NONPRECEDENTIAL DISPOSITION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

Argued November 15, 2023
Decided January 5, 2024

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-1009

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Central District of Illinois.
v.	No. 18-CR-10014-001
JOSHUA M. DuPAGE, *Defendant-Appellant*.	James E. Shadid, *Judge*.

O R D E R

Joshua DuPage pleaded guilty to possessing methamphetamine with intent to distribute and possessing a firearm in furtherance of drug trafficking. The parties agreed to a 156-month aggregate sentence. DuPage also agreed to waive his rights to appeal his conviction and any resulting sentence. In exchange, the government dismissed another firearm count, recommended that the sentence be concurrent with DuPage's state sentences, and withdrew a proposed enhancement linked to a prior state methamphetamine conviction. The enhancement, if valid, would have led to a combined 180-month mandatory minimum.

On appeal, DuPage argues for the first time that his plea agreement, including his appeal waiver, was invalid because he received no consideration for it. In his view, the enhancement on which the government relied was legally unsupportable and, thus, the government's withdrawal of it had no value. For this and other reasons, he asks that we undo his plea under the plain-error standard. Based on this record, however, we conclude that the district court did not plainly err by accepting DuPage's guilty plea. And, with the plea intact, DuPage's agreement to waive his appeal rights requires the dismissal of this appeal.

In 2018, DuPage was charged in a three-count indictment with distributing methamphetamine, 21 U.S.C. §§ 841(a)(1), (b)(1)(B); possessing a firearm in furtherance of drug trafficking, 18 U.S.C. § 924(c); and unlawfully possessing a gun as a felon, *id.* § 922(g). The government filed a notice of enhancement under 21 U.S.C. § 851 because, it said, DuPage had a prior conviction for a "serious drug felony" as defined in 21 U.S.C. § 802(57): a 2009 Illinois conviction for aggravated participation in methamphetamine manufacturing, 720 ILCS 646/15 (2009). With the enhancement, DuPage faced a mandatory minimum 15 years in prison: 10 for the § 841 offense plus 5 for the § 924(c) offense. 21 U.S.C. § 841(b)(1)(B). Without it, the minimum was 10 years: 5 for the § 841 offense plus 5 for the § 924(c) offense. *Id.* Either way, due to the 924(c) offense, the maximum term of imprisonment was life. In addition, he faced up to 10 years' imprisonment for the § 922(g) offense, which could run concurrent with or consecutive to the drug count.

Against this backdrop, the parties entered a plea agreement for a binding sentence under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. If accepted by the district court, the plea required a 13-year prison term (156 months). In exchange for DuPage's willingness to plead guilty, the government agreed to withdraw the enhancement notice, dismiss the § 922(g) charge, and recommend that the sentence run concurrently with any uncharged state sentence. As part of this deal, DuPage also agreed to waive his rights to appeal the conviction and sentence.

After a magistrate judge conducted a colloquy and the district judge accepted the plea, DuPage moved to withdraw it—but not on the grounds raised today. Rather, he argued that counsel had not timely let him see some discovery materials. The district court denied the motion, ruling that DuPage had entered the plea knowingly and voluntarily. Along the way, DuPage's counsel mentioned that he and DuPage had discussed a potential challenge to the enhancement if the case proceeded to trial, and that counsel was uncertain about the odds of success. Again, however, DuPage did not

press this as a ground for invalidating the plea. The court adopted the plea agreement and sentenced DuPage to 13 years in prison.

DuPage now asks us to set aside his plea, claiming that he entered the plea agreement unknowingly and involuntarily. And if his plea is void, he contends, so too is his appeal waiver. *See United States v. Nulf*, 978 F.3d 504, 506 (7th Cir. 2020) (holding an appeal waiver "stands or falls with the underlying agreement and plea").

In support, DuPage offers two theories for invalidating his plea: one based on Rule 11, and the other based on contract principles. But because DuPage did not raise these arguments in the district court, we review for plain error. *See United States v. Williams*, 946 F.3d 968, 971 (7th Cir. 2020). Under this standard, DuPage must show (1) that the district court committed an error, (2) that is clear or obvious, (3) that affects his substantial rights, (4) and that seriously diminishes the fairness, integrity, or reputation of judicial proceedings. *Id.*

DuPage begins by asserting that his plea colloquy violated Rule 11(b)(1)(I) because, he says, the judge did not correctly inform him of the mandatory minimum sentence that could be imposed. But this contention fails for two reasons. First, in the colloquy, the magistrate judge *did* tell DuPage of the correct 5-year minimum for the federal methamphetamine offense. The judge then added the conditional statement that DuPage objects to now: *If* DuPage had a prior serious drug conviction as defined by federal law, *then* the mandatory minimum sentence of imprisonment would increase to 10 years. This was correct. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(B). We have not found any case holding that a conditional statement like this violates the judge's duty to recite the correct potential penalties. Thus, it is not obvious that any Rule 11 error occurred, even if we credited DuPage's argument that the enhancement would have been invalid.

Second, to demonstrate that a putative Rule 11 error affected his substantial rights, DuPage must show a reasonable probability that, but for the judge's incorrect statement of the applicable mandatory minimum, he would not have pleaded guilty. *See United States v. Goliday*, 41 F.4th 778, 786 (7th Cir. 2022). On this record we see no real probability that DuPage would have backed out of the agreement if the judge had not informed him of the potential impact of the sentencing enhancement. DuPage may have dreaded the potential applicability of the enhancement, but any such fear did not stem from the magistrate judge's recitation of penalties.

Next, relying on contract principles, DuPage invokes *United States v. De La Torre*, 940 F.3d 938 (7th Cir. 2019), and argues that he may undo his plea because the parties mistakenly assumed his prior drug conviction could be used to enhance his sentence. Given that kind of mistake, he says, the government's agreement to withdraw the enhancement was "no concession at all" and was inadequate consideration for the plea agreement.

But, in general, defendants cannot invalidate plea agreements based on unanticipated legal developments. *See, e.g.*, *United States v. McGraw*, 571 F.3d 624, 631 (7th Cir. 2009). And nowhere have we held that a defendant's prior conviction of an Illinois methamphetamine offense does not qualify as a "serious drug felony" under § 841(b)(1)(B). Still, DuPage argues that the district court should have plainly known that this was the case. Yet his argument regarding this purported misfit depends on nuanced textual differences between the state and federal methamphetamine statutes, discussions in Illinois appellate decisions, and out-of-circuit appellate decisions. The conclusion he urges now hardly seems plain.

In any event, we need not and do not resolve this open question. For even if DuPage were right about the validity of the dropped enhancement, there was ample other consideration for his plea.

To start, the government agreed to dismiss a § 922(g) charge that would have added a felony to his record. And if DuPage had timely pleaded guilty without this agreement and without the enhancement, then the § 922(g) charge also would have increased his guidelines range from 130–147 months (70–87 for the un-enhanced § 841 count plus 60 consecutive months for the § 924(c) count) to 144–165 months (84–105 for the § 841 and § 922(g) counts plus 60 consecutive months for the § 924(c) count). And even those figures may be too generous: Had DuPage gone to trial, he would not have received a three-level reduction for acceptance of responsibility, so he would have faced 170–197 months (110–137 for the § 841 and § 922(g) counts plus 60 consecutive months for the § 924(c) count). Measured by those standards, agreeing to a fixed term of 156 months made sense. Plus, the government agreed to recommend that the federal sentence be served concurrently to any state sentence.

DuPage's reliance on *De La Torre* is misplaced. In *De La Torre*, defendants Chapman and Rush showed it was reasonably probable they would not have entered their plea agreements but for the mandatory life sentences they each believed they faced because of (invalid) enhancements. 940 F.3d at 950, 53. For Chapman, the record was

"abundantly clear" that he agreed to a 25-year sentence only because he believed mandatory life in prison was the alternative. *Id.* at 949–50. And for both defendants, the sentencing judge voiced concern at the length of the binding sentences, labeling them "greater than necessary." *Id.* at 950, 53. Here, by contrast, the record is not at all clear that DuPage would not have entered the plea but for the enhancement. Indeed, the guidelines calculations without the enhancement make his decision look reasonable. And nothing here suggests the sentencing judge thought the binding term of imprisonment too high. In sum, valuable consideration apart from the withdrawn enhancement supported this plea deal—a prospect that our opinion in *De La Torre* did not examine.

Finally, for what it is worth, DuPage's plea agreement, colloquy, and discussions at sentencing all reflect that he and counsel were aware that the enhancement might not apply and intentionally bargained around the legal uncertainty. Indeed, DuPage's plea agreement provided that "[i]f the defendant has a prior serious drug conviction" and the § 851 notice were not withdrawn, then he would receive an enhanced sentence. Likewise, at the colloquy, the magistrate judge said the enhancement would apply only "if you have a prior serious drug conviction." The same goes for counsel's on-the-record statements of uncertainty about the enhancement. Such language cuts against DuPage's assertion that all parties were sure he would receive an enhancement without the deal. *See United States v. Chapa*, 602 F.3d 865, 868–69 (7th Cir. 2010) (no mutual mistake where conditional language in agreement left "no doubt" that defendant considered potential that provision would not apply).

We have repeatedly stressed that a major purpose of plea agreements is to allocate risks about legal and factual uncertainty; when the parties have made those allocations, we are loathe to interfere. *See, e.g.*, *Oliver v. United States*, 951 F.3d 841, 845 (7th Cir. 2020); *United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005). To be sure, DuPage contends that the record does not make clear *why* counsel was uncertain the enhancement would apply; counsel may have had different reasons than the ones pressed today, and thus may not have appreciated the true risks and benefits of the deal. But if the record is unclear on this point, that does not mean DuPage wins; it means only that DuPage cannot carry his burden to show the plainness of any error.

In sum, DuPage provides no valid grounds to nullify his plea or his plea agreement. And, because we uphold the plea, his agreement to waive his rights to appeal also stands. This appeal is DISMISSED.