FILED
United States Court of Appeals
Tenth Circuit

November 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEVAN NATHANIEL JOHNSON,

Defendant - Appellant.

No. 23-6098
(D.C. No. 5:22-CR-00025-J-2)
(W.D. Okla.)

ORDER AND JUDGMENT*

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

Following his acceptance of a plea agreement that included a waiver of his right to appeal, Devan Nathaniel Johnson pleaded guilty to one count of a hate crime and aiding and abetting a hate crime, in violation of 18 U.S.C. §§ 249(a)(1) and (2). He was sentenced to 120 months in prison and three years of supervised release. Despite his waiver, Mr. Johnson filed an appeal. The government has moved to enforce the appeal waiver. *See United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (per curiam). Mr. Johnson's counsel has filed a response stating that the government's motion is unopposed.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Our independent review confirms that Mr. Johnson's appeal waiver is enforceable. In evaluating a motion to enforce an appellate waiver, 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." *Id.* at 1325.

We find that the record satisfies each of these factors. First, Mr. Johnson seeks to appeal whether his within-Guidelines sentence is reasonable and whether the district court properly credited him for the prior prison time he had already served in related state cases. His appeal therefore falls within the scope of the waiver because the plea agreement stated that he waived his right to appeal his sentence and the manner in which it was determined.

Second, the plea agreement clearly sets forth that the waiver was knowing and voluntary, and the district court confirmed Mr. Johnson's understanding of his appeal waiver during his change of plea hearing. *See id.* at 1325 (on second factor, the court looks to whether the plea agreement states the waiver was knowing and voluntary and whether there was a sufficient Federal Rule of Criminal Procedure 11 colloquy).

Third, a miscarriage of justice occurs only:

> [1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful.

Id. at 1327 (internal quotation marks omitted). None of these are applicable. There is no evidence that Mr. Johnson's race had anything to do with his sentence and no indication that he received ineffective assistance in connection with the negotiation of the waiver. His 120-month prison sentence did not exceed the statutory maximum, *see* 18 U.S.C. § 249(a)(1)(A), and there appears to be nothing that is "otherwise unlawful" about the waiver.

The motion to enforce is granted and this matter is dismissed.

Entered for the Court
Per Curiam