FILED
United States Court of Appeals
Tenth Circuit

July 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSUE ISRAEL LOPEZ, a/k/a Mono,

Defendant - Appellant.

No. 23-6059
(D.C. No. 5:22-CR-00005-R-11)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **TYMKOVICH**, and **MORITZ**, Circuit Judges.

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

BACKGROUND

Mr. Lopez pleaded guilty to drug conspiracy, in violation of 21 U.S.C. § 846, and felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The parties stipulated that for sentencing purposes, Mr. Lopez's "relevant conduct in this

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

case includes at least 3.5 kilograms of a mixture and substance containing a detectible amount of cocaine." Mot. to Enforce, Attach. 1 at 9. The government agreed that after Mr. Lopez signed the agreement, it would "end its investigation of allegations in the [original and amended indictments] as to [him], except insofar as required to prepare for further hearings in this case, including but not limited to sentencing, and to prosecute others, if any, involved in [his] conduct." *Id.* at 10. The government "reserve[d] the right to take positions that deviate from the [parties'] stipulations . . . in the event that material credible evidence requiring such a deviation is discovered during the course of its investigation after the signing of [the agreement] or arises from sources independent of the [prosecutor's office], including the United States Probation Office." *Id.* As part of his plea agreement, Mr. Lopez waived "the right to appeal [his] guilty plea" and his sentence, including "the manner in which [it was] determined," but he retained the right to appeal the substantive reasonableness of an above-Guidelines sentence. *Id.* at 11. Both by signing the written agreement and in his responses to the court's questions at the change of plea hearing, Mr. Lopez confirmed that he understood the consequences of his plea, including the appeal waiver, and he acknowledged that his plea was knowing and voluntary.

At the sentencing hearing, the government indicated that the investigation of Mr. Lopez's relevant conduct revealed that the amount of drugs attributable to him was significantly greater than the 3.5 kilos referred to in the plea agreement. Accordingly, the government asked the court to use a base offense level based on the

greater drug amounts. The agent who conducted the investigation explained that in addition to the 3.5 kilos of cocaine seized directly from Mr. Lopez, drug ledgers seized from other members of the conspiracy established that he had purchased 67 kilos of cocaine and 8.5 kilos of methamphetamine. The agent testified that the ledgers were seized in October 2021, but that much of the analysis of the raw data in the ledgers and of the corroborating information was conducted after Mr. Lopez signed the agreement in July 2022, largely in connection with the investigation of the other members of the conspiracy. Counsel for the government indicated that the ledgers and corroborating information had been provided to defense counsel in April 2022—about three months before Mr. Lopez signed the agreement.

Mr. Lopez objected to the government's request that the court use the higher base offense level, arguing that its post-plea analysis of the drug ledgers and corroborating information violated the terms of the plea agreement. The court overruled the objection, noting that the parties agreed that his relevant conduct was at least—not "no more than"—3.5 kilos, Mot. to Enforce, Attach. 3 at 9, and that the phrase "'at least' . . . contemplates that there may be more," *id.* at 56. The court further noted that both the prosecution and defense counsel had all of the information supporting the greater drug amount before Mr. Lopez signed the plea agreement. Using a base offense level for the greater drug amounts, the court determined the applicable Guidelines range was 292 to 365 months, granted a downward variance, and sentenced Mr. Lopez to 240 months in prison. *See id.* at 57-58, 73-74.

Despite the appeal waiver, Mr. Lopez filed a notice of appeal. His docketing statement indicates that the issue he intends to raise on appeal is whether imposing a sentence based on the greater drug amounts violated his plea agreement. The government moved to enforce the appeal waiver. Mr. Lopez opposes the motion, arguing that the appeal waiver is unenforceable because the government breached the plea agreement by "us[ing] additional investigation to corroborate, clarify and interpret the raw data [in the ledgers,] which it could only gain in breach of the agreement." Resp. at 6.

DISCUSSION

"[A]n appellate waiver is not enforceable if the Government breaches its obligations under the plea agreement." *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1212 (10th Cir. 2008). Whether a plea agreement has been breached is a question of law that we review de novo. *United States v. Guzman*, 318 F.3d 1191, 1195 (10th Cir. 2003). "General principles of contract law define the government's obligations under the agreement, looking to the express language and construing any ambiguities against the government as the drafter of the agreement." *Id.* In deciding whether the government breached a plea agreement, we examine the nature of its promise and evaluate it "in light of the defendant's reasonable understanding of the promise at the time of the guilty plea." *Id.* at 1195-96.

Mr. Lopez asserts he understood the plea agreement to mean his relevant conduct was limited to 3.5 kilos of drugs. This understanding is unreasonable because it ignores that the parties stipulated that his relevant conduct was "*at least*

3.5 kilograms," Mot. to Enforce, Attach. 1 at 9 (emphasis added), not that his relevant conduct would be limited to that amount. Based on the plain language of the agreement, it is clear that the parties contemplated that his relevant conduct could involve a greater drug quantity. And given that the prosecution provided the defense with the information that yielded the increased drug quantities several months before Mr. Lopez signed the agreement, his expectation that the drug amounts attributable to him would not exceed 3.5 kilos is unreasonable. Thus, the government's request that the court use a base offense level based on the greater drug quantities did not violate the parties' stipulation to relevant conduct of "at least" 3.5 kilos.

Mr. Lopez also asserts he understood the agreement to mean "the government would stop its investigation of his conduct, thereby ceasing an increase in his relevant conduct or drug quantity beyond what existed as of [the date of his plea]." Resp. at 3. This understanding is also unreasonable. The agreement expressly allowed the government to continue its investigation of him "as required to prepare for [his sentencing] hearing[] . . . and to prosecute others . . . involved in [his] conduct." *Id.* at 10. And the evidence presented at the sentencing hearing shows the government did precisely that—it continued analyzing information it already had, both as part of its investigation of the co-conspirators' conduct and to prepare for Mr. Lopez's sentencing hearing. We thus reject his argument that the government breached the plea agreement by continuing to analyze the ledgers and corroborating information.

Having rejected Mr. Lopez's claim that the appeal waiver is unenforceable based on the government's alleged breach, we turn to the motion to enforce. In ruling on the motion, we consider whether the appeal falls within the scope of the waiver, whether the waiver was knowing and voluntary, and whether enforcing it would result in a miscarriage of justice. *See Hahn*, 359 F.3d at 1325. Mr. Lopez's challenge to his below-Guidelines sentence is within the scope of his waiver of the right to appeal his sentence, including "the manner in which [it was] determined," Mot. to Enforce, Attach. 1 at 11. Our review of the written plea agreement and transcript of the change of plea hearing confirms that the waiver was knowing and voluntary and that enforcing it would not result in a miscarriage of justice. We thus conclude that the *Hahn* factors have been met, and Mr. Lopez concedes that "the waiver is likely enforceable" under *Hahn*, Resp. at 7.

CONCLUSION

Because the government did not breach the plea agreement and the *Hahn* factors have been met, we grant the government's motion to enforce and dismiss this appeal.

Entered for the Court
Per Curiam