NONPRECEDENTIAL DISPOSITION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 January 4, 2024
Decided January 5, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-2360

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOVAN STEWART, a/k/a Peso,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:20CR00096-002

Tanya Walton Pratt,
Chief Judge.

O R D E R

Jovan Stewart pleaded guilty to conspiring to distribute a controlled substance, 21 U.S.C. §§ 841(a)(1); 846, and possessing with intent to distribute 50 grams or more of actual methamphetamine, *id*. § 841(a)(1). The district court sentenced him to 250 months' imprisonment (12 months below the bottom of his guidelines range) and 5 years' supervised release. Stewart appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. See *Anders v. California*, 386 U.S. 738 (1967).

Stewart has responded under Circuit Rule 51(b). Because counsel's analysis appears thorough, and her brief explains the nature of the case and addresses the issues that an appeal of this kind might be expected to involve, we limit our review to the subjects that counsel and Stewart discuss. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

A few weeks before his trial date, Stewart pleaded guilty to one count each of conspiracy and possession. See 21 U.S.C. §§ 841(a)(1); 846. (Some of his codefendants, too, pleaded guilty; others were tried and convicted.) The probation officer's presentence investigation report echoed statements from the government's factual basis for the plea: For months in late 2019 and early 2020, Stewart was the "top lieutenant" to the conspiracy's leader, coordinated sales when the leader was out of town, and personally delivered methamphetamine to customers. The report attributed to Stewart more than 65.3 kilograms (144 pounds) of methamphetamine ice (i.e., highly pure meth). Stewart filed no written objection to the PSR. See FED. R. CRIM. P. 32(f)(1). And at the sentencing hearing, counsel confirmed that he was not raising any objection, so the court took the drug quantity as an uncontested fact. See FED. R. CRIM. P. 32(i)(3)(A).

That quantity of ice was many times the 4.5-kilogram threshold for a base offense level of 38 under the Sentencing Guidelines. See U.S.S.G. § 2D1.1. The court deducted two levels for acceptance of responsibility under § 3E1.1(a). But the government did not move for an additional reduction under § 3E1.1(b). Stewart's prior convictions yielded a criminal history category of IV. *Id.* at ch. 5, pt. A. That category, combined with his adjusted offense level of 36, led to an advisory imprisonment range of 262 to 327 months. *Id.* The court adopted these calculations without objection.

Still, in a sentencing memorandum, counsel suggested generally that the government exaggerated Stewart's role in the conspiracy. In allocution at the sentencing hearing, Stewart apologized and stressed his family's need for him. The court imposed concurrent terms of 250 months in prison for both counts (one year below the lower end of the guidelines range), 5 years of supervised release, and a $1,000 fine.

In seeking to withdraw, appellate counsel tells us she consulted with Stewart and confirmed that he wishes to challenge only his sentence, not his plea. Counsel thus properly refrains from discussing whether the plea was valid. *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002).

Counsel first considers whether Stewart could argue for a minor-role reduction under U.S.S.G. § 3B1.2, but correctly concludes that he could not. Because Stewart did not seek this reduction or object at sentencing, the plain-error standard would restrict our review. See *United States v. Butler*, 777 F.3d 382, 387–88 (7th Cir. 2015). The minor-role adjustment applies only when a defendant is "substantially less culpable than the average participant" in the scheme he joined. *United States v. Guzman-Ramirez*, 949 F.3d 1034, 1037 (7th Cir. 2020). Stewart was a "top lieutenant," coordinated deliveries when the leader was absent, and was responsible for "tens of pounds" of methamphetamine ice. We see no clear error, much less plain error, in the court's decision declining to apply the minor-role adjustment here. See *United States v. Sanchez*, 989 F.3d 523, 545 (7th Cir. 2021).

Stewart responds that he was a mere courier and that the court overestimated his role in the conspiracy. He maintains that because his plea colloquy and the PSR canvassed the precise details of only a dozen or so drug sales, the PSR's attribution to him of daily one-pound sales for the duration of the conspiracy was thinly supported. But at sentencing Stewart did not object to the PSR, and the court was entitled to "accept any undisputed portion of the presentence report as a finding of fact." FED. R. CRIM. P. 32(i)(3)(A), *quoted in United States v. Williams*, 949 F.3d 1056, 1070 (7th Cir. 2020). The way to put the government to its proof would have been an objection.

Rule 32(i)(3)(A) aside, the lack of objection also means Stewart would need to meet the plain-error standard here. This would require him to show a reasonable probability that, but for any error, the outcome would change. See *Greer v. United States*, 141 S. Ct. 2090, 2096 (2021). Precisely because he did not object—and thus did not trigger a government offer of proof or revisions to the PSR—he cannot carry his burden to show that further factual development was reasonably likely to undercut the PSR's finding. *Cf. id.* at 2098 (although jury instructions omitted mens rea element, and trial record on that element was undeveloped, plain-error standard required defendant to show reasonable probability that fuller record would lead to acquittal).

To be sure, Stewart now contends that counsel's sentencing memorandum accusing the government of exaggeration counted as an objection to the PSR. But that position is inconsistent with the timing of the memo (after the deadline for written objections), its caption, and counsel's statement at the sentencing hearing that Stewart did not object—as well as *Butler*'s ruling that a counseled sentencing memo seeking a downward variance under 18 U.S.C. § 3553(a) does not count as a procedurally proper objection to the PSR, see *Butler*, 777 F.3d at 387–88.

Next, counsel explores whether Stewart could otherwise challenge his sentencing range and rightly concludes that he cannot. The relevant statute authorizes life in prison and requires at least five years' supervised release. 21 U.S.C. § 841(b)(1)(A)(viii). And no problem with the guidelines range is apparent: 262 to 327 months' imprisonment, based on an offense level of 36 (a base level of 38, minus 2 for accepting responsibility) and a criminal history category of IV. See U.S.S.G. §§ 2D1.1; 3E1.1; ch. 5 pt. A.

Stewart responds that he deserved a three-level reduction for accepting responsibility under U.S.S.G. § 3E1.1(b), rather than just two levels under subsection (a). But whether to seek a reduction under § 3E1.1(b) is reserved to the government's discretion, *United States v. Roush*, 2 F.4th 616, 618 (7th Cir. 2021), and the government did not request the extra reduction here. A § 3E1.1(b) reduction depends on whether the defendant timely notified the government of his intention to plead guilty and the extent to which the defendant's plea helps the government allocate resources efficiently and avoid preparing for trial. Here, Stewart did not schedule a plea hearing until after the government had submitted motions in limine, witness and exhibit lists, and voir dire questions. Given that extensive trial preparation, we see no plausible challenge to the absence of a § 3E1.1(b) motion here.

Finally, counsel correctly observes that challenging the substantive reasonableness of Stewart's below-guidelines sentence would be frivolous. Nothing in the record suggests that Stewart could overcome our appellate presumption that a below-range sentence is not unreasonably high. See *United States v. Law*, 990 F.3d 1058, 1066 (7th Cir. 2021). And the judge expressly weighed the sentencing factors in 18 U.S.C. § 3553(a): the nature and circumstances of the offense (involving 144 pounds of methamphetamine), Stewart's history and characteristics (his mental health, substance use, and prior felonies—but also his family's need for his presence), and potential sentencing disparities with other defendants (including 400 months for the leader of the conspiracy, who went to trial). The judge considered Stewart's mitigating arguments, citing his genuine remorse as the main ground for a downward variance. And the $1,000 fine was well below the guideline minimum ($50,000), see U.S.S.G. § 5E1.2(c)(3), and statutory maximum ($10,000,000), see 21 U.S.C. § 841(a), (b)(1)(A)(viii).

We therefore GRANT counsel's motion to withdraw and DISMISS the appeal.