NONPRECEDENTIAL DISPOSITION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 8, 2024
Decided February 9, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-2551

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN D. McBRIDE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 4:19-CR-40081-JPG-2

J. Phil Gilbert,
Judge.

O R D E R

Kevin McBride pleaded guilty to two drug-trafficking offenses. The district court sentenced him to 168 months in prison and 5 years of supervised release. McBride appeals, but his appointed lawyer asserts that the appeal is frivolous and moves to withdraw. *Anders v. California*, 386 U.S. 738, 744 (1967). Counsel's brief explains the nature of the case and addresses the issues that a case of this kind might be expected to involve. We notified McBride of counsel's motion, and he did not respond. *See* CIR.

R. 51(b). Because counsel's brief appears thorough, we limit our review to the subjects that counsel discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

From 2018 to 2019, McBride and his co-conspirator sold drugs in Jackson County, Illinois. The co-conspirator also gave McBride methamphetamine for personal use in exchange for selling methamphetamine on his behalf and acting as a lookout during drug deals. McBride was arrested after he and his co-conspirator sold methamphetamine to a confidential source working with the federal Drug Enforcement Administration. At the time of his arrest, McBride had methamphetamine in his possession. When agents searched the co-conspirator's home, they found a firearm in the bedroom McBride used. After his co-conspirator was indicted, McBride was charged in a second superseding indictment with distributing and conspiring to distribute 50 grams or more of methamphetamine. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846; 18 U.S.C. § 2.

During pretrial proceedings, McBride filed two pro se motions—the first accusing his attorney of ineffective assistance and the government of vindictive prosecution, and the second asserting prosecutorial misconduct. McBride voluntarily withdrew the first motion, and the district court struck the second motion because McBride was represented by counsel.

McBride later pleaded guilty, without a plea agreement, to both counts of the second superseding indictment. At the change of plea hearing, the district court placed McBride under oath and began the colloquy under Rule 11 of the Federal Rules of Criminal Procedure. McBride interjected and expressed confusion about the overlap between the conspiracy counts and the distribution count. After the court responded to his question, McBride stated that he wished to go forward, and the court proceeded with the remainder of the colloquy. The government provided a factual basis, which included the statement that the controlled buy involved 55 grams of methamphetamine of 100 percent purity, and McBride then entered his pleas. The court found that a sufficient factual basis existed, and that McBride was knowingly and voluntarily pleading guilty. The court accepted the pleas and ordered the probation office to prepare a presentence investigation report (PSR).

The government objected to the PSR's calculation of McBride's offense level under the Sentencing Guidelines because it did not add two offense levels under § 2D1.1(b)(1) for McBride's possession of a firearm in furtherance of drug trafficking, which McBride denied, attributing the gun solely to his co-conspirator. The PSR listed

McBride's base offense level at 30 because his drug conviction involved at least 1,000 kg of converted drug weight. *See* U.S.S.G § 2D1.1(c)(5). (This included an additional 21 grams of a methamphetamine mixture distributed during the conspiracy.) The PSR then subtracted three levels for acceptance of responsibility, *see id.* at § 3E1.1(a)–(b), resulting in an offense level of 27.

At the sentencing hearing, the district court overruled the government's objection and adopted the PSR in its entirety. With McBride's undisputed criminal-history category of VI, the Guidelines imprisonment range was 130 to 162 months, with a statutory range of 10 years to life, 21 U.S.C. § 841(a)(1), (b)(1)(A). The supervised-release period was a mandatory minimum of five years by statute and five years under the Guidelines. 21 U.S.C. § 841(b)(1)(A); U.S.S.G. § 5D1.2(c).

The court heard arguments from both parties. McBride argued for a below-Guidelines sentence because he played a minimal role in the conspiracy and had no knowledge of the amount and purity of the methamphetamine he distributed. Further, McBride recounted a difficult childhood where he was exposed to alcohol and drugs at a young age. The government requested an upward variance, to 188 months, based on McBride's extensive criminal history and the need to provide specific deterrence for McBride and promote respect for the law. After considering the arguments and weighing the mitigating and aggravating factors under 18 U.S.C. § 3553(a), the court sentenced McBride to two concurrent sentences of 168 months in prison—six months above the top of the Guidelines range—and two concurrent terms of five years of supervised release. To justify the above-Guidelines prison sentence, the court explained that McBride knew that his co-conspirator often possessed a firearm during their drug activity. Even if McBride did not qualify for the increase under U.S.S.G. § 2D1.1(b)(1), an upward adjustment was warranted to reflect the dangerousness of his conduct.

Counsel first informs us that McBride wishes to argue that the government prosecuted him vindictively, that he was forced to plead guilty (by whom is unclear), and that he received ineffective assistance of counsel. Because these issues affect the validity of his plea, counsel properly considers whether any challenge to the plea would be frivolous. *See United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012). McBride did not move in the district court to withdraw his plea, so our review would be for plain error. *See United States v. Schaul*, 962 F.3d 917, 921 (7th Cir. 2020).

Counsel correctly concludes that challenging the guilty plea would be frivolous. At the change-of-plea hearing, the district court substantially complied with the requirements of Federal Rule of Criminal Procedure 11(b). Although it omitted mention of McBride's right to cross-examine witnesses at trial, *see* FED. R. CRIM. P. 11(b)(1)(E), we agree with counsel that this was harmless. The court advised McBride of his right to confront witnesses, which includes the right to cross-examine. *See United States v. Perryman*, 20 F.4th 1127, 1136 (7th Cir. 2021). Moreover, after detecting confusion from McBride, the court took painstaking care to ensure that McBride's pleas were knowing and voluntary. Multiple times, the court stopped and gave McBride the chance to confer with his lawyer; the court allowed and answered McBride's questions, and it repeatedly inquired whether McBride wished to proceed. Therefore, McBride could not plausibly argue that the court plainly erred in accepting the plea.

As counsel further notes, the valid guilty plea waived all non-jurisdictional challenges to the indictment, including any based on vindictive or selective prosecution. *United States v. Turner*, 55 F.4th 1135, 1139 (7th Cir. 2022). And although pleading guilty does not preclude McBride from arguing that he received ineffective assistance of counsel, we agree with McBride's lawyer that McBride could not mount a nonfrivolous claim of ineffective assistance on direct appeal. "Unless the issue was raised and a full record developed in the trial court, an appellate court cannot determine on direct appeal whether counsel's assistance was ineffective." *United States v. Cates*, 950 F.3d 453, 457 (7th Cir. 2020); *see Massaro v. United States*, 538 U.S. 500, 504–05 (2003).

Counsel next considers potential sentencing arguments, beginning with possible procedural errors. Counsel considers whether the district court correctly calculated McBride's offense level and criminal history category under the Guidelines. Because McBride did not object to these calculations, we would review them for plain error, *United States v. Thomas*, 897 F.3d 807, 816 (2018), and counsel correctly explains why it would be frivolous to argue that plain error occurred.

First, McBride's base offense level was 30 based on two drug amounts: 55 grams of pure methamphetamine distributed to the confidential source, and another 21 grams of a mixture containing methamphetamine distributed during and in furtherance of the conspiracy. (Though McBride's co-conspirator distributed the majority of the 21 grams, a defendant is liable for any foreseeable crimes committed by his co-conspirator in furtherance of the conspiracy, *see United States v. Conley*, 875 F.3d 391, 401 (7th Cir. 2017) (citing *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946)). And here, McBride attended the sales and knew what was occurring.) Even if the calculation were based

only on the 55 grams exchanged during the controlled sale, the resulting base offense level would have been the same. *See* U.S.S.G. § 2D1.1(c)(5).

Second, McBride incurred three criminal history points for three prior sentences of imprisonment exceeding one year and one month, two points for six prior sentences of imprisonment exceeding sixty days, and one point for each of four prior convictions that were not otherwise counted. *See* U.S.S.G. § 4A1.1(a)–(c). The sum of 25 points establishes a criminal history category of VI. *See id.* § 5A. We agree with counsel that there is no nonfrivolous argument to the contrary.

Counsel does not identify any other potential procedural errors in McBride's sentence and next observes that McBride could not plausibly argue that the above-Guidelines sentence of 168 months is substantively unreasonable. We agree with counsel that challenging the reasonableness of McBride's sentence would be frivolous. *See United States v. Moultrie*, 975 F.3d 655, 661 (7th Cir. 2020). The court recognized McBride's difficult childhood and struggles with mental health and addiction but emphasized aggravating factors: his persistent criminal history, the need for deterrence, and his gun possession. The court explained its decision to impose an above-Guidelines sentence, stating that even though McBride did not receive the enhancement for possession of a firearm, *see* U.S.S.G. § 2D1.1(b)(1), the record showed that his co-conspirator often possessed a firearm during drug activity, and McBride knew that he did. The court considered what range would have applied with the enhancement and, in its discretion, concluded that the lowest end of that range, 168 months, better reflected the aggravating circumstances. In light of the court's discussion, McBride cannot make a nonfrivolous argument suggesting that the above-Guidelines sentence is inconsistent with the § 3553(a) factors. *Moultrie*, 975 F.3d at 661–62.

We also agree with counsel that there are no nonfrivolous challenges to the terms or the conditions of McBride's supervised release. Imposing supervised release was mandatory, and he received the statutory minimum term of five years under 21 U.S.C. § 841(b)(1)(A). And regardless, because the term is within the Guidelines range, it would be presumed reasonable. *See United States v. Lickers*, 928 F.3d 609, 621 (7th Cir. 2019). Further, as counsel explains, McBride confirmed at the sentencing hearing that he had read the proposed conditions of supervised release, and he raised no objections. *See United States v. Flores*, 929 F.3d 443, 449–50 (7th Cir. 2019).

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