

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 16, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

YESENIA FERNANDES DE ESPINOZA,
a/k/a Yesenia Fernandez De Espinosa,

Defendant - Appellant.

No. 23-1010
(D.C. No. 1:20-CR-00160-RM-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **KELLY** and **EID**, Circuit Judges.

This matter is before the court on the government’s motion to enforce the appeal waiver in Yesenia Fernandes De Espinoza’s plea agreement.

Ms. Fernandes De Espinoza pleaded guilty to possession with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine, and aiding and abetting the same, in violation of 21 U.S.C.

§ 841(a)(1), (b)(1)(A)(ii)(II), and 18 U.S.C. § 2. The district court sentenced her to 96 months in prison.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

As part of her plea agreement, Ms. Fernandes De Espinoza agreed to waive her right to appeal her conviction and sentence unless (1) the court imposed a sentence above the statutory maximum; (2) the sentence exceeded the advisory guideline range applicable to a total offense level of 28 or exceeded 120 months if the statutory mandatory minimum under 21 U.S.C. § 841(b)(1)(A) applied; or (3) the government appealed the sentence imposed. Despite this broad appeal waiver, she filed a notice of appeal. Her docketing statement indicates that the issue she intends to raise on appeal is “whether the sentence imposed violates the law.” Aplt. Docketing Statement at 5. The government filed a motion to enforce the appeal waiver under *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam).

In response to the government’s motion, Ms. Fernandes De Espinoza’s counsel cited *Anders v. California*, 386 U.S. 738, 744 (1967), and stated that Ms. Fernandes De Espinoza has no non-frivolous argument against enforcement of her appeal waiver. Counsel also requested permission to withdraw from representing Ms. Fernandes de Espinoza. *See id.* We gave Ms. Fernandes De Espinoza an opportunity to file a pro se response to the motion to enforce, but she has not done so.

In evaluating 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 [her] appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice.” *Hahn*, 359 F.3d at 1325. Having reviewed the proceedings in accordance with our obligation under

Anders, see 386 U.S. at 744, we conclude that the *Hahn* factors have been met and that there is no non-frivolous argument to make against enforcing the appeal waiver.

As to the first *Hahn* factor, none of the exceptions to the appeal waiver apply, so Ms. Fernandes De Espinoza's appeal falls within the scope of the waiver. Specifically, the statutory maximum sentence for her offense is life imprisonment. See 21 U.S.C. § 841(b)(1)(A). The district court determined that Ms. Fernandes De Espinoza was not eligible for a safety-valve reduction, which meant that the statutory mandatory minimum applied and the guideline sentence became the mandatory minimum sentence of 120 months. See *id.*; U.S. Sent'g Guidelines Manual § 5G1.1(b) (U.S. Sent'g Comm'n 2018). The court then determined that a sentence below the mandatory minimum was appropriate and sentenced Ms. Fernandes De Espinoza to 96 months. Her sentence thus does not exceed either the statutory maximum or the applicable guidelines range for the statutory mandatory minimum sentence, and the government did not appeal the sentence. As for the second and third *Hahn* factors, the written plea agreement and the colloquy at the change of plea hearing confirm that Ms. Fernandes De Espinoza knowingly and voluntarily waived her appellate rights, and there is no basis for concluding that enforcing the waiver would result in a miscarriage of justice.

Accordingly, we grant the government's motion to enforce Ms. Fernandes De Espinoza's appeal waiver and dismiss this appeal. We also grant the government's unopposed motion to file the transcript of the sentencing hearing,

which is attached to the motion to enforce, under seal. Finally, we grant defense counsel's motion to withdraw.

Entered for the Court
Per Curiam