FILED
United States Court of Appeals
Tenth Circuit

October 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAMIAN HERNANDEZ-GALVAN, a/k/a Damian Galvan, a/k/a Damian Galvin, a/k/a Daniel Perez,

Defendant - Appellant.

No. 22-6129
(D.C. No. 5:21-CR-00032-D-1)
(W.D. Okla.)

ORDER AND JUDGMENT[*]

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

After pleading guilty to illegal reentry into the United States, Damian Hernandez-Galvan appeals the judgment of the district court, arguing that his guilty plea was not knowing and voluntary because the district court misinformed him as to the maximum sentence he faced if convicted at trial. Counsel for Mr. Hernandez-Galvan has moved to withdraw and filed a brief consistent with

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[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Anders v. California, 386 U.S. 738 (1967), asserting that no non-frivolous appellate issues exist. Exercising jurisdiction under 28 U.S.C. § 1291, we dismiss the appeal and grant counsel's motion to withdraw.

BACKGROUND

A federal grand jury indicted Mr. Hernandez-Galvan on one count of illegal reentry after removal from the United States, in violation of 8 U.S.C. § 1326(a). The one-count indictment alleged that, on May 8, 2018, Mr. Hernandez-Galvan was knowingly in the United States, that he was a non-citizen previously removed from the country five times, and that he did not have permission to reapply for entry.

Mr. Hernandez-Galvan pleaded guilty to the indictment without a plea agreement. At the plea hearing, attorneys for the United States stated "[t]he charge carries up to 20 years of imprisonment." R. vol. 3 at 7. Both Mr. Hernandez-Galvan and his attorney responded affirmatively when the court asked them if they "agree[d] with that summary stated by government counsel." *Id.* at 8. Likewise, Mr. Hernandez-Galvan's written petition to enter a plea of guilty stated the "maximum sentence the law provides for the offense[] to which [he] want[ed] to plead [guilty]" included "[n]ot [m]ore than 20 years' imprisonment." R. vol. 1 at 41.

After the district court accepted Mr. Hernandez-Galvan's guilty plea, the probation department completed a presentence investigation and submitted a presentence report (PSR). Citing 8 U.S.C. § 1326(b)(1), the PSR stated the maximum penalty for the charge was "[n]ot more than 10 years['] imprisonment."

R. vol. 2 at 3. The PSR calculated Mr. Hernandez-Galvan's advisory Guidelines range as 51 to 63 months' imprisonment.

Before sentencing, Mr. Hernandez-Galvan submitted a sentencing memorandum seeking "a sentence at the bottom of the advisory . . . Guidelines range of 51 to 63 months." R. vol. 1 at 52. *See also id.* at 55 ("Damian Hernandez-Galvan posits that a sentence at the bottom of the [G]uidelines range called for in the PSR is sufficient but not greater than necessary to meet the objectives of sentencing in this case considering the nature and circumstances of the offense and his history and characteristics.").

At the sentencing hearing, the district court asked counsel for Mr. Hernandez-Galvan if "[he] and the defendant each had an opportunity to review and discuss the [PSR], including any addenda or revisions that may have been made since initial disclosure." R. vol. 3 at 21–22. Counsel confirmed that he did have such an opportunity. Counsel and Mr. Hernandez-Galvan also confirmed that, although they had originally listed three objections to the PSR in the sentencing memorandum, they were withdrawing those objections at the sentencing hearing. The court therefore adopted the findings of the PSR for sentencing purposes. The court also considered arguments Mr. Hernandez-Galvan had advanced in his sentencing memorandum supporting a departure or downward variance from the bottom of his presumptive Guidelines sentencing range, but concluded that "although departure may be authorized in this case, [it] would exercise [its] discretion not to

depart because [it has] concluded that departure is not warranted under the circumstances . . . here." R. vol. 3 at 23.

The court then imposed a sentence of 51 months' imprisonment. Mr. Hernandez-Galvan filed a timely notice of appeal. His counsel filed an *Anders* brief, and Mr. Hernandez-Galvan submitted a responsive brief raising four issues. Initially, the government certified its intention not to file a brief but, following the submission of Mr. Hernandez-Galvan's brief, we ordered a formal response "address[ing] Mr. Hernandez–Galvan's assertion that he was misinformed as to the maximum possible penalties he faced if convicted at trial." Order of May 11, 2023, at 1. The government and counsel for Mr. Hernandez-Galvan timely responded to our order.

DISCUSSION

Mr. Hernandez-Galvan raises four arguments on appeal.[1] He asserts that (1) his conviction is invalid because "he did not reenter the United States *after* being convicted of [three] qualifying misdemeanors or any felony," Aplt. Pro Se Opening Br. at 2; (2) his guilty plea was not knowing and voluntary because he was misinformed as to the maximum possible penalty he faced if convicted at trial; (3) the court should have departed downward from his Guidelines sentence to fairly account

[1] In reviewing Mr. Hernandez-Galvan's pro se submissions, we construe his arguments liberally. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

for time he spent in state custody; and (4) application of certain Guidelines "result[ed] in double counting and overstate[d] the seriousness of the offense," *id.*

We first address issues (1), (3), and (4). Issue (1) does not provide a basis to reverse the district court's acceptance of Mr. Hernandez-Galvan's guilty plea. The facts in Mr. Hernandez-Galvan's appellate brief about the timing of his various state convictions and arrests *may* have provided a basis to defend against the charge of illegal reentry, but he waived his right to present those factual defenses by pleading guilty. *See United States v. Wright*, 43 F.3d 491, 494 (10th Cir. 1994) ("A defendant who knowingly and voluntarily pleads guilty waives all non-jurisdictional challenges to his conviction. Having pleaded guilty, a defendant's only avenue for challenging his conviction is to claim that he did not voluntarily or intelligently enter his plea." (footnote and citations omitted)).

As to issues (3) and (4), Mr. Hernandez-Galvan invited any error. Before the district court, he did raise challenges related to time spent in state custody and double-counting in the calculation of his Guidelines range. But those arguments were advanced in support of Mr. Hernandez-Galvan's request for a sentence at the bottom of the applicable range—51 months—and he received the sentence he requested. "[W]hen . . . the defendant affirmatively endorses the appropriateness of the length of the sentence before the district court, we conclude that if, there was error, it was invited and waived." *United States v. Mancera-Perez*, 505 F.3d 1054, 1059 (10th Cir. 2007).

As for issue (2)—whether Mr. Hernandez-Galvan's guilty plea was involuntary because he was misinformed of the statutory penalties for his crime—we review for plain error because Mr. Hernandez-Galvan did not object or move to withdraw his guilty plea. *See United States v. Ferrel*, 603 F.3d 758, 763 (10th Cir. 2010). Under this standard,

> [t]here must be an error that is plain and that affects substantial rights. Moreover, [Fed. R. Crim. P.] 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

United States v. Olano, 507 U.S. 725, 732 (1993) (internal quotation marks and brackets omitted). To establish plain error, a defendant must show that an error (1) was committed; (2) was plain; (3) affected substantial rights, and (4) seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States v. Pacheco-Donelson*, 893 F.3d 757, 760 (10th Cir. 2018) (citation omitted). "An error is plain if it is clear or obvious under current, well-settled law." *United States v. Faulkner*, 950 F.3d 670, 678 (10th Cir. 2019) (internal quotation marks omitted).

"Guilty pleas must be entered intelligently and voluntarily." *United States v. Vidal*, 561 F.3d 1113, 1119 (10th Cir. 2009). "To enter a plea that is knowing and voluntary, the defendant must have 'a full understanding of what the plea connotes and of its consequence.'" *United States v. Hurlich*, 293 F.3d 1223, 1230 (10th Cir. 2002) (quoting *Boykin v. Alabama*, 395 U.S. 238, 244 (1969)). Accordingly, Federal

Rule of Criminal Procedure 11 requires the court, in relevant part, to inform the defendant of, and determine that the defendant understands, "any maximum penalty." Fed. R. Crim. P. 11(b)(1)(H).

Here, the district court accurately informed Mr. Hernandez-Galvan of the maximum possible penalty he faced if convicted. He pleaded guilty to violating § 1326(a), which provides, "subject to subsection (b)," for a two-year maximum penalty. Subsection 1326(b)(2) is a sentencing factor for violations of § 1326(a), not a separate criminal offense. *See Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). Before Mr. Hernandez-Galvan pleaded guilty, there was a possibility that § 1326(b)(2) would apply to increase his maximum possible sentence to 20 years' imprisonment, so the United States attorney correctly stated that 20 years was the maximum possible sentence at that stage. After the guilty plea, the probation department concluded that § 1326(b)(2) did not apply but that § 1326(b)(1) did apply. So, it correctly informed Mr. Hernandez-Galvan in the PSR that his maximum sentence was 10 years.

Defense counsel suggests it would have been "better" during Mr. Hernandez-Galvan's plea colloquy for the court to advise him "as to the three different possible maximum penalties" under § 1326 depending on which sentencing factors the court found applicable. Aplt. Counsel Reply Br. at 2. Maybe so. But even if we were to require this level of specificity in a plea colloquy, we cannot say that the district court's advisement in this case was "clear or obvious" error "under *current*, well-settled law." *Faulkner*, 950 F.3d at 678 (emphasis added). Moreover,

even if Mr. Hernandez-Galvan was misinformed of the penalties, he has not met his burden of establishing that the error affected his substantial rights. To establish that a Rule 11 error was prejudicial, a defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). But as defense counsel also points out, Mr. Hernandez-Galvan did not move to withdraw his guilty plea or object to "any alleged dates of deportation or the date or fact of his felony conviction at his sentencing hearing." Aplt. Counsel Reply Br. at 5.

We therefore conclude Mr. Hernandez-Galvan has not carried his burden to show the district court plainly erred in misinforming him of the maximum possible sentence he faced at any stage of his plea and sentencing. Although a district court's failure to ensure a defendant adequately understands the maximum possible penalty on conviction may—in some circumstances—render a guilty plea non-voluntary, *see United States v. Gigot*, 147 F.3d 1193, 1199 (10th Cir. 1998), that did not happen here.[2]

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[2] To the extent Mr. Hernandez-Galvan argues his own counsel misadvised him as to the potential consequences of entering a guilty plea, we generally do not consider such arguments on direct appeal. *See United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) ("Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed."). In keeping with our usual rule, we decline to do so here.

CONCLUSION

We dismiss the appeal and grant counsel's motion to withdraw.

Entered for the Court

Veronica S. Rossman
Circuit Judge