United States Court of Appeals
For the Eighth Circuit

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No. 20-1260
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United States of America

Plaintiff - Appellee

v.

Dayon J. Fips, also known as Dayon Ballard

Defendant - Appellant

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Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

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Submitted: December 14, 2020
Filed: January 25, 2021
[Unpublished]

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Before GRUENDER, ERICKSON, and KOBES, Circuit Judges.

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PER CURIAM.

In this direct appeal following entry of a guilty plea and judgment of conviction, Dayon Fips argues that he received constitutionally ineffective assistance from prior counsel, who represented him before the district court[1] for a

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[1]The Honorable John A. Ross, United States District Judge for the Eastern District of Missouri.

short time. With the assistance of different counsel before the district court, however, Fips entered into a plea agreement, which the district court accepted, that included a "Waiver of Appeal and Post-Conviction Rights" provision ("Waiver Provision"). We find this appeal waiver applicable and enforceable, so we dismiss this appeal.

We consider *de novo* "issues concerning the interpretation and enforcement of a plea agreement and the application of appeal waivers." *United States v. Dallman*, 886 F.3d 1277, 1280 (8th Cir. 2018). We will enforce an appeal waiver and dismiss the appeal if: (1) the appeal falls within the scope of the waiver; (2) the plea agreement and waiver were entered into knowingly and voluntarily; and (3) enforcing the waiver will not cause a miscarriage of justice. *Id.* at 1279-80; *United States v. Boroughf*, 649 F.3d 887, 890 (8th Cir. 2011). These conditions are satisfied here.

First, Fips's ineffective-assistance claim falls within the scope of his appeal waiver. "We interpret plea agreements according to their plain language," *United States v. Manzano-Huerta*, 809 F.3d 440, 444 (8th Cir. 2016), and "we apply general contract principles and try to discern the intent of the parties as expressed in the plain language of the agreement when viewed as a whole," *United States v. Lara-Ruiz*, 681 F.3d 914, 919 (8th Cir. 2012) (internal quotation marks omitted). In the direct-appeal subsection of the Waiver Provision, Fips waived his right to raise on direct appeal "all non jurisdictional . . . issues," and no exception was made in this subsection for ineffective-assistance claims. By comparison, in the *habeas corpus* subsection of the Waiver Provision, Fips waived "all rights to contest the conviction or sentence in any post-conviction proceeding . . . except for claims of . . . ineffective assistance of counsel." Particularly in light of the absence of a carveout for ineffective-assistance claims in the direct-appeal subsection despite the inclusion of such a carveout in the *habeas corpus* subsection, we have no trouble concluding that, by the expansive plain language of the direct-appeal subsection, Fips waived the right to bring an ineffective-assistance claim on direct appeal unless it somehow implicated a jurisdictional issue. Fips claims only that his prior counsel's ineffective

assistance compromised his ability to litigate the merits of his defense, which does not implicate a jurisdictional issue, so his ineffective-assistance claim is within the scope of the appeal waiver.

Second, Fips knowingly and voluntarily agreed to the appeal waiver. During the plea colloquy, the district court specifically discussed, and asked Fips under oath if he understood, various provisions of the plea agreement, including the Waiver Provision. Fips explicitly acknowledged he understood. The district court also asked Fips under oath if he entered into the plea agreement voluntarily, and Fips confirmed he did. "[Fips's] sworn testimony at the plea hearing shows that he entered into the plea agreement, and the appeal waiver, knowingly and voluntarily." *United States v. Sohl*, 632 F. App'x 302, 302 (8th Cir. 2016) (per curiam); *see also Boroughf*, 649 F.3d at 890 ("[O]ur review of the transcript from the change-of-plea hearing shows the plea agreement and appeal waiver were entered into knowingly and voluntarily.").

Third, enforcing the appeal waiver will not result in a miscarriage of justice, which is a "very narrow exception to the general rule that waivers of appellate rights are enforceable." *See United States v. Blue Coat*, 340 F.3d 539, 542 (8th Cir. 2003). "[O]rdinarily, we do not address claims of ineffective assistance of counsel on direct appeal" anyway, but instead we require such claims to be raised in postconviction proceedings. *United States v. Adkins*, 636 F.3d 432, 434 (8th Cir. 2011). The plea agreement leaves that option open to Fips, so he is not without recourse to pursue his ineffective-assistance claim if we follow our usual rule and refuse to consider this claim now. *See United States v. Vondal*, 394 F. App'x 336, 337 (8th Cir. 2010) (per curiam) (enforcing an appeal waiver and declining to consider an ineffective-assistance claim within the scope of that waiver because, *inter alia*, "ineffective-assistance claims are more properly raised in a proceeding under 28 U.S.C. § 2255, and [the defendant] reserved her right to do so" (citation omitted)).

Granted, we have suggested that, under this miscarriage-of-justice exception, we may consider on direct appeal an ineffective-assistance claim otherwise within the scope of an appeal waiver when the claim is that "the plea agreement itself is the result of advice outside the range of competence demanded of attorneys in criminal cases." *DeRoo v. United States*, 223 F.3d 919, 923-24 (8th Cir. 2000) (internal quotation marks omitted); *see also United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003) (en banc) (citing *DeRoo* as an example of when the miscarriage-of-justice exception may apply). But Fips's claim, based on conduct of prior counsel who did not represent him when he entered into the plea agreement, is not this kind of ineffective-assistance claim.

Therefore, we enforce Fips's appeal waiver and dismiss this appeal.

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