UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4050

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ADRIAN RASHAUN ANDERSON, a/k/a Duke,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, Senior District Judge. (5:17-cr-00111-H-2)

Submitted: May 13, 2020 Decided: May 27, 2020

Before RICHARDSON and RUSHING, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed in part, dismissed in part by unpublished per curiam opinion.

James M. Ayers II, AYERS & HAIDT, P.A., New Bern, North Carolina, for Appellant. Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

PER CURIAM:

Adrian Rashaun Anderson pled guilty, pursuant to a written plea agreement, to two counts of using, carrying, and brandishing a firearm in furtherance of a crime of violence and aiding and abetting, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A) (2018), and was sentenced to a total term of 384 months' imprisonment. On appeal, Anderson's counsel has filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), stating that there are no meritorious issues for appeal, but questioning whether Anderson's conviction on Count 3 is invalid, arguing that Hobbs Act robbery does not qualify as a predicate crime of violence to support a conviction under § 924(c)(1)(A), citing *Johnson v. United States*, 135 S. Ct. 2551 (2015), and its progeny. *See United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (holding residual clause in 18 U.S.C. § 924(c)(3)(B) (2012) defining a crime of violence unconstitutionally vague). Although advised of his right to file a supplemental pro se brief, Anderson has not done so. The Government seeks to dismiss the appeal based on the appellate waiver provision in the plea agreement.

This court reviews de novo the issue of whether a defendant validly waived his right to appeal. *United States v. McCoy*, 895 F.3d 358, 362 (4th Cir.), *cert. denied*, 139 S. Ct. 494 (2018). Where, as here, the Government seeks to enforce the appeal waiver and has not breached the plea agreement, we will enforce the waiver if it is valid and the issue being appealed falls within the waiver's scope. *United States v. Manigan*, 592 F.3d 621, 627 (4th Cir. 2010).

A defendant's waiver of rights is valid if he entered it knowingly and intelligently. *United States v. Thornsbury*, 670 F.3d 532, 537 (4th Cir. 2012). In making this

determination, we consider "the totality of the circumstances, including the experience and conduct of the defendant, his educational background, and his knowledge of the plea agreement and its terms." *McCoy*, 895 F.3d at 362 (internal quotation marks omitted). Generally, if the district court fully questions a defendant regarding the waiver position during the plea "colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid." *Id.* (internal quotation marks omitted). Our review of Anderson's guilty plea hearing confirms that the district court complied with Fed. R. Crim. P. 11 and fully questioned Anderson regarding the waiver provision before accepting Anderson's plea. And Anderson acknowledges that the waiver is enforceable as to issues within its scope. The issue, then, is whether Anderson's appeal falls outside the scope of the waiver.

"A waiver remains valid even in light of a subsequent change in the law." *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (internal quotation marks omitted). In *Adams*, the defendant argued in his 28 U.S.C. § 2255 (2018) motion that he was actually innocent of his conviction of being a felon in possession of a firearm under 18 U.S.C. § 922(g) (2018). *Adams*, 814 F.3d at 181. After concluding that Adams' appeal waiver was valid, we examined whether his claim, based on *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), fell within the scope of the waiver. *Adams*, 814 F.3d at 182. We noted that we "will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice" and concluded that "[a] proper showing of actual innocence is sufficient to satisfy the miscarriage of justice requirement." *Id.* (internal quotation marks omitted). Because Adams' state convictions no longer qualified as predicate felonies under

federal law after *Simmons*, he was actually innocent of the felon-in-possession offense. *Id.* at 183. Accordingly, we declined to enforce the appellate waiver. *Id.* Under *Adams*, we find that the miscarriage of justice exception does not apply because we have held that "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)." *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019). Accordingly, we grant in part the Government's motion to dismiss.[*]

In accordance with *Anders*, we have reviewed the entire record in this case and have found no other meritorious grounds for appeal outside the scope of the appellate waiver. We, therefore, affirm the district court's judgment in all other respects. This court requires that counsel inform Anderson, in writing, of the right to petition the Supreme Court of the United States for further review. If Anderson requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Anderson. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART,
DISMISSED IN PART

[*] Anderson also moves to assert a claim under the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 to challenge the "stacking" of his § 924(c) sentences. However, we have recently held that the relevant provision of the First Step Act does not apply to cases that were pending on appeal when Congress passed the First Step Act. *United States v. Jordan*, 952 F.3d 160, 171-74 (4th Cir. 2020). We therefore deny Anderson's motion to remand.