FILED
United States Court of Appeals
Tenth Circuit

August 24, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AARON SPELLMAN,

Defendant - Appellant.

No. 23-1157
(D.C. No. 1:22-CR-00081-PAB-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **EID**, **KELLY**, and **CARSON**, Circuit Judges.

This matter is before the court on the government's motion to enforce the appeal waiver in Aaron Spellman'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.

I. Background

Mr. Spellman pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). As part of the plea agreement, Mr. Spellman waived his right to appeal "any matter in connection with his

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

prosecution, conviction or sentence (including the restitution order)," so long as (1) the sentence did not exceed the statutory maximum or the applicable advisory guideline range, or (2) the government did not appeal from the sentence imposed. Mot. to Enforce, Attach. 1 at 2-3.

By signing the plea agreement, Mr. Spellman agreed that he "knowingly and voluntarily" waived his right to appeal. *Id.* at 2. At the change-of-plea hearing, the district court confirmed that he was not under the influence of drugs or alcohol, was competent to understand the proceedings, and was not forced to plead guilty. *See id.*, Attach. 2 at 3-4. On this basis, the district court found that Mr. Spellman's guilty plea was entered "voluntarily, knowingly, and intelligently." *Id.* at 28.

The district court sentenced Mr. Spellman to 40 months in prison, which was below both the statutory maximum and the applicable guideline range. The government did not file an appeal.

Despite his waiver, Mr. Spellman filed this appeal. His docketing statement indicates he seeks to challenge the constitutionality of § 922(g)(1), as well as unspecified aspects of his sentence.

II. 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.

Mr. Spellman argues that all three factors weigh against enforcing the waiver because

he discovered after entering the plea agreement that a defendant in another case intends to challenge the constitutionality of § 922(g)(1)—the statute to which Mr. Spellman pled guilty in light of the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

Mr. Spellman first argues that a constitutional challenge to § 922(g)(1) is outside the scope of his waiver. We disagree. His waiver is broad, barring the right to appeal "*any* matter in connection with his prosecution, conviction or sentence." Mot. to Enforce, Attach. 1 at 2 (emphasis added). Neither the Supreme Court nor this court has declared § 922(g)(1) unconstitutional. Thus Mr. Spellman pleaded guilty to violating a valid statute. His constitutional claim therefore falls squarely within the scope of the waiver.

We also reject Mr. Spellman's argument that his waiver was not knowing and voluntary. We consider two factors in determining whether an appeal waiver is enforceable under this prong of the *Hahn* analysis: (1) whether the plea agreement states it was entered knowingly and voluntarily, and (2) the adequacy of the plea colloquy conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure. *Hahn*, 359 F.3d at 1325. Mr. Spellman does not address either of these factors and he does not contend that he did not understand the appeal waiver or any other aspect of his agreement. Instead, he contends his plea was not knowing and voluntary because he did not learn about the other defendant's challenge to § 922(g)(1) until after he pleaded guilty, so he entered the plea "without understanding that [his statute of conviction] was unconstitutional." Resp. Br. at 3. As we have explained,

however, the statute has not been declared unconstitutional. And *Bruen*, which underpins Mr. Spellman's constitutional challenge, was decided more than six months *before* he entered his plea. In any event, "criminal defendants may waive both rights in existence and those that result from unanticipated later judicial determinations." *United States v. Porter*, 405 F.3d 1136, 1144 (10th Cir. 2005). The fact that Mr. Spellman did not know when he entered his plea what specific claims of error he was foregoing does not render his guilty plea unknowing or involuntary. *Hahn*, 359 F.3d at 1326.

Mr. Spellman's final argument is that enforcing the waiver would be a miscarriage of justice because his appeal involves the constitutionality of the underlying statute. 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). "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). Mr. Spellman appears to argue that his waiver is "otherwise unlawful" in light of *Bruen*.

To show that his appeal waiver is "otherwise unlawful," Mr. Spellman needed to prove that enforcing it would seriously undermine "the fairness, integrity or public reputation of judicial proceedings[.]" *Hahn*, 359 F.3d at 1327 (internal quotation marks omitted). He argues that enforcing the waiver would be a miscarriage of

justice because his appeal involves the constitutionality of the underlying statute. But the proper inquiry is "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). The mere assertion of constitutional error is insufficient to establish that the waiver itself was unlawful. *See United States v. Holzer*, 32 F.4th 875, 887 (10th Cir. 2022). Accordingly, we reject his contention that enforcing the waiver would constitute a miscarriage of justice.

III. Conclusion

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

Entered for the Court
Per Curiam