IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v. Nos. 2:13-CR-03696-RB
1:16-CV-00831-RB-LF

JENNIFER SANDERS,

Defendant/Movant.

MEMORANDUM OPINION AND ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on Magistrate Judge Laura Fashing's Proposed Findings of Fact and Recommended Disposition (Doc. 270[1]) (PF&RD) and movant Jennifer Sanders' Objections and Response to Magistrate Judge Report (Doc. 274). Having reviewed the record in this case, the Court overrules Sanders' objections and adopts the magistrate judge's recommendation to deny Sanders' motion.

I. Standard of Review

When a party files timely written objections to the magistrate judge's recommendation, the district court generally will conduct a de novo review and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(C); *see also* FED. R. CIV. P. 72(b)(3). To preserve an issue for de novo review, "a party's objections to the magistrate judge's report and recommendation must be both timely and specific." *United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents, Known as: 2121 E. 30th St., Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

[1] Citations to "Doc." are to the document number in the criminal case, case number 13-CR-03696-RB, unless otherwise noted.

II. Discussion

The magistrate judge recommended that the Court deny Sanders' motion because Sanders knowingly and voluntarily waived her right to collaterally attack her sentence in her plea agreement. (*See* Doc. 270 at 10–11.) Applying the factors set forth in *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (per curiam), the magistrate judge found that Sanders' motion fell within the scope of the waiver, that Sanders knowingly and voluntarily waived her right to collaterally attack her sentence, and that enforcing the waiver would not result in a miscarriage of justice. (*See* Doc. 270 at 4–11.)

Sanders objects to the magistrate judge's PF&RD on three grounds. (*See* Doc. 274.) First, she argues that the magistrate judge erred in finding that she knowingly and voluntarily waived her right to collaterally attack her sentence because she entered into the agreement with the understanding that the government would file a 5K1 motion, which, she says, the government failed to do. (*Id.* at 1.) Second, she asserts that because her attorney failed to file a notice of appeal as instructed, she is entitled to an evidentiary hearing on this issue. (*See id.* at 1–2.) Third, she argues that the Court improperly relied on prior drug possession convictions and a counterfeit drug conviction to find that she qualified as a career offender, and that she is entitled to an evidentiary hearing on this basis as well. (*See id.* at 2–3.) None of Sanders' arguments have merit.

Sanders' first claim is factually inaccurate. She says she was coerced into signing the plea agreement because the government promised that if she testified, it would file a motion for downward departure. (*Id.* at 1.) Although Sanders oversimplifies the government's obligations, (*see* Doc. 256 at 11), she wrongly states that the government did not file a motion for downward departure after she testified. In fact, the government filed a motion for downward departure based on her substantial assistance. (*See* Doc. 257 at 4 ("the government has asked for a five-

level departure down to 151 months"), 18 ("The government, having moved the court for downward departure for substantial assistance to authorities, pursuant to 5K1.1 of the Guidelines and 18 U.S.C. § 3553(e), and the court, having considered all relevant information in the matter, now finds that, in the interest of justice, the government's motion will be granted.").) Sanders' claim that the government failed to file a 5K1.1 motion is simply wrong. The government did not coerce Sanders into pleading guilty by making false promises.

Sanders' second argument is that the magistrate judge ignored her claim that her attorney failed to file a direct appeal despite her instruction to do so. (Doc. 274 at 1.) She argues that the magistrate judge incorrectly focused only on the waiver provision in her plea agreement. (*Id.*) In addition, she claims that she is entitled to an evidentiary hearing on this claim. (*See id.* at 2.) However, the Tenth Circuit has specifically held that the failure to file an appeal as instructed falls within the scope of a collateral attack waiver similar to the one at issue here. *United States v. Viera*, 674 F.3d 1214, 1217–20 (10th Cir. 2012). In her plea agreement, Sanders specifically waived her right to collaterally attack her conviction and sentence "pursuant to 28 U.S.C. §§ 2241, 2255, or any other extraordinary writ, except on the issue of counsel's ineffective assistance in negotiating or entering this plea or this waiver." (Doc. 100 at 8.) Her current claim is that her counsel was ineffective for failing to file a notice of appeal, which has nothing to do with "negotiating or entering this plea or this waiver." She provides no basis for the Court to conclude that her failure-to-file-an-appeal-as-instructed claim does not fall within the scope of her waiver. Sanders has waived her right to collaterally attack her sentence and conviction based on her counsel's ineffective assistance in failing to file an appeal as instructed.

Sanders' third argument is a reassertion of arguments she submitted to the magistrate judge—that her counsel was ineffective because he failed to argue that she did not qualify as a career offender based on her prior convictions. (*Compare* Doc. 274 at 2–3 *with* Doc. 250 at 7,

25–26.) Sanders seems to be arguing that because her sentence may have been based on an incorrect application of the Guidelines, she is entitled to a hearing. (*See* Doc. 274 at 2–3.) This is a misapprehension of her waiver of the right to collaterally attack her conviction and sentence. As the Tenth Circuit has explained,

> The essence of plea agreements . . . is that they represent a bargained-for understanding between the government and criminal defendants in which each side foregoes certain rights and assumes certain risks in exchange for a degree of certainty as to the outcome of criminal matters. One such risk is a favorable change in the law. To allow defendants or the government to routinely invalidate plea agreements based on subsequent changes in the law would decrease the prospects of reaching an agreement in the first place, an undesirable outcome given the importance of plea bargaining to the criminal justice system.

United States v. Porter, 405 F.3d 1136, 1145 (10th Cir. 2005) (citation omitted) (enforcing an appellate waiver even though defendant's 110-month sentence was based on a mandatory application of the Guidelines that subsequently was held unconstitutional in *United States v. Booker*, 543 U.S. 220 (2005)). The Court must look to whether the waiver itself is unlawful—not whether the sentence imposed was unlawful—to determine whether a collateral attack waiver is enforceable. *United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007) (citing *Porter*, 405 F.3d at 1144). Thus, that the Court may have misapplied the career offender provision is irrelevant to the magistrate judge's conclusion that Sanders knowingly and voluntarily waived her right to collaterally attack her conviction and sentence.

Finally, because the files and records of this case conclusively show that Sanders is not entitled to relief, she is not entitled to an evidentiary hearing on her motion. *See United States v. Gallegos*, 459 F. App'x 714, 716 (10th Cir. 2012).

III. Conclusion

For the forgoing reasons, the Court overrules Sanders' objections (Doc. 274) (Doc. 15/16cv0831).

IT IS THEREFORE ORDERED that the Proposed Findings of Fact and Recommended Disposition (Doc. 270) (Doc. 14/16cv0831) is **ADOPTED** by the Court.

IT IS FURTHER ORDERED that this case is **DISMISSED**, and that a final judgment be entered concurrently with this order.

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE