NONPRECEDENTIAL DISPOSITION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 January 31, 2024
Decided January 31, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 22-3071

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRIAN McGEE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21CR00193-012

James Patrick Hanlon,
Judge.

O R D E R

Brian McGee pleaded guilty to conspiring to distribute 400 grams or more of fentanyl and a substance containing methamphetamine, and the district court sentenced him to 10 years' imprisonment and 5 years of supervised release. Despite a broad appeal waiver in his plea agreement, McGee now appeals his sentence. His appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). In her brief, counsel explains the nature of the case and addresses issues that an appeal of this kind would typically involve. Because counsel's

analysis appears thorough, and McGee did not respond to the motion, *see* CIR. R. 51(b), we limit our review to the subjects that counsel discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014). We grant the motion and dismiss the appeal.

As part of a drug trafficking organization in Indiana, McGee distributed fentanyl and methamphetamine. Months of surveillance captured McGee receiving these drugs for redistribution, and federal agents found guns, drugs, and drug paraphernalia in McGee's home. In an indictment against several defendants, McGee was charged with conspiracy to distribute substances containing fentanyl and methamphetamine. 21 U.S.C. §§ 841(a)(1), 846. A grand jury later issued a superseding indictment, adding a charge of possession of methamphetamine with intent to distribute against McGee. 21 U.S.C. § 841(a)(1).

McGee pleaded guilty to the conspiracy charge in Count One of the original indictment. In his plea agreement, McGee expressly waived the right to challenge his conviction and sentence "on any ground" except ineffective assistance of counsel, retroactive changes to his range under the Sentencing Guidelines, or compassionate release. The waiver otherwise extends to "all provisions of the guilty plea and sentence imposed." In exchange, the government agreed to recommend a sentence at the low end of the Guidelines range and, in what appears to be a clerical error, to dismiss "Count Three of the Indictment." (McGee was not charged in Count Three.) After McGee entered his plea, the government dismissed the superseding indictment, which contained the remaining methamphetamine-possession charge. The district court accepted the plea. Four months later, the court—citing McGee's history of addiction, his remorse, and his lack of criminal history—sentenced him to the statutory minimum of 10 years' imprisonment and 5 years' supervised release. *See* 21 U.S.C. § 841(b)(1)(A).

In her brief, counsel first tells us that she advised McGee about the risks and benefits of challenging his guilty plea, and she reports that McGee wishes to challenge only his sentence. Counsel therefore properly forgoes discussing whether the plea was valid. *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002).

Counsel next considers whether McGee could raise a nonfrivolous challenge to his sentence but rightly concludes that the appeal waiver would foreclose any such challenge. An appeal waiver "stands or falls" with the underlying plea, *United States v. Nulf*, 978 F.3d 504, 506 (7th Cir. 2020), and because McGee did not move to withdraw his plea in the district court, our review would be for plain error, *United States v.*

Davenport, 719 F.3d 616, 618 (7th Cir. 2013). The record shows no such error: The district court substantially complied with Rule 11(b) of the Federal Rules of Criminal Procedure to ensure that McGee's plea was knowing and voluntary.

And counsel rightly rejects arguing that any exception to the appeal waiver could apply. McGee's sentence did not exceed the statutory maximum, *see* 21 U.S.C. § 841(b)(1)(A), and the district court did not consider any constitutionally impermissible factors at sentencing. *See Nulf*, 978 F.3d at 506. Counsel also rightly acknowledges that the clerical error in the appeal waiver (mistakenly referring to the dismissal of "Count Three") does not render the plea invalid. Even though the agreement mislabeled the charge the government agreed to dismiss, McGee obtained dismissal of the only other charge he faced when the government dismissed the superseding indictment.

We GRANT counsel's motion and DISMISS the appeal.