reference as the definition of "serious bodily injury" for purposes of carjacking). Thus, he says there was "a failure of proof on an essential element of the charged offense," Resp. at 12, and, for this additional reason, he did not enter into the plea agreement (including the appeal waiver) knowingly and voluntarily.

Again, we disagree. The district court found that J.K.'s description of his pain as an 8 or 8.5 on a scale of 1 to 10 qualifies as extreme physical pain. The district court also found that loss of the use of his right hand for six weeks counted as protracted impairment of the function of a bodily member. Either finding, by itself, is enough.

Villalobos claims the district court's findings are inconsistent with *United States v. Alexander*, 447 F.3d 1290, 1299–1300 (10th Cir. 2006), where he claims this court "collected cases" demonstrating that "serious bodily injury is present only

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skeptical that this is an appropriate argument under *Hahn*'s miscarriage-of-justice prong. It implies that an appeal waiver (or a plea agreement) might be deemed voluntary for purposes of *Hahn*'s voluntariness inquiry but involuntary for purposes of *Hahn*'s miscarriage-of-justice inquiry. We will not address this issue further, however, because Villalobos has not supported the underlying factual premise.

in those cases where the injury created a serious medical condition which required hospitalization, surgery, prolonged treatment and rehabilitation, or where the victim lost copious amounts of blood, or where the victim sustained multiple, severe lacerations." Resp. at 18 (internal quotation marks omitted). Villalobos's description of *Alexander* bears no resemblance to *Alexander* itself. *Alexander* was describing the evidence supporting serious bodily injury in that case. *Alexander* did not "collect cases," and it did not state—or even imply—that the sorts of facts present in that prosecution are required in all serious-bodily-injury prosecutions. We therefore reject this additional attack on *Hahn*'s voluntariness prong.

C. Mistake of Fact

Finally, Villalobos argues that his situation fits within contract doctrine regarding mistakes of fact. Sometimes he refers to it as a "mutual" mistake of fact, Resp. at 1, 12, contrary to his claims elsewhere that the government "mis-characterized" and "exaggerat[ed]" the facts, *id.* at 9, 10.

It is not clear if Villalobos raises the mistake-of-fact doctrine to support his arguments under *Hahn*, or if he considers mistake-of-fact to be a basis outside the *Hahn* factors for avoiding the appeal waiver. Regardless, a party seeking to void a plea agreement based on mistake of fact "must show that the mistake ha[d] a material effect on the agreed exchange of performances." *United States v. Frownfelter*, 626 F.3d 549, 555 (10th Cir. 2010) (internal quotation marks omitted). As explained, Villalobos has no evidence that there was any connection between the description of

J.K.'s injury and the decision to agree that 15–20 years was an appropriate sentencing range. The mistake-of-fact doctrine therefore does not apply.

III. CONCLUSION

We reject Villalobos's arguments against enforcement of the appeal waiver, grant the government's motion, and dismiss this appeal.

Entered for the Court
Per Curiam