NONPRECEDENTIAL DISPOSITION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 July 24, 2023
Decided July 25, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2094

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Eastern District of Wisconsin.
v.	No. 19-CR-120-2-JPS
CALVIN NASH, *Defendant-Appellant*.	J. P. Stadtmueller, *Judge*.

O R D E R

In 2019, Calvin Nash pleaded guilty to conspiring to distribute illegal drugs, *see* 21 U.S.C. § 841(a)(1), (b)(1)(A); 18 U.S.C. § 2, and was sentenced to 144 months' imprisonment and five years' supervised release. He appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). We notified Nash of the motion, *see* CIR. R. 51(b), and he did not respond. Counsel's brief explains the nature of the case and addresses potential issues that an appeal of this kind would involve; because counsel's analysis appears thorough, we limit our review to the issues she discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

In December 2019, Nash pleaded guilty to his role in a Milwaukee-area drug conspiracy, for which he distributed heroin and cocaine, maintained stash houses, and acted as an enforcer. As part of the plea agreement, Nash stipulated that he was responsible for 1 to 3 kilograms of heroin and 5 to 15 kilograms of cocaine, and he acknowledged that he might qualify as a career offender under the Sentencing Guidelines. A magistrate judge conducted a plea colloquy under Rule 11 of the Federal Rules of Criminal Procedure, and the district court accepted the plea.

Although he was represented by counsel, before sentencing Nash submitted two relevant filings pro se. First, he argued to the court that he was not a career offender. *See* U.S.S.G. § 4B1.1(a). He recognized that he had prior drug felony convictions under Wisconsin law for cocaine delivery and a federal drug-trafficking conviction. But he contended that he was not a career offender because, in his view, Wisconsin law defined cocaine more broadly than federal law, and therefore, he concluded, his Wisconsin conviction was not a predicate to the career-offender designation. Second, in August 2020, Nash moved pro se to withdraw his guilty plea, saying that he had felt "rushed" into the plea agreement and wanted a new lawyer to negotiate a better deal. While the motion was pending, the government offered to recommend the mandatory minimum sentence (120 months' imprisonment) if Nash withdrew the motion. Nash neither accepted that offer nor withdrew the motion. The district court later adopted the magistrate judge's recommendation to deny the motion because Nash was represented by counsel, and thus the motion was not properly before the court.

In the presentence investigation report (PSR), a probation officer first determined that Nash qualified as a career offender. U.S.S.G. § 4B1.1(a). Under the career-offender guideline, Nash's base offense level was 37 because he faced a maximum sentence of life in prison for the current offense. *Id.* § 4B1.1(b)(1); 21 U.S.C. 841(b)(1)(A). But the PSR recommended a three-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1, for a final offense level of 34. As a career offender, Nash's criminal history category was VI regardless of his criminal-history points, *id.* § 4B1.1(b), and thus the applicable guidelines range was 262 to 327 months' imprisonment.

The district court adopted the PSR's guidelines calculation and imposed sentence. When the government argued for a 180-month sentence, defense counsel objected, insisting that the government was obligated to recommend the 120-month minimum sentence to which, in counsel's view, it had previously agreed before the court denied Nash's motion to withdraw his plea. The government responded that there was no agreement because Nash never accepted its offer and never withdrew his

motion. The court overruled the objection. Nash then personally objected to his career-offender designation, maintaining his argument that his Wisconsin conviction is not a predicate offense. The court overruled that objection, then imposed a below-guidelines sentence of 144 months in prison and five years of supervised release. In explaining the sentence, the court recognized that Nash had faced significant challenges but emphasized the severity of Nash's offense, his criminal history, and the need to protect the public from his conduct.

After consulting with Nash and confirming that he wishes to challenge his guilty plea, counsel appropriately evaluates the decision to deny Nash's motion to withdraw his plea. *See United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012). We agree with counsel that Nash could not plausibly challenge that ruling. Putting aside the problem that Nash, represented by counsel, did not receive approval to move pro se to withdraw his plea, we would review the court's denial of that motion for plain error because the motion did not identify a defect in his Rule 11 colloquy. *United States v. Dyer*, 892 F.3d 910, 913–14 (7th Cir. 2018). No plain error occurred. First, the district court substantially complied with Rule 11 of the Federal Rules of Criminal Procedure and ensured the plea was knowing and voluntary. *See* FED. R. CRIM. P. 11(b). Further, Nash stated under oath at the plea hearing that he was voluntarily pleading guilty and no one had threatened, forced, or pressured him to plead guilty. Those sworn statements are presumed true, and Nash would need to provide a "compelling explanation" for contradicting them on appeal, but none is evident here. *See Thompson v. United States*, 732 F.3d 826, 829–30 (7th Cir. 2013). Finally, although the court did not tell Nash of potential immigration, forfeiture, or restitution consequences, these omissions are harmless. Nash is a citizen of the United States, and the government did not seek forfeiture or restitution; thus, these omissions did not affect Nash's substantial rights and cannot undermine his plea. *United States v. Coleman*, 806 F.3d 941, 944 (7th Cir. 2015).

Turning to sentencing, counsel rightly concludes that Nash cannot mount nonfrivolous procedural challenges to his sentence. As counsel notes, the district court correctly computed a guidelines range of 262 to 327 months' imprisonment based on a total offense level of 34 and a criminal history category of VI. Counsel next considers challenging Nash's career-offender designation based on his argument that Wisconsin defines cocaine more broadly than federal law, so his cocaine-delivery conviction under Wisconsin law is not a predicate offense. Counsel correctly rejects that argument: We have interpreted "controlled substance offense" under the career-offender Guideline to include state-law offenses, like Nash's, that relate to illegal drugs and are punishable by more than one year in prison. *See United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020).

Counsel cannot identify any other potential procedural errors in the sentence, and we see none. To begin, as counsel rightly observes, the district court adequately addressed Nash's arguments in mitigation, applied the sentencing factors under 18 U.S.C. § 3553(a), and explained the sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007). In addition, counsel considers but correctly rejects challenging the court's refusal to require the government to recommend the mandatory minimum sentence. As counsel notes, resentencing may be proper when the government breaches an agreement to recommend a certain sentence. *See United States v. Wyatt*, 982 F.3d 1028, 1030 (7th Cir. 2020) (citing *Santobello v. New York*, 404 U.S. 257, 263 (1971)). But here the government merely *offered* to recommend a 120-month sentence *if* Nash withdrew his motion to withdraw his plea. Nash never did so, thus no agreement occurred.

Next, counsel correctly concludes that it would be pointless to challenge the substantive reasonableness of the sentence. We would presume that Nash's below-guidelines sentence is reasonable. *See United States v. Wehrle*, 985 F.3d 549, 557 (7th Cir. 2021), and nothing in the record could rebut that presumption. In considering the sentencing factors under 18 U.S.C. § 3553(a), the court reasonably balanced Nash's mitigating arguments against the seriousness of his sale of kilograms of heroin and cocaine and the danger that such high-volume drug trafficking poses to the community. Thus, we agree with counsel that it would be frivolous to argue that the sentence is unreasonably high.

Finally, counsel considers raising the issue of ineffective assistance of counsel. But, as counsel notes, Nash is better off advancing an ineffective-assistance claim on collateral attack, where he can develop a record to support the claim. *See United States v. Cates*, 950 F.3d 453, 456–57 (7th Cir. 2020).

We therefore GRANT counsel's motion to withdraw and DISMISS the appeal.