FILED
United States Court of Appeals
Tenth Circuit

July 31, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DILLON E. EVERMAN,

Defendant - Appellant.

No. 23-3069
(D.C. No. 6:21-CR-10068-JWB-3)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **McHUGH** and **CARSON**, Circuit Judges.

This matter is before the court on the government's motion to enforce the appeal waiver in Dillon E. Everman's plea agreement pursuant to *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam). Exercising jurisdiction under 28 U.S.C. § 1291, we grant the motion and dismiss the appeal.

BACKGROUND

Mr. Everman pleaded guilty to conspiracy to commit sexual exploitation of a child (production of child pornography), in violation of 18 U.S.C. § 2251(a) and (e). As part of his plea agreement, Mr. Everman agreed to "pay for the full amount of the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

victim's losses, as contemplated in 18 U.S.C. § 2259(b)(1), as determined by the Court." Mot. to Enforce, Attach. A at 5. He also agreed to waive his right to appeal "any matter in connection with. . . his conviction[] or the components of [his] sentence" unless the court departed upwards from the Guideline range or the government appealed the sentence. *Id.* at 7. Both by signing the written plea agreement and in his responses to the court's questions at the change of plea hearing, Mr. Everman confirmed that he understood the consequences of his plea, including the restitution requirement and appeal waiver, and he acknowledged that his plea was knowing and voluntary.

At the restitution hearing, the government sought an award that included the victim's projected future costs for weekly psychological therapy for five years. It argued that an award of projected future therapy costs was appropriate under the applicable restitution statute, which provides that the defendant must pay "the full amount of the victim's losses," including costs that are "reasonably projected to be incurred in the future[] by the victim[] as a proximate result of the offenses involving the victim," 18 U.S.C. § 2259(b)(1), (c)(2)(A). The statute provides that such costs include "medical services relating to . . . psychological care." *Id.* § 2259(c)(2)(A). In support of the request, the government submitted a letter from the victim's therapist stating that "trauma therapy can take over ten years," Mot. to Enforce, Attach. C at 8-9, and that this victim would need therapy for at least five years. The government provided a projected future cost estimate that was calculated based on the victim's current therapy costs. Mr. Everman objected, arguing that the amount of

time the victim would need therapy was "speculation," *id.* at 9, so the cost estimate was not "reasonably projected to be incurred" by the victim, § 2259(b)(1). The district court overruled the objection and entered a restitution award that included the projected future therapy costs. The court recognized that it was the government's "burden to prove" the reasonableness of the projected future costs, Mot. to Enforce, Attach. C at 24, and it found that "given the things that were done to [the victim]," *id.* at 19, and the therapist's opinion about his future therapeutic needs, the amount sought was reasonable, *id.* at 24.

Despite the appeal waiver, Mr. Everman filed this appeal challenging the restitution order as excessive. Specifically, the issues he intends to argue are that the government did not prove the victim's projected future losses by a preponderance of the evidence and that the district court's inclusion of such losses in the restitution order was "based on an erroneous view of the law or on a clearly erroneous assessment of the evidence[.]" Docketing Statement at 5.

DISCUSSION

In ruling on a motion to enforce, 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." *Hahn*, 359 F.3d at 1325. In opposing the government's motion, Mr. Everman argues that the restitution-related

issues he intends to raise on appeal are outside the scope of the appeal waiver and that enforcing the waiver would result in a miscarriage of justice.[1]

1. Scope of Waiver

Mr. Everman's main argument is that the appeal issues fall outside the scope of the waiver because restitution is not a component of his sentence and because the issues he intends to raise challenge the legality of the restitution award.

In *United States v. Anthony*, 25 F.4th 792 (10th Cir. 2022), we held that "restitution is a component of a criminal sentence and therefore included in the judgment of conviction." *Id.* at 796. We reject Mr. Everman's argument that *Anthony* is inapplicable here because it "did not involve the interpretation of a plea agreement or an attempt to enforce a waiver provision against the defendant." Resp. at 5. The specific question presented in *Anthony* was when a judgment of conviction becomes final in a deferred restitution case for purposes of the limitations period for seeking relief under 28 U.S.C. § 2255. 25 F.4th at 793. But nothing in our opinion suggests that our holding applies only in that context. Indeed, we recognized that in order to address the finality question, we first needed to decide the threshold question whether restitution is part of a defendant's sentence and therefore part of a judgment of conviction. *Id.* at 795. Our holding that "restitution is a component of a criminal sentence," *id.* at 796, was "based on the restitution statutes and Supreme Court

[1] Mr. Everman does not claim his waiver was not knowing and voluntary, so we do not address that issue. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005) (court need not address uncontested *Hahn* factors).

precedent, both of which treat restitution as part of the defendant's sentence," *id.*, our decisions treating restitution as part of a sentence in other contexts, *id.* at 799, and "the realities of the sentencing process," *id.* Mr. Everman has not articulated a compelling reason to limit that holding to cases involving finality questions. And he has presented no authority from this circuit—and we are not aware of any—supporting the conclusion that restitution is part of a criminal sentence in some contexts but not in others.

We also reject Mr. Everman's argument that the phrase "components of the sentence to be imposed," Mot. to Enforce, Attach. A at 7, is ambiguous so should not be construed as including the restitution order. We strictly construe appeal waivers and read any ambiguities against the government, *see Hahn*, 359 F.3d at 1325, but we see no ambiguity here. The word "components" is plural, so the phrase "the components of the sentence" plainly includes more than just the prison sentence. The plea agreement identifies the elements of "the maximum sentence" that could be imposed as a prison sentence, a fine, a term of supervised release, three different monetary assessments, and "restitution pursuant to 18 U.S.C. § 2259." Mot. to Enforce, Attach. A at 1-2. At the change of plea hearing, the district court reminded Mr. Everman that restitution was among the "penalties and consequences of" pleading guilty, *id.*, Attach. B at 9-10, and he assured the court that he understood the written and oral sentencing advisements. Based on the language of the plea

agreement and these advisements, it is clear that the parties contemplated, and that Mr. Everman understood, that restitution would be part of his sentence.[2]

Moreover, in *United States v. Cooper*, 498 F.3d 1156 (10th Cir. 2007), we held that the defendant's waiver of his right to appeal any "aspect of" his sentence and the manner in which it was determined, *id.* at 1158 (internal quotation marks omitted), encompassed his challenge to the restitution award. *See id.* at 1159-60. We recognized that "a challenge to the legality of a restitution award" can survive a general appeal waiver, but limited that "extremely narrow" exception to situations "where there is no factual dispute as to the amount of restitution linked to an offense and the legality of the district court's restitution award can therefore be reviewed solely as a question of law." *Id.* at 1160; *see also United States v. Williams*, 10 F.4th 965, 971-72 (10th Cir. 2021) (waiver of "the right to appeal any matter in connection with . . . [the] sentence" did not preclude appeal claiming that the restitution award "exceed[ed] the [statutory limit]" or the bounds of "what the district court had authority to order" (internal quotation marks omitted)).

[2] Contrary to Mr. Everman's contention, *In re Sealed Case*, 702 F.3d 59 (D.C. Cir. 2012), does not undermine our conclusion. There, the D.C. Circuit held that the defendant's waiver of the right to appeal his "sentence," *id.* at 63, did not apply to his restitution order because the agreement defined "sentence" as including only the period of incarceration, *id.* at 64-65. In so concluding, the court rejected the government's argument that restitution is necessarily part of a sentence. *Id.* at 64-65. Here, by contrast, the plea agreement defines "the maximum sentence" as including restitution, Mot. to Enforce, Attach. A at 1-2; Mr. Everman waived his right to appeal "the components of the sentence," *id.* at 7, not just his prison sentence; and the law in this circuit is that "restitution is a component of a criminal sentence," *Anthony*, 25 F.4th at 796.

There is no meaningful difference between the language of the waiver in *Cooper*, which covered any "aspect of" the sentence, 498 F.3d at 1158 (internal quotation marks omitted), and the language in Mr. Everman's waiver, which applies to "the components" of his sentence, Mot. to Enforce, Attach. A at 7. And the exception for appeals challenging the legality of a restitution award does not apply here. Mr. Everman characterizes his appeal as raising "errors of law as to the [government's] burden of proof" and the district court's "erroneous assessment of the statute and facts." Resp. at 11. But he does not assert that the restitution award exceeds the statutory limit or the district court's authority. Instead, his issues focus on the adequacy of the government's evidence regarding the victim's projected future losses and the propriety of the district court's conclusion that the government met its burden to show that the amount sought was "reasonably projected to be incurred" by the victim, as required by 18 U.S.C. § 2259(b)(2)(A). These are fact issues, not legal issues, and they fall squarely within Mr. Everman's waiver of his right to appeal "any matter in connection with . . . the components of [his] sentence," Mot. to Enforce, Attach. A at 7. *See Cooper*, 498 F.3d at 1160 ("A challenge to the amount of a restitution award based on sufficiency of the evidence is necessarily based on disputed facts . . . ."); *see also United States v. Gordon*, 480 F.3d 1205, 1209 n.4 (10th Cir. 2007) (recognizing that an appeal that "challenges the district court's factual calculation of the amount of restitution linked to an offense . . . would be precluded by a general [appeal] waiver").

2. Miscarriage of Justice

A miscarriage of justice occurs where (1) "the district court relied on an impermissible factor such as race"; (2) "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid"; (3) "the sentence exceeds the statutory maximum"; or (4) "the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327 (internal quotation marks omitted). Mr. Everman's argument falls in the fourth miscarriage-of-justice scenario.

"The burden rests with the defendant to demonstrate that the appeal waiver results in a miscarriage of justice." *United States v. Anderson*, 374 F.3d 955, 959 (10th Cir. 2004). To show that an appeal waiver is "otherwise unlawful," Mr. Everman needed to prove that the alleged error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[.]" *Hahn*, 359 F.3d at 1327 (internal quotation marks omitted). The "inquiry is not whether the [restitution order] is unlawful, but whether the waiver itself is unlawful because of some procedural error or because no waiver is possible." *United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007).

Mr. Everman's appeal issues challenge the propriety of the restitution order, not the legality of his appeal waiver. A defendant may not rely on the "otherwise unlawful" exception to avoid enforcement of an appeal waiver based on alleged errors in the calculation of his sentence. *See United States v. Smith*, 500 F.3d 1206, 1212-13 (10th Cir. 2007) (explaining that the miscarriage-of-justice inquiry "looks to whether the *waiver* is otherwise unlawful, not to whether another aspect of the

proceeding may have involved legal error," and holding that a defendant may not rely on alleged errors at sentencing to avoid enforcement of an appeal waiver (citation and internal quotation marks omitted)).

The entirety of Mr. Everman's argument—for which he cites no authority—is that "[t]o deny [him] an appeal would be a miscarriage of justice." Resp. at 13. This conclusory and unsupported assertion falls far short of establishing that a miscarriage of justice will occur if we enforce the appeal waiver. *See United States v. Gonzalez-Huerta*, 403 F.3d 727, 737 (10th Cir. 2005) (holding that statement that "[t]o leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity, or public reputation of judicial proceedings," was insufficient to show miscarriage of justice for purposes of fourth prong of plain-error (internal quotation marks omitted)).

CONCLUSION

We grant the government's motion to enforce the waiver in Mr. Everman's plea agreement and dismiss this appeal.

Entered for the Court
Per Curiam