

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-4340

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICK RONALD SILVA,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, District Judge. (1:14-cr-00026-MR-DLH-1)

Submitted: February 29, 2016

Decided: April 6, 2016

Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Randolph Marshall Lee, Charlotte, North Carolina, for Appellant. Jill Westmoreland Rose, United States Attorney, Anthony J. Enright, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Patrick Ronald Silva pleaded guilty, pursuant to a plea agreement, to coercing a minor to produce child pornography, in violation of 18 U.S.C. § 2251(a) (2012). He was sentenced to 262 months' imprisonment. On appeal, Silva argues that trial counsel was ineffective at sentencing in failing to present certain arguments or in failing to file a motion for a downward variance or departure.

Silva pled guilty pursuant to a written plea agreement, wherein he waived his appellate rights except for claims of ineffective assistance of counsel and prosecutorial misconduct. Silva has not challenged the validity of the waiver nor has the Government sought to enforce the waiver. Accordingly, Silva's ineffective assistance of counsel claim is reviewable by this court.

Silva asserts that counsel provided ineffective assistance in failing to present certain arguments at sentencing. This issue falls outside the appellate waiver provision. However, as a general rule, claims of ineffective assistance of counsel must be raised in a 28 U.S.C. § 2255 (2012) motion rather than on direct appeal, unless the appellate record conclusively demonstrates ineffective assistance. United States v. Benton, 523 F.3d 424, 435 (4th Cir. 2008). Because the record here does not conclusively establish that counsel was constitutionally

ineffective in presenting sentencing arguments, the claim is not subject to review on direct appeal.

Accordingly, we dismiss the appeal of Silva's sentence and otherwise affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED