NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 14, 2023
Decided February 17, 2023

Before

DIANE P. WOOD, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-1645

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	1:20-CR-00138(1)
DAVID L. SMITH, *Defendant-Appellant*.	John J. Tharp, Jr., *Judge*.

O R D E R

David Smith pleaded guilty to transporting a minor with the intent that she engage in prostitution, 18 U.S.C. § 2423(a), and stipulated to sex trafficking and exploitation of a minor through force, fraud, and coercion, 18 U.S.C. §§ 1591(a), 2251(a). The district court sentenced him to 300 months in prison. Smith appeals, but his counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 744 (1967). Smith has not accepted our invitation to respond. CIR. R. 51(b). Because the analysis in the brief appears to be thorough, we limit our review to the subjects that counsel discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

In 2019, Smith contacted 16-year-old Minor A and asked her to engage in commercial sex acts in Chicago. Minor A refused but said that she needed a ride from Wisconsin to Chicago to visit her friend, which Smith offered to provide. Smith and Minor B then picked up Minor A in Wisconsin and drove her to Chicago. But instead of bringing Minor A to her friend, Smith brought the two minors to a hotel and advertised appointments with them for sex, resulting in one or two customers buying sex from Minor A. Smith later drove the two minors back to Wisconsin where customers continued to buy sex from the minors, and Smith collected the cash from the transactions. Smith visibly possessed two firearms at the time, threatened violence, and hit Minor A in the face. Eventually Minor A was able to reach her mother, who then contacted the police, and they arrested Smith.

Smith entered a written plea agreement. He admitted to the facts in the above paragraph and acknowledged that, based on the statutory minimum and the Sentencing Guidelines, he would receive a sentence of at least 10 years and possibly life in prison. He further agreed to forfeit his rights to the property he used in the offense, including his cell phone. Lastly, Smith agreed to waive his right to appeal.

Counsel, having confirmed that Smith has concerns about his conviction that would require the withdrawal of his guilty plea, *see United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002), first considers whether Smith could challenge the validity of the plea. She evaluates the potential arguments but properly concludes that any such challenge would fail. Because Smith did not move to withdraw the plea in the district court, our review would be for plain error. *United States v. Davenport*, 719 F.3d 616, 618 (7th Cir. 2013).

The transcript of the plea colloquy reflects that the district judge substantially complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedure. *See id.* Smith confirmed that he understood the trial rights he was waiving, the consequences of pleading guilty, the maximum sentence possible, and the role of the sentencing guidelines. FED. R. CRIM. P. 11(b). The judge also reviewed the stipulated facts in the plea agreement and ensured that this factual basis supported the plea. *See id.*; *United States v. Neal*, 907 F.3d 511, 515 (7th Cir. 2018).

Counsel observes omissions in the colloquy but rightly determines that Smith could not plausibly argue that they are substantial. The court neglected to confirm that Smith understood that he could continue to plead not guilty. But the court clarified, and Smith confirmed he understood, that until the court accepted his guilty plea, he would be presumed innocent. The court also neglected to tell Smith that under his plea deal he

faced the forfeiture of a cell phone involved in his offense and waived his right to appeal or to collaterally attack his conviction and sentence. *See* FED. R. CRIM. P. 11(b)(1)(B), (J), (N). But Smith's plea agreement—which Smith confirmed he read in its entirety, understood, and voluntarily signed—filled in these gaps in the colloquy. Because, through this agreement, Smith knew about his rights, risks, and waivers (and he confirmed that he discussed the agreement with his lawyer), any of these omissions at the hearing was harmless. *United States v. Adams*, 746 F.3d 734, 746–47 (7th Cir. 2014); *United States v. Coleman*, 806 F.3d 941, 945 (7th Cir. 2015).

Next, counsel considers whether Smith could raise a nonfrivolous challenge to his sentence. This analysis requires consideration of his appeal waiver. An appeal waiver "stands or falls with the underlying agreement and plea," and because Smith cannot raise a non-frivolous challenge to the plea agreement, the appeal waiver applies unless it is unenforceable. *United States v. Nulf*, 978 F.3d 504, 506 (7th Cir. 2020). Here, because the court inadvertently told Smith that he had the right to appeal his sentence, and it omitted discussing the waiver during the plea colloquy, counsel assumes that the waiver is unenforceable against sentencing arguments. With that assumption, she properly concludes that even if Smith did not waive his appellate rights, he could not raise a potentially meritorious argument to contest his sentence.

First, counsel rightly rejects the possibility of contesting the district court's calculation of the guidelines range. The court correctly grouped the admitted offense and stipulated conduct, applied an enhancement for being a repeat sex offender, *see* U.S.S.G. § 4B1.5(b), and reduced the offense level for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, resulting in a total offense level of 43. *See* U.S.S.G. Ch. 5, Pt. A cmt. n.2. An offense level of 43 combined with a criminal history category of IV yielded a guideline sentence of life in prison. Smith did not object to this calculation, and we (like counsel) see no error in it; thus any challenge would be pointless, even if it were not waived.

Second, counsel appropriately concludes that it would be frivolous to argue that Smith's 300-month sentence was substantively unreasonable. That term was below the guidelines sentence of life in prison, and so we would presume it to be reasonable. *See United States v. Wehrle*, 985 F.3d 549, 557 (7th Cir. 2021). The court reasonably balanced the sentencing factors under 18 U.S.C. § 3553(a), highlighting aggravating factors like the duration of Smith's offense (which lasted over a week for Minor A and likely months for Minor B) and his extensive criminal history without sustained employment, while acknowledging mitigating factors like his relatively young age and

traumatic childhood. Thus, any argument that the court imposed a substantively unreasonable sentence would be frivolous.

Finally, we note that Smith's notice of appeal and an accompanying letter assert that he believes he received ineffective assistance of counsel. Such a claim, which his appeal waiver does not bar, is best saved for collateral review where an evidentiary foundation can be developed. *Massaro v. United States*, 538 U.S. 500, 504 (2003); *United States v. Cates*, 950 F.3d 453, 456–58 (7th Cir. 2020).

Thus, we GRANT counsel's motion to withdraw and DISMISS the appeal.