United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3006 **September Term, 2018**

FILED ON: MARCH 29, 2019

UNITED STATES OF AMERICA,
APPELLEE

v.

RANDY KOONTZ,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cr-00016-1)

Before: ROGERS and TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is hereby

ORDERED and **ADJUDGED** that the appeal be dismissed.

Appellant Randy Koontz pled guilty to one count of traveling to engage in illicit sexual conduct and one count of child pornography distribution. In the written plea agreement, Koontz

> agree[d] to waive the right to appeal the sentence in this case, including any term of imprisonment . . . and the manner in which the sentence was determined, except to the extent the Court sentences [Koontz] above the statutory maximum or guidelines range determined by the Court or [Koontz] claims that [he] received ineffective assistance of counsel, in which case [Koontz] would have the right to appeal the illegal sentence or above-guidelines sentence or raise on appeal a claim of ineffective assistance of counsel, but not to raise on appeal other issues regarding the sentencing.

Plea Agreement, *United States v. Koontz*, No. 1:16-cr-00016-EGS, ECF No. 14, at 9 (D.D.C. Mar. 2, 2016), Joint Appendix (J.A.) 69.

At Koontz's Rule 11 plea colloquy, the magistrate judge further explained the waiver's terms in an exchange reproduced below:

> THE COURT: Sir, your plea agreement also raised certain appellate rights as well. Do you understand that by entering into this plea agreement and entering your plea of guilty you will have waived or given up your right to an unfettered appeal, or to collaterally attack all or part of your sentence, except in the following ways: Okay? So these are the only parts of your appellate and collateral attack rights that will remain following your entry of a plea of guilty: You may challenge your sentence if the Court sentences you above the statutory maximum, or sentences you outside of the guideline range determined by the Court, or if you believe you have an ineffective assistance of counsel claim. But in all of those cases, if you were to appeal on those narrow issues, you will not be able to raise any other issues regarding your sentencing. Do you understand that?
>
> THE DEFENDANT: Yes.

Status Conference Tr., *United States v. Koontz*, No. 1:16-cr-00016-EGS, ECF No. 50, at 11:21–12:12 (D.D.C. Mar. 2, 2016), J.A. 39–40.

After Koontz accepted the plea agreement—including the waiver—the district court proceeded to sentencing. The statutory maximum prison term on the travel count was 30 years, 18 U.S.C. § 2423(b), and the maximum on the child pornography count (because Koontz has a prior conviction) was 40 years, *see* 18 U.S.C. § 2252(b)(1). The guidelines range, ultimately undisputed, called for 360 months to life. *See* Appellant's Br. 5 (noting the range "was mutually adjusted" to this figure). The court imposed the statutory maximum term on each count, to run concurrently, for an overall forty year (that is, 480 month) term.

Despite his waiver, Koontz claims in this appeal that the district court imposed an overlong sentence based on four failures: (1) failure to consider Koontz's history of abuse; (2) failure to consider whether the number of enhancements applied resulted in an unfair sentence; (3) failure to consider sentences in allegedly similar cases; and (4) failure to recognize Koontz's receptivity to treatment. Koontz's problem is that, by the terms of his waiver, he has given up the right to raise those issues. None claims ineffective assistance of counsel, that the sentence exceeds the statutory maximum (it does not), or that the sentence exceeds the "guidelines range determined by the Court" (again, it does not).

In his reply brief, Koontz invokes three possible exceptions to the waiver. None describes this case.

First, Koontz claims that he was misled by the written plea agreement's statement that he could appeal an "illegal sentence"; the magistrate judge's statement that he had no right to an "unfettered appeal" or a "collateral attack"; and a statement by the district judge at the end of the sentencing hearing that Koontz had "the right to challenge this sentence in the Court of Appeals." Appellant's Reply Br. 4–5 (internal quotation marks omitted). Koontz is correct that, generally speaking, when a district court has "mischaracterized the meaning of [a] waiver in a fundamental way," the agreement is void. *United States v. Godoy*, 706 F.3d 493, 495 (D.C. Cir. 2013). None of the statements referenced above, however, fits that bill.

Starting with the written plea agreement and the magistrate judge's statement, there is simply no risk of confusion in this case. True, we have held that it can be misleading to tell a defendant he has a right to appeal an "illegal" sentence, or something similarly vague, without explaining what the term means. *See, e.g.*, *United States v. Kaufman*, 791 F.3d 86, 88 (D.C. Cir. 2015) (waiver void where district court told defendant he could appeal "if he believed the sentence [wa]s illegal" or "if he did not 'like' the sentence" (internal quotation marks and alterations omitted)); *Godoy*, 706 F.3d at 495 (waiver void where district court told defendant he could appeal if "the Court ha[d] done *something illegal, such as* imposing a period of imprisonment longer than the statutory maximum") (internal quotation marks omitted). Here, however, there is a crucial difference: both the plea agreement and the magistrate judge marked the precise metes and bounds of Koontz's appellate rights. Koontz confirmed his understanding by signing the plea agreement and verbally acknowledging that he understood the magistrate judge's recital. Koontz's allusion to the collateral attack language is a red herring because this is not a collateral attack and the validity of Koontz's separate waiver of a collateral attack is not at issue.

As to the district court's statement at the end of the sentencing hearing, this court has squarely held that, to vitiate an otherwise valid waiver, the allegedly misleading statement has to come before the defendant enters his plea. *See United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009) ("[A] statement made at the sentencing hearing could not have informed (or misinformed) Guillen's decision to waive her right to appeal because that decision was made at the earlier plea hearing."). A statement like the one here, coming weeks later at the end of the sentencing hearing, cannot have undermined the knowing, intelligent, and voluntary character of the waiver. *See id.* (declining to void a waiver where the district court, "at the end of the sentencing hearing," said the defendant had "the right to take an appeal from this sentence" (internal quotation marks omitted)).

Second, in two sentences, Koontz invokes an exception for departures from "sentencing procedure" that result in "a miscarriage of justice." Appellant's Reply Br. 2 (first sentence, quoting *Guillen*, 561 F.3d at 531); *see also id.* at 5 (second sentence). The primary example we have offered is a situation where the district court "utterly fails to advert to the" section 3553(a) factors. *Guillen*, 561 F.3d at 531. The exception obviously does not apply. The district court did not "utterly fail to advert" to the relevant factors. At most, Koontz's objections claim that the court did not properly consider certain individual factors. That is not an "utter fail[ure]." *Cf. Guillen*, 561 F.3d at 532 (holding appellate waiver valid where defendant claimed that the

district court "failed to give sufficient weight to" several 3553(a) factors). On the contrary, the record reveals that the court considered many relevant factors, including the nature and seriousness of the offense, the failure of lesser sentences to stop Koontz from reoffending, the need to protect the public, Koontz's cooperation, and Koontz's character traits. Even if there were an utter failure, it did not result in a miscarriage of justice: Koontz's sentence falls well within the stipulated guidelines range and common sense confirms that this sentence, designed to incapacitate a repeat child sex offender, is appropriate.

Third, Koontz tries to raise the specter of ineffective assistance of counsel. But his argument is simply that the plea agreement was "one sided." Appellant's Reply Br. 2. That is not an argument about the quality of his counsel; it is merely dissatisfaction with the result. Without explaining how trial counsel's performance fell short, Koontz cannot invoke the ineffective assistance exception.

In sum, because Koontz executed a valid waiver of his appellate rights, we dismiss the appeal.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk