

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL ANTHONY SMITH,

Defendant - Appellant.

No. 23-8039
(D.C. No. 1:20-CR-00186-ABJ-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **MATHESON, PHILLIPS, and McHUGH**, Circuit Judges.

Following his acceptance of a plea agreement that included a waiver of his right to appeal, Michael Anthony Smith pleaded guilty to one count of possession with intent to distribute methamphetamine under 21 U.S.C. § 841(a)(1) & (b)(1)(B). He was sentenced to 70 months in prison. Despite his waiver, Mr. Smith filed an appeal. The government has moved to enforce the appeal waiver. *See United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam). Mr. Smith's counsel has filed a response conceding the enforceability of the waiver.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Our independent review confirms that Mr. Smith’s appeal waiver is enforceable. In evaluating a motion to enforce an appellate waiver, 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.” *Id.* at 1325.

We find that the record satisfies each of these factors. Mr. Smith’s appeal falls within the scope of the waiver because the plea agreement stated that he waived his right to appeal any aspect of his conviction and sentence unless his sentence exceeded 78 months,¹ and the district court sentenced Mr. Smith to 70 months. The plea agreement also clearly sets forth that the waiver was knowing and voluntary, and the district court confirmed Mr. Smith’s understanding of his appeal waiver during his change of plea hearing.

As for the third factor, a miscarriage of justice occurs only:

[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful.

Id. at 1327 (internal quotation marks omitted). None of these is applicable. First, there is no evidence that Mr. Smith’s race had anything to do with his sentence.

¹ The waiver also contemplated that Mr. Smith could raise claims of ineffective assistance of counsel or prosecutorial misconduct under 28 U.S.C. § 2255, or seek a sentence reduction under 18 U.S.C. § 3582(c). Neither exception applies here.

Second, although Mr. Smith complained about his counsel during the proceedings, nothing at this stage of the proceedings indicates he received ineffective assistance in connection with the negotiation of the waiver. Indeed, under the original charges Mr. Smith faced a possible mandatory minimum sentence of 10 years, but his counsel negotiated a plea deal resulting in a much lower sentence that was even below the range called for by the Sentencing Guidelines. Third, Mr. Smith’s sentence did not exceed the 40-year statutory maximum. *See* 21 U.S.C. § 841(b)(1)(B).

Finally, there is no indication that Mr. Smith’s waiver is “otherwise unlawful.” *Hahn*, 359 F.3d at 1327. While Mr. Smith “made equivocal statements about possibly seeking to withdraw his plea,” Resp. at 9, he never specifically made such a request. Even if he had, the record does not establish a “fair and just reason” for the withdrawal of his plea, *United States v. Dominguez*, 998 F.3d 1094, 1103 (10th Cir. 2021) (internal quotation marks omitted). In short, we find the enforcement of Mr. Smith’s appellate waiver would not result in a miscarriage of justice as defined by *Hahn*, 359 F.3d at 1327.

The motion to enforce is granted and this matter is dismissed.

Entered for the Court
Per Curiam