FILED
United States Court of Appeals
Tenth Circuit

August 9, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHNNY C. TRUJILLO,

Defendant - Appellant.

No. 23-2080
(D.C. No. 1:21-CR-01422-WJ-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **McHUGH**, and **CARSON**, Circuit Judges.

This matter is before the court on the government's motion to enforce the appeal waiver in Johnny C. Trujillo's plea agreement pursuant to *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam). Exercising jurisdiction under 28 U.S.C. § 1291, we grant the motion and dismiss the appeal.

BACKGROUND

Mr. Trujillo pleaded guilty to one count of possessing or receiving a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). As part of the plea agreement, Mr. Trujillo "waive[d] the right to appeal [his] conviction(s) and any

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 . . . at or under the maximum statutory penalty authorized by law." Mot. to Enforce, Attach. 1 at 8.

Before sentencing, Mr. Trujillo moved to withdraw his guilty plea, arguing that in light of the Supreme Court's opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), which was decided about a month before he entered his guilty plea, the statute of conviction, 18 U.S.C. § 922(k), facially violates the Second Amendment. After a hearing, the district court denied the motion, concluding that the weight of authority supported the government's argument that that § 922(k) was not unconstitutional under *Bruen*. The court suggested, however, that he appeal the issue so that this court could weigh in on the matter.

At sentencing, the district court determined that the applicable guidelines range was 21 to 27 months. Consistent with its obligations under the plea agreement, the government recommended a sentence at the low end of the range. The court sentenced Mr. Trujillo to 21 months, a sentence well below the statutory maximum sentence of five years for his offense. *See* 18 U.S.C. §§ 922(k) and 924(a)(1)(B). The court reminded Mr. Trujillo that he had waived his right to appeal, but said "it would not bother me if the ruling on the [motion to withdraw were] appealed to . . . give the Tenth Circuit an opportunity to consider that. But again, the plea agreement contains a waiver of appeal provision." Mot. to Enforce, Attach. 3 at 9.

Despite his waiver of the right to appeal his conviction and any sentence below the statutory maximum, Mr. Trujillo filed an appeal. His docketing statement indicates that he intends to argue that the district court should have allowed him to

withdraw his plea based on his claim of actual innocence because 18 U.S.C. § 922(k) is unconstitutional.

DISCUSSION

In ruling on a motion to enforce, we consider: "(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." *Hahn*, 359 F.3d at 1325. In his response to the motion to enforce, Mr. Trujillo argues that his appeal does not fall within the scope of the waiver and that enforcing the waiver would result in a miscarriage of justice. He does not assert his waiver was not knowing and voluntary, so we need not address that factor. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005).

A. Scope of the Waiver

Mr. Trujillo argues that his appeal falls outside the scope of the waiver because his challenge to the constitutionality of the statute of conviction goes to the district court's subject-matter jurisdiction and therefore cannot be waived. But it is well established that a defendant's challenge to the constitutionality of a federal criminal statute is not jurisdictional in nature. *See United States v. De Vaughn*, 694 F.3d 1141, 1153-54 (10th Cir. 2012) ("A claim that a criminal statute is unconstitutional [as applied] does not implicate a court's subject matter jurisdiction." (citation omitted)); *United States v. Herrera*, 51 F.4th 1226, 1283-84 (10th Cir. 2022) (applying *De Vaughn* to facial challenge, explaining that "district courts have the

power to act regardless of whether a constitutional challenge is facial or as applied"). As the Supreme Court has explained, a court has jurisdiction over a criminal case even when it or an appellate court later determines that the statute of conviction is unconstitutional. *United States v. Williams*, 341 U.S. 58, 68-69 (1951).

We are not persuaded otherwise by Mr. Trujillo's related argument that his constitutional challenge is non-waivable under *Blackledge v. Perry*, 417 U.S. 21 (1974) and *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), because it implicates the government's "power to criminalize his (admitted) conduct" and "to constitutionally prosecute him." Response at 6 (brackets and internal quotation marks omitted). *Blackledge* and *Menna* recognized "a narrow class of constitutional claims involving the right not to be haled into court," but they "did not address a court's power to adjudicate the case." *De Vaughn*, 694 F.3d at 1153 (citation, italics, and internal quotation marks omitted).

We are also not persuaded by Mr. Trujillo's argument based on *Class v. United States*, 138 S. Ct. 798 (2018), in which the Supreme Court held that a guilty plea "by itself" does not bar a defendant from raising a constitutional challenge to a criminal statute on appeal. *Id.* at 803. Mr. Trujillo maintains that his challenge to the constitutionality of § 922(k) is non-waivable under *Class* and is therefore outside the scope of the appeal waiver. But he overreads *Class*.

In *Class*, the Court held that a defendant does not give up the right to appeal an adverse ruling on a constitutional challenge to the statute of conviction "simply by pleading guilty," but it did not hold that such challenges are non-waivable. *Id.* at

803. In fact, the Court expressly noted that Class's constitutional challenge "d[id] not contradict the terms" of his "written plea agreement," *id.* at 804, which provided that he waived his right to appeal a within-guidelines sentence but did not waive his right to challenge his conviction, *id.* at 802.

Here, by contrast, Mr. Trujillo expressly waived his right to appeal his conviction, not just his sentence. Thus, *Class* does not save his appeal. *See Khadr v. United States*, 67 F.4th 413, 421 (D.C. Cir. 2023) (where defendant "expressly waived the right to appeal his convictions, sentence and detention[,] [n]othing in *Class* . . . suggests that his non-jurisdictional claims, even if based on the Constitution, survive his express waiver").

The district court's comments encouraging Mr. Trujillo to raise his constitutional claim on appeal do not require a different result. The court reminded Mr. Trujillo at both the change of plea hearing and the sentencing hearing that his guilty plea waived his right to appeal his conviction, and nothing in the court's comments purported to limit the scope of the waiver. *Cf. Class*, 138 S. Ct. at 807 (holding that Class's "acquiescence" with the district court's incorrect oral statement as the Rule 11 advisement that he was waiving his right to appeal his conviction did not change the terms of the written plea agreement, which contained no such waiver).

The bottom line is that § 922(k) has not been deemed unconstitutional.[1] Thus, Mr. Trujillo pleaded guilty to violating a valid statute, and the plea agreement does

[1] In *Bruen*, the Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that

not exempt constitutional challenges from his waiver of the right to appeal his conviction. His constitutional claim is thus squarely within the scope of the waiver.

B. Miscarriage of Justice

A miscarriage of justice occurs where (1) "the district court relied on an impermissible factor such as race"; (2) "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid"; (3) "the sentence exceeds the statutory maximum"; or (4) "the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327 (internal quotation marks omitted). Mr. Trujillo's miscarriage-of-justice arguments fall in the fourth scenario.

"The burden rests with the defendant to demonstrate that the appeal waiver results in a miscarriage of justice." *United States v. Anderson*, 374 F.3d 955, 959 (10th Cir. 2004). To show that an appeal waiver is "otherwise unlawful," Mr. Trujillo needed to prove that the alleged error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[.]" *Hahn*, 359 F.3d at 1327 (internal quotation marks omitted). The inquiry is "whether the waiver itself is unlawful because of some procedural error or because no waiver is possible." *United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007).

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conduct." 142 S. Ct. at 2126. For a firearm regulation covering such conduct to survive constitutional review, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* *Bruen* did not address the constitutionality of § 922(k). No circuit court has found § 922(k) unconstitutional since *Bruen*, and the majority of district courts that have addressed the issue have concluded that § 922(k) satisfies the *Bruen* test.

Mr. Trujillo makes two miscarriage-of-justice arguments. First, he asserts that "since the claim here is not waivable, the waiver is unlawful." Resp. at 7. Having rejected his argument that his constitutional challenge is non-waivable, we likewise reject his derivative argument that the waiver is unlawful.

Second, he declares that "[i]t is hard to conceive of a greater miscarriage of justice than imprisoning an individual for conduct protected by the Second Amendment." *Id.* He cites no authority for this conclusory and hyperbolic argument, and it falls far short of establishing that a miscarriage of justice will occur if we enforce the appeal waiver. *See United States v. Gonzalez-Huerta*, 403 F.3d 727, 737 (10th Cir. 2005) (holding that statement that "[t]o leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity, or public reputation of judicial proceedings," was insufficient to show miscarriage of justice for purposes of fourth prong of plain-error (internal quotation marks omitted)).

CONCLUSION

We grant the government's motion to enforce the waiver in Mr. Trujillo's plea agreement and dismiss this appeal.

Entered for the Court
Per Curiam