NONPRECEDENTIAL DISPOSITION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 23, 2024
Decided January 24, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-1378

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RALPH GARCIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:16-CR-00109(1)

Robert M. Dow, Jr.,
Judge.

O R D E R

Ralph Garcia was sentenced to 210 months' imprisonment and 5 years' supervised release after he was found guilty of multiple counts of distributing methamphetamine, *see* 21 U.S.C. § 841(a)(1), and one count of possessing a firearm as a felon, *see* 18 U.S.C. § 922(g)(1). On the latter count, he was sentenced as an armed career criminal under 18 U.S.C. § 924(e). Garcia appealed, and this court affirmed his conviction but vacated his sentence and remanded for resentencing with the proper

offense-level calculation under the Sentencing Guidelines. *United States v. Garcia*, 37 F.4th 1294, 1307 (7th Cir. 2022) (*Garcia I*). On remand, the district court sentenced Garcia to a total of 180 months in prison, the statutory minimum under § 924(e).

Garcia appeals again, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 744 (1967). Counsel's brief explains the nature of the case and raises potential issues that we would expect an appeal like this to involve. Because the analysis appears thorough, and Garcia has not responded to the motion, *see* CIR R. 51(b), we limit our review to the subjects that counsel discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014). We grant counsel's motion and dismiss the appeal as frivolous.

From November 2014 until March 2015, Garcia communicated with a confidential source working with the federal Bureau of Alcohol, Tobacco, and Firearms (ATF). The ATF used the source to conduct controlled buys of methamphetamine and a firearm from Garcia. After Garcia was charged with five counts of distributing methamphetamine and one count of being a felon in possession of a firearm, he proceeded to a bench trial and argued entrapment. The district court concluded that Garcia was not entrapped and found him guilty of all six counts.

The presentence investigation report (PSR) grouped the distribution counts and, based on the drug quantity, calculated a base offense level of 32 under § 2D1.1(c)(4) of the Sentencing Guidelines; it then added two levels for possession of a firearm, *id.* § 2D1.1(b)(1), for an adjusted offense level of 34. Next, the PSR selected a base offense level of 24 for the firearm offense because Garcia had at least two prior felony convictions for crimes of violence. *Id.* § 2K2.1(a)(2). With two levels added because the firearm was stolen, *id.* § 2K2.1(b)(4)(A), the total offense level for the firearm count was 26. But, on that count, the PSR also determined that Garcia qualified for the armed career criminal enhancement under 18 U.S.C. § 924(e), based on four prior state convictions for violent felony offenses: a 1980 conviction for aggravated battery and attempted armed robbery; a 1982 conviction for attempted murder and armed violence; a 1990 conviction for aggravated battery; and a 1993 conviction for aggravated battery with a firearm. Therefore, the PSR applied a mandatory minimum sentence of 15 years to the firearm count, *see id.*, and raised the criminal history category to VI, *see* U.S.S.G. § 4B1.4(c)(2). With a combined adjusted offense level of 35 under the grouping rules, § 3D1.4, the PSR arrived at a range of 292–365 months in prison. *Id.* § 5A.

At the sentencing hearing, the district court adopted the PSR's guidelines calculations and heard argument from both parties. The court then discussed the

sentencing factors under 18 U.S.C. § 3553(a). It considered mitigating factors, such as Garcia's advanced age, his pleasant demeanor, and his decision to contest only the legal issue of entrapment (saving resources and demonstrating acceptance of responsibility, for which he deserved "partial credit" despite not qualifying for a reduction under U.S.S.G. § 3E1.1). The court emphasized "glimmers of hope" that Garcia could change. But it also highlighted aggravating factors including the severity of the offense—selling a potent form of methamphetamine—and Garcia's record of violence. It noted that recorded conversations revealed Garcia's broad knowledge about drug trafficking and his willingness to commit crimes. The court ultimately imposed 210 months in prison (82 months below the low end of the range) and 5 years of supervised release.

Garcia appealed his conviction and sentence. First, he challenged the court's entrapment decision. Second, he argued that sentencing him as an armed career criminal was erroneous because the PSR did not cite the Illinois aggravated battery statute that gave rise to his predicate convictions. Finally, Garcia argued that his offense level was miscalculated. He pointed out, and the government conceded, that the PSR wrongly relied on his 1990 conviction to select a base offense level of 24 under § 2K2.1(a)(2), when it should have been 20 under § 2K2.1(a)(4).

This court affirmed Garcia's conviction, declining to reverse the decision on the entrapment defense. *Garcia I*, 37 F.4th at 1304. We also concluded that the district court did not err in applying the armed career criminal enhancement. *Id.* at 1305–06. Under Illinois law at the time of Garcia's convictions, aggravated battery with a firearm was categorically a violent felony, and so the absence of a statutory citation was immaterial. Therefore, we said, "Mr. Garcia has convictions for three qualifying felonies." *Id.*

But we agreed with the parties that, for the firearms conviction, Garcia's base offense level should have been 20 under § 2K2.1(a)(4)(A), resulting in an adjusted offense level of 22, not 26. *Id.* at 1306. Thus, his total combined offense level should have been 34, and his guidelines range should have been 262–327 months (not 292–365 months). Because the miscalculation led to a higher guidelines range, and the district court did not state that it would have imposed the same sentence regardless of the range, we remanded "for resentencing based on a corrected offense-level calculation." *Id.* at 1307.

On remand, Garcia objected to the armed career criminal designation, arguing for the first time that he has only two qualifying felonies: the 1980 aggravated battery conviction and the 1993 aggravated battery with a firearm. He contended that, for various reasons, no other conviction qualified as a matter of law. For instance, he

argued that some of his convictions did not require force as an element, that cases decided after his sentencing altered his designation, and that one of his convictions (his 1982 armed-violence conviction) was invalid altogether.

At the resentencing hearing, the district court rejected Garcia's arguments about his armed career criminal designation based, first, on the scope of our remand, and second, on the merits. The court determined that the scope of the remand was limited to resentencing based on the corrected offense-level calculation that this court set forth in *Garcia I*. Acknowledging the resulting range of 262–327 months, the court explained that it "can't go below the mandatory minimum" and imposed the minimum sentence of 180 months—82 months below the recalculated guidelines range based on the same § 3553(a) factors discussed at the original sentencing. The court doubted it could consider Garcia's new objections to his offender status, but it explained that, if it did, the sentence would be the same because the arguments lacked merit. The court concluded, as we had on appeal, that Garcia had at least three qualifying felony convictions under § 924(e): the two that Garcia had conceded and the 1982 armed-violence conviction, as to which any objection was waived. Garcia appeals.

In the *Anders* brief, counsel begins by considering whether it would be frivolous to argue that the scope of the remand allowed arguments about whether Garcia was an armed career criminal. We review the scope of remands de novo, *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002), and we agree with counsel that the court could not entertain new arguments about his armed career criminal designation. First, we instructed the district court to resentence Garcia "based on a corrected offense-level calculation" but ruled for the government on every remaining issue. Therefore, the only error to be addressed on remand was the miscalculated guidelines range. *See United States v. Hopper*, 11 F.4th 561, 570 (7th Cir. 2021) (remand limited to sentencing errors identified by the court regardless of other challenges on appeal). Further, "any issue conclusively decided by this court on the first appeal is not remanded," *Husband*, 312 F.3d at 251, and we decided that Garcia had "three qualifying felonies," *Garcia I*, 37 F.4th at 1305. Thus, that issue was not before the district court. *Hopper*, 11 F.4th at 570; *see also United States v. Barnes*, 660 F.3d 1000, 1006 (7th Cir. 2011). Arguing otherwise would be frivolous.

Additionally, as counsel points out, any issue that could have been raised at the original sentencing or in the first appeal, but was not, was waived and could not be raised at the second sentencing. *See Husband*, 312 F.3d at 250–51; *Barnes*, 660 F.3d at 1006. Garcia could have argued all along that various convictions did not have an

element of force or were invalid, but he did not. On remand, the government correctly asserted that the arguments were waived, and so the court could not consider them.

Counsel also opines that the district court's assessment of the merits, in the alternative, would not be subject to a nonfrivolous challenge. We agree. The district court considered Garcia's arguments and correctly explained that § 924(e) applied: Garcia waived his challenge to the 1982 armed-violence conviction as a qualifying offense, conceded that two other convictions were violent felonies, and thus had at least three predicate offenses. *See Garcia I*, 37 F.4th at 1297 (aggravated battery with a firearm is violent crime); *Hill v. Werlinger*, 695 F.3d 644, 650 (7th Cir. 2012) (Illinois aggravated battery is violent crime); *United States v. Fife*, 624 F.3d 441, 449 (7th Cir. 2010) (Illinois armed violence is violent crime).

Finally, counsel considers arguing that Garcia's new sentence was substantively unreasonable but properly concludes that any challenge would be frivolous. He received the statutory minimum sentence on the firearm count and received a below-guidelines sentence, which we would presume reasonable. *See United States v. Wehrle*, 985 F.3d 549, 557 (7th Cir. 2021). And nothing here undermines that presumption. The court incorporated its prior analysis of the § 3553(a) factors, which highlighted the seriousness of the offense, the gravity of his criminal history, and the need for specific deterrence. But based on Garcia's mitigating arguments (his older age, positive attitude, and acceptance of responsibility), the court again varied downward from the guidelines range by 82 months.

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