

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

September 29, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JIMMIE LUNA, III,

Defendant - Appellant.

No. 21-5030
(D.C. No. 4:20-CR-00116-JFH-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **MORITZ, BALDOCK**, and **EID**, Circuit Judges.

Jimmie Luna pleaded guilty to distributing heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Under the plea agreement, Luna waived the right to appeal his sentence unless it exceeded the statutory maximum of 240 months in prison. The district court later imposed a 96-month prison term, which Luna now challenges as substantively unreasonable. In response, the government contends that the appeal

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

waiver in Luna's plea agreement bars this argument because Luna's sentence fell far below the statutory maximum.

We review the enforceability of an appeal waiver in a plea agreement de novo. *United States v. Ibarra-Coronel*, 517 F.3d 1218, 1221 (10th Cir. 2008). Such a waiver is enforceable if (1) it covers the issue raised on appeal; (2) "the defendant knowingly and voluntarily waived his [or her] appellate rights"; and (3) enforcing the waiver will not "result in a miscarriage of justice." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam).

All three requirements are satisfied here. First, the waiver covers Luna's challenge to the substantive reasonableness of his prison sentence: The plea agreement permits such a challenge only if the sentence "exceeds the statutory maximum," yet Luna's sentence fell far below that maximum. R. vol. 1, 19. Second, Luna knowingly and voluntarily waived his appellate rights, as evidenced by the plea agreement's language and the district court's exchange with Luna at the plea hearing. *See Hahn*, 359 F.3d at 1325 (assessing whether waiver is knowing and voluntary based on "language of the plea agreement" and "adequate Federal Rule of Criminal Procedure 11 colloquy"). And third, none of the circumstances in which enforcing an appeal waiver may cause a miscarriage of justice exist here. *See id.* at 1327 (holding that miscarriage of justice occurs only if "the district court relied on an impermissible factor such as race," "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid," "the sentence exceeds the

statutory maximum,” or “the waiver is otherwise unlawful” (quoting *United States v. Elliott*, 264 F.3d 1171, 1173 (10th Cir. 2001))).

Luna does not dispute this analysis. On the contrary, he recognizes in his reply brief that all three requirements for enforcing the waiver are met and that “there is no viable, non[]frivolous basis for opposing the [government’s] request to dismiss the appeal.” Rep. Br. 3. We therefore dismiss this appeal. *See Hahn*, 359 F.3d at 1328.

Entered for the Court

Nancy L. Moritz
Circuit Judge