

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 24, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE LOPEZ JOVEL,

Defendant - Appellant.

No. 22-4089
(D.C. No. 2:19-CR-00088-DAK-DBP-2)
(D. Utah)

ORDER AND JUDGMENT*

Before **HARTZ, EBEL**, and **BACHARACH**, Circuit Judges.

Defendant Jose Lopez Jovel pleaded guilty to bank robbery, in violation of 18 U.S.C. § 2113(a). The parties agreed to a sentence of 30 months' imprisonment pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The district court accepted the plea agreement and imposed that sentence. Despite the appeal waiver in his plea agreement, Mr. Lopez Jovel filed an appeal. The government now moves to enforce the appeal waiver and to dismiss this appeal. *See United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

In deciding whether to enforce an appeal waiver, 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.” *Id.* at 1325. Mr. Lopez Jovel does not argue that his appeal is outside the scope of his appeal waiver or that enforcing the appeal waiver would result in a miscarriage of justice, so we need not address those issues. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005). He contends his appeal waiver was not knowing and voluntary because his guilty plea was not knowing and voluntary.

“[I]n determining whether an appellate waiver is knowing and voluntary under *Hahn*, we may consider whether the entire plea agreement, including the plea, was entered knowingly and voluntarily.” *United States v. Rollings*, 751 F.3d 1183, 1186 (10th Cir. 2014). “A plea may be involuntary when an attorney materially misinforms the defendant of the consequences of the plea, *e.g.*, by falsely alleging that promises or guarantees exist.” *Field v. Gibson*, 277 F.3d 1203, 1213 (10th Cir. 2002) (citation and internal quotation marks omitted).

Mr. Lopez Jovel argues that his plea was not knowing and voluntary “[b]ecause [his] decision to plead guilty was based on a material misunderstanding as to the consequences of his plea.” Resp. at 1. He contends that he “agreed to plead guilty based on his understanding that this would result in him being immediately released from pretrial custody and into ICE custody for deportation proceedings

immediately following the combined change-of-plea and sentencing hearing.” *Id.* at 3-4. “In other words, he believed that by giving up his trial rights and pleading guilty, he could get out of federal pretrial custody and move on with his life.” *Id.* at 4. But instead of being remanded to ICE for deportation proceedings after sentencing in this case, Mr. Lopez Jovel explains that he was “transferred to the District of Wyoming for separate criminal proceedings requiring, at a minimum, additional time in federal pretrial custody, and raising the prospect of further federal incarceration.” *Id.* at 6.¹

In support of his argument, Mr. Lopez Jovel asserts that his “belief that he would immediately be transferred to ICE for deportation proceedings was wholly reasonable based upon the representations of the prosecutor,” who told defense counsel in a pre-plea email that “with the recommended 30-month sentence, Mr. Lopez Jovel should be done with his sentence, and would be transferred on an ICE hold and likely be deported.” *Id.* at 4 (ellipsis and internal quotation marks omitted). The government argues in its reply that there was no material misrepresentation, because the email “provided only the facts of the guideline range, that [Mr. Lopez Jovel] had an ICE hold, and that he will likely be deported.”² Reply

¹ The government notes, “[i]t is not clear from the record when Lopez Jovel and his attorney knew about the March 2019 Wyoming charges” Reply at 2 n.1.

² The email states: “Looks like he is a level 1 base offense 20 + 2 for bank range is 41-51 months with acceptance 30-37 months. I can recommend low end 30 months with time served meaning he should be done with his sentence. He has an ICE hold and will likely be deported.” R., Vol. I at 169.

at 2 (internal quotation marks omitted). We agree. The email does not contain a representation guaranteeing that Mr. Lopez Jovel would be transferred immediately to ICE for deportation proceedings after his plea and sentencing hearing.

Moreover, Mr. Lopez Jovel does not point to any communications showing that he was promised a transfer to ICE for deportation proceedings in exchange for pleading guilty. And he points to nothing in his plea agreement (and we see nothing) regarding the promise of being transferred to ICE for deportation proceedings being a condition of him pleading guilty.³

Mr. Lopez Jovel has not shown that there was any material misrepresentation about the consequences of him pleading guilty, that he was guaranteed immediate transfer into ICE custody for deportation proceedings, or that transfer into ICE custody for deportation proceedings was a condition of his plea agreement. Because he has failed to show that his guilty plea was not knowing and voluntary, he likewise has not shown that his appeal waiver was not knowing and voluntary.

II. Conclusion

We grant the government's motion to enforce the appeal waiver and dismiss this appeal.

Entered for the Court
Per Curiam

³ The only part of his plea agreement that even remotely relates to this issue is the following statement: "I understand that, if I am not a United States citizen, I may be removed from the United States, denied citizenship, and denied admission to the United States in the future." Mot. to Enf., Attach. A at 2.