NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 16, 2024
Decided February 20, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2016

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DENNIS GERMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 20 CR 330-1

Matthew F. Kennelly,
Judge.

O R D E R

Dennis German pleaded guilty to several drug and firearm offenses. The district court sentenced him to 13 years' imprisonment, below the applicable range under the Sentencing Guidelines. German appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). German responded to counsel's motion and proposed issues that he wishes to raise on appeal. *See* CIR. R. 51(b). Because counsel explains the nature of the case, addresses the

potential issues that the appeal might involve, and appears to analyze the issues thoroughly, we limit our review to the subjects that counsel and German discuss. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

German operated a drug-trafficking business out of his residence, where he sold heroin, cocaine, and fentanyl. German was charged with three co-defendants in a 12-count superseding indictment. Four counts are relevant to this appeal: Count 7, knowingly using a residence for the purpose of manufacturing and distributing a controlled substance, 21 U.S.C. § 856(a)(1); Count 10, possessing a firearm as a felon, 18 U.S.C. § 922(g)(1); Count 11, possessing with intent to distribute heroin and fentanyl, 21 U.S.C. § 841(a)(1); and Count 12, possessing a firearm in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(c)(1)(A).

Through his retained counsel at the time, German filed two motions to suppress evidence. He first argued that federal agents violated the Fourth Amendment by installing and using a surveillance camera outside his house. The agents had provided video of German shooting a gun into the air outside his house to officers from the Midlothian Police Department, who used the evidence to obtain a search warrant for the inside of the house. During their search, the officers recovered drugs and firearms. The district court denied the motion to suppress, concluding that German had no reasonable expectation of privacy in the open area outside his house.

German also sought to suppress evidence from another search of his home by Midlothian police officers; he argued that their search warrant, which they obtained after conducting numerous controlled buys, was invalid. German asserted that the officers acted outside of their geographic jurisdiction under Illinois law while conducting the controlled buys. The court denied the motion, ruling that even if the officers violated state law, they did not violate German's federal constitutional rights, and thus German lacked a legal basis in this federal case to suppress the evidence.

German's retained counsel then moved to withdraw, in part because counsel did not support German's continued interest in filing motions to suppress. The court denied the motion to withdraw but allowed German to file a pro se suppression motion. In that motion, German raised the same arguments about the surveillance camera and the controlled buys, and the court denied the motion for the same reasons as before.

German then filed another pro se motion to suppress, primarily raising the same arguments. In a minute entry, the court noted that it had not given German leave to file another pro se motion, but that it would nevertheless address the motion at a final pretrial conference. At that conference, however, the parties informed the court that they were working on a plea agreement, and so the court did not rule on the motion.

German entered into a written plea agreement with the government under which he would plead guilty to four counts related to drugs and firearms: Counts 7, 10, 11, and 12. Five days before the trial was set to begin, the court held a change of plea hearing. Another district judge substituted for the presiding judge at the hearing. The court asked counsel whether there were any outstanding motions. Counsel mentioned the second pro se motion to suppress but stated that he had discussed with German "that a guilty plea means that he won't get a final conclusion" on the motion. The court then engaged in a colloquy with German, inquiring about his state of mind and reasons for pleading guilty, explaining the charges and penalties, and describing the rights he gave up by pleading guilty. The government described the factual basis for the four counts and the relevant conduct that German was admitting. German affirmed that he was pleading guilty, and the court accepted the plea.

Three weeks later, German filed a motion to withdraw the plea, and German's counsel moved again to withdraw representation. At a hearing, German told the court (the presiding judge) that the plea agreement was "forced upon" him, and that he "didn't really understand it." He also stated that he wanted a ruling on his second pro se motion to suppress, and that he pleaded guilty only because counsel had told him that the court had denied that motion. Finally, he asserted that counsel had misinformed him about the length of the mandatory minimum sentence for defendants convicted of multiple counts of possessing a firearm in furtherance of a drug-trafficking crime. (German initially had been charged with two violations of § 924(c), but he ultimately pleaded guilty to just one such count.)

The court continued counsel's motion to withdraw representation and denied German's motion to withdraw the guilty plea. The court explained that German had

been under oath during the plea colloquy, and he had testified that he was entering the plea knowingly and voluntarily. Further, there was no evidence that counsel had misinformed German about the penalties he faced. Last, the court noted that German had improperly filed the second pro se motion to suppress and that, in any event, the court would have denied the motion if the case had proceeded.

German then moved again to withdraw his guilty plea, reasserting two of the same arguments: Counsel had incorrectly told him that the court had denied his second pro se motion to suppress, and counsel had provided inaccurate information about the possible penalties he faced for the § 924(c) counts. The court held a hearing. It observed that during the change of plea hearing, German's lawyer had told the court that the motion to suppress was still pending. German said that he had not heard this, but the court discredited him. Next, the court heard testimony from German, his counsel, and his counsel's colleague. The court believed counsel's testimony that he had accurately explained the possible penalties associated with the § 924(c) charges. The court thus denied German's motion to withdraw his guilty plea, granted counsel's motion to withdraw representation, and appointed new counsel.

In preparation for sentencing, the probation office submitted a presentence investigation report (PSR) that described relevant conduct warranting upward adjustments to German's offense level under the Sentencing Guidelines. With these adjustments, German had a total offense level of 32 and a criminal history category of III, and thus a guidelines imprisonment range of 151 to 188 months (plus a consecutive 5-year term for the § 924(c) offense). German objected to several of the adjustments, arguing that his offense level was 25 and that his guidelines range was instead 70 to 87 months.

At the sentencing hearing, the court heard argument on German's objections to the adjustments and ultimately adopted the calculations in the PSR. First, regarding a two-level increase for German's leadership role in the drug operation, *see* U.S.S.G. § 3B1.1(c), German argued that he ran his own operation without help. The court disagreed, citing video of German directing others to measure and distribute drugs. Next, based on German's involvement in a high-speed car chase that preceded his arrest, the court considered a two-level increase for recklessly creating a substantial risk of death or serious bodily injury. *See* U.S.S.G. § 3C1.2. German argued that he was not driving and was not responsible for the chase. But an officer involved in the chase testified at the sentencing hearing that he saw German driving the car. The court found

by a preponderance of the evidence—including the officer's testimony and the fact that the car was registered to German—that German was the driver.

The court next considered a two-level increase for obstruction of justice, based on evidence that German had tried to convince a third party to take responsibility for a gun recovered from his house. *See* U.S.S.G. § 3C1.1. German argued that he had been trying to prove that he had not stolen the firearm by establishing that it belonged to his associate. But the court ruled that the context of the entire conversation provided sufficient evidence that German wanted the associate to "take responsibility for the firearm in a way that would not be accurate." Finally, the court considered German's argument that the PSR should have included a three-level reduction for acceptance of responsibility and timely notification. *See* U.S.S.G. § 3E1.1(a), (b). The court ruled that no reduction was warranted because German had consistently demonstrated through his submissions to the court that he was unwilling to admit the offense conduct.

Having resolved German's objections to the guidelines calculations, the court imposed a sentence totaling 13 years' imprisonment. The court weighed the sentencing factors under 18 U.S.C. § 3553(a), observing the seriousness of German's crimes and the harm that he had caused, but noting in mitigation that he had the support of his family and the potential to change. Concluding that the guidelines range (151 to 188 months) was excessive in this case, the court imposed a term of 96 months' imprisonment for Counts 7, 10, and 11. The court then imposed a consecutive sentence of five years' imprisonment for Count 12 (possessing a firearm in furtherance of a drug-trafficking crime). *See* 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D)(ii). Finally, the court granted the government's motion for a preliminary order of forfeiture (covering several guns and around $80,000 in cash), imposed a $400 special assessment, and imposed three years of supervised release to follow the prison term.

On appeal, counsel reports that, although German told her that he does not wish to withdraw his guilty plea, he wants to raise three arguments that affect the validity of his convictions, and counsel therefore discusses whether German could raise a nonfrivolous challenge to the plea. *See United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012). According to counsel, German wants to argue that: (1) trial counsel misadvised him about the potential penalties that he faced; (2) trial counsel erroneously told him that his second pro se motion to suppress had been denied; and (3) he is innocent of the § 924(c) offense.

We agree with counsel that challenging the plea would be pointless. To begin, the transcript of the plea hearing shows that the district court complied with all requirements of Federal Rule of Criminal Procedure 11, including by explaining the charges, the minimum and maximum penalties that he faced, and the rights he would give up by forgoing a trial. *See* FED. R. CRIM. P. 11(b)(1). The court also confirmed that German's guilty plea did not result from threats or promises other than those in the agreement, that there was a factual basis for the plea, and that German pleaded guilty because he committed the alleged acts. *See* FED. R. CRIM. P. 11(b)(2), (3).

Regarding the contentions that German would like to raise about trial-counsel's advice, it would not behoove him to assert an ineffective-assistance claim in a direct appeal. Such a claim is best reserved for collateral review, when a more complete record can be developed. *See Massaro v. United States*, 538 U.S. 500, 504–05 (2003); *United States v. Cates*, 950 F.3d 453, 457 (7th Cir. 2020) ("[W]e have repeatedly warned defendants against bringing ineffective-assistance claims on direct appeal" because the claim may not be presented a second time on collateral attack under 28 U.S.C. § 2255). Even if German confined his arguments on appeal to counsel's assistance with the plea agreement, he could not later assert *any* ineffective-assistance claim. *See Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005) ("[I]neffective assistance of counsel is a single ground for relief" and defendant cannot raise new "failings" of counsel in serial motions). To the extent that German wishes to argue ineffective assistance of counsel, it is not properly raised on direct appeal.

As for German's other argument for withdrawing his plea agreement—that he is innocent of Count 12, possessing a firearm in furtherance of a drug-trafficking crime, *see* 18 U.S.C. § 924(c)(1)(A)—our review would be for plain error because he did not raise this argument in his plea-withdrawal motions. *United States v. Stapleton*, 56 F.4th 532, 539 (7th Cir. 2022). Counsel informs us that German believes that his possessing a gun and trafficking drugs were unrelated conduct. But German admitted in his plea agreement that he stored the gun in his mattress along with several bags of drugs, and that he possessed it to protect himself and his narcotics. *See United States v. Perryman*, 20 F.4th 1127, 1134–35 (7th Cir. 2021) (accessibility of firearm and its proximity to drugs support "in furtherance of" element). And, in response to remarks from German at the change of plea hearing, both the court and counsel clarified that Count 12 charged German with possessing a weapon to protect his drug business. German replied that he understood the charge and wished to plead guilty. That statement, under oath, carries a "presumption of verity." *United States v. Patterson*, 576 F.3d 431, 437 (7th Cir. 2009).

Having concluded that there is no nonfrivolous ground on which to challenge the guilty plea, counsel next considers arguments about the sentence, beginning with potential procedural errors. Counsel first discusses whether German could plausibly argue that it was error to apply upward adjustments to his offense level under the Guidelines. We would review the court's factual findings for clear error and its application of the Guidelines de novo. *United States v. Price*, 28 F.4th 739, 754 (7th Cir. 2022). It would be frivolous to challenge the adjustments. First, a two-level increase for a leadership role is proper if the defendant "tells people what to do and determines whether they've done it." *United States v. Anderson*, 988 F.3d 420, 428 (7th Cir. 2021); *see* U.S.S.G. § 3B1.1(c). We would conclude that the court properly applied this enhancement based on video of German directing others to weigh and package drugs.

Second, a two-level increase is proper if the defendant recklessly created a substantial risk of death or serious bodily injury while fleeing law enforcement. *See* U.S.S.G. § 3C1.2; *United States v. Brown*, 716 F.3d 988, 995–96 (7th Cir. 2013). German admitted that he was in the fleeing car, and we see no clear error in the court's finding, based in part on an officer's testimony, that German was the driver. *See United States v. Ranjel*, 872 F.3d 815, 821 (7th Cir. 2017) (sentencing judge's credibility determination is "entitled to exceptional deference").

Third, a two-level increase for obstruction of justice is proper if a defendant has "attempted to obstruct or impede … the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1. One method of obstructing justice is "attempting to suborn perjury" when the perjury "pertains to conduct that forms the basis of the offense of conviction." U.S.S.G. § 3C1.1 cmt. n.4(B). German was charged with possessing a firearm as a felon, 18 U.S.C. § 922(g)(1), and while he was detained, he asked a co-defendant to take responsibility for the firearm. We would conclude that this enhancement was proper because German's efforts "could [have] affect[ed], to some reasonable probability, the outcome of the judicial process." *See United States v. DeLeon*, 603 F.3d 397, 404 (7th Cir. 2010) (quoting *United States v. Mayberry*, 272 F.3d 945, 949 (7th Cir. 2001)).

Fourth, a two-level reduction of a defendant's offense level is appropriate only "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). German's motions to withdraw his guilty plea were on their own sufficient grounds to withhold this adjustment. *See United States v. Collins*, 796 F.3d 829, 836 (7th Cir. 2015). And because German did not receive an adjustment for acceptance

of responsibility, he could not receive an adjustment for timely notifying authorities of his intention to plead guilty. U.S.S.G. § 3E1.1(b).

Like counsel, we also see no issues to raise about the remaining sentencing calculations. The court correctly determined that German's total offense level of 32 and criminal history category of III yielded a guidelines imprisonment range of 151 to 188 months. U.S.S.G. ch. 5, pt. A. The below-guidelines prison term of 96 months was also below the statutory maximums for Count 7 (21 U.S.C. § 856(b), 20 years), Count 10 (18 U.S.C. § 924(a)(2), 10 years), and Count 11 (21 U.S.C. § 841(b)(1)(C), 20 years). And the court was required to add a five-year consecutive sentence for Count 12. *See* 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D)(ii).

Counsel identifies no other potential procedural errors and further concludes that German cannot make a nonfrivolous argument that his sentence was substantively unreasonable. We agree. The court properly discussed the sentencing factors under 18 U.S.C. § 3553(a), and we would not reweigh those factors. *See United States v. De La Torre*, 940 F.3d 938, 954 (7th Cir. 2019). Moreover, German received a below-guidelines sentence, which will almost never be unreasonably high. *Id.* Nothing suggests that this is an extraordinary case.

Finally, we note that in German's response under Circuit Rule 51(b), he proposes arguments, for the first time, about the scope of the relevant conduct attributed to him for purposes of adjusting his offense level and entering a preliminary order of forfeiture. But the PSR discussed German's relevant conduct, and he never objected—either in his written response or at the sentencing hearing. And when asked at the hearing whether there were objections or corrections to the PSR, counsel replied that German's only objections were in the written submission. Thus, these arguments are waived. *See United States v. Robinson*, 964 F.3d 632, 639–41 (7th Cir. 2020) (applying waiver where defendant knew contents of PSR, knew of his right to object, and affirmatively stated that he did not object).

Accordingly, we GRANT counsel's motion to withdraw and DISMISS the appeal.