

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 5, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRADLEY KEITH COLLINS,

Defendant - Appellant.

No. 23-6029
(D.C. No. 5:22-CR-00386-R-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON, BACHARACH, and ROSSMAN**, Circuit Judges.

The government moves to enforce Bradley Keith Collins’ appeal waiver contained in his plea agreement, and to dismiss this appeal. Mr. Collins pleaded guilty to transportation of child pornography. Under the terms of his plea agreement, he waived his right to appeal his “guilty plea, and any other aspect of [his] conviction, including but not limited to any rulings on pretrial suppression motions or any other pretrial dispositions of motions and issues.” Mot. to Enforce, Attach. 1 (Plea Agreement) at 9, ¶ 17.a. He also “waive[d] the right to appeal [his] sentence, including any restitution, and the manner in which the sentence [was] determined,

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

including its procedural reasonableness.” *Id.*, ¶ 17.b. But “[i]f the sentence [was] above the advisory Guidelines range determined by the Court to apply to [his] case, [the appeal] waiver [did] not include [Mr. Collins’] right to appeal the substantive reasonableness of [his] sentence.” *Id.*, ¶ 17.b.

Additionally, Mr. Collins “waive[d] the right to collaterally challenge or move to modify (under 28 U.S.C. § 2255, 18 U.S.C. § 3582(c)(2), or any other ground) [his] conviction or sentence, including any restitution, except with respect to claims of ineffective assistance of counsel.” *Id.*, ¶ 17.c. He preserved his “ability to file a motion for compassionate release (under 18 U.S.C. § 3582(c)(1)(A)(i)) to the extent such motion is based solely on ‘extraordinary and compelling reasons’ currently listed in U.S.S.G. § 1B1.13, comment. (n.1).” *Id.*

The district court sentenced Mr. Collins to 135 months in prison, at the top of, but still within, the advisory guidelines range of 108 to 135 months in prison. Despite this within-guidelines sentence, Mr. Collins appealed. The government then moved to enforce the appeal waiver pursuant to *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004).

Under *Hahn*, we evaluate the enforceability of an appeal waiver by considering “(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. Collins concedes the first two factors—that his appeal falls within the scope of the appeal waiver and that he knowingly and voluntarily

waived his appellate rights. We therefore need not consider those factors. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005).

Mr. Collins contends, however, that enforcing his appeal waiver would result in a miscarriage of justice. A miscarriage of justice occurs “only when 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.” *United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007) (internal quotation marks omitted). “For the waiver to be invalid on the ground of unlawfulness, the unlawfulness must seriously affect the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks omitted). “The defendant bears the burden of persuasion on this point.” *Id.*

The first three situations do not apply here, and Mr. Collins does not contend otherwise. Instead, he says enforcing his waiver would result in a miscarriage of justice because it is unlawful for two reasons: First, he contends that in sentencing him, the district court inappropriately relied on allegations that he molested a child. He asserts those allegations are unreliable and no charges were ever filed based on them. Second, he contends the district court erred in relying on the “discredited child pornography guidelines to set the sentencing range” because they “apply in virtually every child pornography case” and they “were the product of Congress acting on political considerations.” Resp. to Mot. to Enforce at 8-9.

These arguments do not establish a miscarriage of justice. The inquiry is “whether the *waiver* is otherwise unlawful, not . . . whether another aspect of the sentencing proceeding may have involved legal error.” *United States v. Holzer*, 32 F.4th 875, 887 (10th Cir. 2022) (brackets and internal quotation marks omitted). Put differently, we do not focus on the result of the sentencing proceeding, but instead “on the right relinquished[] in analyzing whether an appeal waiver is valid.” *United States v. Smith*, 500 F.3d 1206, 1213 (10th Cir. 2007) (brackets and internal quotation marks omitted). Otherwise, “[t]o allow alleged errors in computing a defendant’s sentence to render a waiver unlawful would nullify the waiver based on the very sort of claim it was intended to waive.” *Id.*

Mr. Collins asks us to invalidate his appeal waiver based on his assertions that unreliable molestation allegations and congressionally driven sentencing guidelines contributed to a higher sentence. But any alleged error by the district court in referencing the molestation allegations amounts to a sentence-determination challenge that provides no basis for invalidating the appeal waiver. *See id.* at 1212-13 (rejecting argument that alleged errors in determining defendant’s sentence warranted invalidating her appeal waiver). Neither is the district court’s consideration of the sentencing guidelines relevant to whether the waiver was unlawful. Indeed, Mr. Collins identifies no procedural defect that renders his appeal waiver unlawful. *See Sandoval*, 477 F.3d at 1208 (“Our inquiry is not whether the sentence is unlawful, but whether the waiver itself is unlawful because of some

procedural error or because no waiver is possible.”). He therefore fails to establish that enforcing it would result in a miscarriage of justice.

Accordingly, we grant the government’s motion to enforce the appeal waiver and dismiss this appeal.

Entered for the Court
Per Curiam