

FILED
United States Court of Appeals
Tenth Circuit

January 19, 2011

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

v.

MARIO ALDO SAUCEDA,

Defendant- Appellant.

No. 10-2229

(D.C. No. 2:10-CR-00606-JEC-2)

(D. N.M.)

ORDER AND JUDGMENT*

Before **TACHA, MURPHY, and O'BRIEN**, Circuit Judges.

Mario Aldo Saucedo pleaded guilty to conspiracy to possess with the intent to distribute less than five grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 846. The district court sentenced him to 188 months in prison. In his plea agreement he waived his right to appeal his conviction or

* This panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

sentence, if the sentence was within the statutory maximum of thirty years, which it was. Despite the appeal waiver, Mr. Saucedo filed a notice of appeal.

Relying on *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam), the government has moved to enforce the appeal waiver.

Mr. Saucedo's counsel has moved to withdraw and has filed an *Anders* response.

See Anders v. California, 386 U.S. 738, 744 (1967) (authorizing counsel to request permission to withdraw where counsel conscientiously examines case and determines that appeal would be wholly frivolous). Counsel states that there are no nonfrivolous grounds for a direct appeal. Counsel recognizes that Mr. Saucedo may want to raise an ineffective assistance of counsel claim, but that he must do so in a collateral proceeding under 28 U.S.C. § 2255. *See, e.g., United States v. Ibarra-Coronel*, 517 F.3d 1218, 1222 (10th Cir. 2008) (recognizing that claims of ineffective assistance of trial counsel usually must be raised in collateral proceedings).

Mr. Saucedo was given an opportunity to file a pro se response to the motion to enforce. *See Anders*, 386 U.S. at 744. To date, he has not done so.

Under *Anders*, we have conducted an independent review of the plea agreement, plea hearing transcript, sentencing hearing transcript, and motion to enforce. *See id.* After doing so, we conclude that the requirements for enforcing the appeal waiver have been satisfied: (1) this “appeal falls within the scope of the waiver of appellate rights”; (2) Mr. Saucedo “knowingly and voluntarily

waived his appellate rights”; and (3) “enforcing the waiver would [not] result in a miscarriage of justice.” *Hahn*, 359 F.3d at 1425. As counsel indicates, Mr. Saucedo may properly bring an ineffective assistance of counsel claim concerning the negotiation of his appeal waiver in a collateral proceeding.

Accordingly, we GRANT the government’s motion to enforce the plea agreement, GRANT counsel’s request to withdraw, and DISMISS the appeal.

ENTERED FOR THE COURT
PER CURIAM