

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 25, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL SANCHEZ, JR.,

Defendant - Appellant.

No. 21-2049
(D.C. No. 1:18-CR-02667-MV-2)
(D. N.M.)

ORDER AND JUDGMENT*

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

This matter is before the court on the government’s motion to enforce the appeal waiver in Samuel Sanchez, Jr.’s plea agreement. We grant the government’s motion and dismiss the appeal.

Sanchez pled guilty to two counts of distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and two counts of aiding and abetting, in violation of 18 U.S.C. § 2. Sanchez faced a mandatory statutory minimum sentence of ten years’ incarceration for these offenses. *See* 21 U.S.C. § 841(b)(1)(A). But Sanchez argued to the district court it could

* This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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

impose a lesser sentence by applying the so-called “safety valve” codified in 18 U.S.C. § 3553(f). This provision instructs district courts to impose the sentence recommended by the sentencing guidelines without regard for the mandatory statutory minimum sentence contained in 21 U.S.C. § 841(b)(1)(A) if a defendant satisfies certain enumerated conditions. The district court held an evidentiary hearing, found Sanchez did not qualify for safety-valve relief, and sentenced Sanchez to the mandatory statutory minimum of ten years.

In this appeal Sanchez seeks to (1) challenge the district court’s failure to apply the safety valve, and (2) raise a claim for ineffective assistance of counsel during sentencing. But he agreed to a broad waiver of appellate rights in the following portion of his plea agreement:

The Defendant is aware that 28 U.S.C. § 1291 and 18 U.S.C. § 3742 afford a defendant the right to appeal a conviction and the sentence imposed. Acknowledging that, the Defendant knowingly waives the right to appeal the Defendant’s conviction(s) and any sentence, including any fine, at or under the maximum statutory penalty authorized by law, as well as any sentence imposed below or within the Guideline range upon a revocation of supervised release in this cause number. In addition, the Defendant agrees to waive any collateral attack to the Defendant’s conviction(s) and any sentence, including any fine, pursuant to 28 U.S.C. §§ 2241, 2255, or any other extraordinary writ, except on the issue of defense counsel’s ineffective assistance.

Mot., Ex. 1 at 9–10. The government has moved to enforce the appeal waiver in the plea agreement under *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam).

Under *Hahn*, 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. The government asserts that all of the *Hahn* conditions have been satisfied: (1) Sanchez’s appeal is within the scope of the appeal waiver because his sentence did not exceed the statutory maximum sentence of life in prison; (2) he knowingly and voluntarily waived his appellate rights; and (3) enforcing the waiver would not result in a miscarriage of justice.

Sanchez concedes he knowingly and voluntarily waived his appellate rights and that enforcing the waiver would not result in a miscarriage of justice. But he argues his appeal falls outside the scope of the appeal waiver. In making his argument, Sanchez tacitly concedes—as he must—that the plain language of the appeal waiver in his plea agreement bars this appeal. Thus, he argues we should look to statements made by the district court at sentencing encouraging him to appeal its ruling on the safety-valve issue so that we might narrowly construe the waiver and conclude it does not bar this appeal. *See United States v. Chavez-Salais*, 337 F.3d 1170, 1173 (10th Cir. 2003) (“Like most waivers, a defendant’s waiver of his right to appeal . . . is to be construed narrowly.”).

At the sentencing hearing, the district court explained its reasons for denying safety-valve relief, expressed the view that defense counsel’s ineffective assistance may have led to Sanchez’s ineligibility for the safety valve, and then said, “[b]ut here we are, and I do encourage an appeal on this. I do hope I’m wrong.” Mot., Ex. 3 at 7. The prosecutor later presented argument and, referring to the district court’s encouragement of an appeal, pointed out that Sanchez had “waived his appellate

rights with the exception of an appeal based on ineffective assistance of counsel.” *Id.* at 22. Before pronouncing sentence, the court stated it would not repeat its reasons for denying the safety valve, but said, “I do think that they need to be reviewed on appeal because I did the best I could with regard to my decision on the safety valve. I think the only issue may be ineffective assistance” *Id.* at 26. Near the end of the sentencing hearing, the court told Sanchez, “[u]nder the terms of your plea agreement, you have waived your right to appeal the final sentence of the Court.” *Id.* at 70.

“[A]bsent exceptional circumstances, the district court lacks authority to modify a plea agreement at sentencing.” *United States v. Arevalo-Jimenez*, 372 F.3d 1204, 1206 (10th Cir. 2004) (internal quotation marks omitted). Sanchez does not argue “exceptional circumstances” compel us to deviate from our general rule. And we do not find the circumstances of this case exceptional. Instead, they are much like those presented in *Arevalo-Jimenez*, where the district court erroneously stated at sentencing that the defendant could appeal his sentence “pursuant to the plea agreement.” *Id.* (internal quotation marks omitted). We held the district court’s statement did not modify the plea agreement where the magistrate judge confirmed the defendant understood the scope of his appeal waiver during the plea colloquy and the plea agreement stated that it could be modified only by a written document signed by the defendant and the government.

In his plea agreement, Sanchez stated he “knowingly waive[d] the right to appeal [his] conviction(s) and sentence, including any fine, at or under the maximum

statutory penalty authorized by law[.]” Mot., Ex. 1 at 9. The magistrate judge addressed this appeal waiver with Sanchez before accepting his guilty plea and Sanchez indicated he “underst[ood] the appellate rights that [he was] giving up as part of [his] plea agreement.” *Id.*, Ex. 2 at 22. The plea agreement states that “[t]his document and any addenda are a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties.” *Id.*, Ex. 1 at 11. And unlike the prosecutor in *Arevalo-Jimenez* who failed to correct the district court’s erroneous suggestion at sentencing that the defendant could appeal, the prosecutor in this case responded to the district court’s suggestion at sentencing that Sanchez could appeal by reminding the court and Sanchez that he had waived his right to appeal. In these circumstances, the district court’s statements at sentencing did not modify the appeal waiver in Sanchez’s plea agreement and his attempt to appeal the district court’s safety-valve ruling falls within its scope.

Sanchez also wants to raise a claim of ineffective assistance of counsel during sentencing. But he did not preserve a right to pursue a direct appeal based on ineffective assistance of counsel. His plea agreement instead preserved his right to pursue a collateral attack based on ineffective assistance of counsel. This was proper. “Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed.” *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc). To the extent Sanchez

seeks to bring a claim of ineffective assistance of counsel, he should do so in a collateral proceeding.

Based on our independent review of the record, we conclude that the *Hahn* conditions are satisfied in this case. We therefore grant the government's motion and dismiss the appeal. We do so, however, without prejudice to Sanchez's right to pursue post-conviction relief on the grounds permitted in his plea agreement.

Entered for the Court
Per Curiam