United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3034 **September Term, 2018**

FILED ON: APRIL 3, 2019

UNITED STATES OF AMERICA,
APPELLEE

v.

LONNELL G. GLOVER
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cr-00153)

Before: ROGERS and WILKINS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record from the District Court and on the briefs of the parties and oral arguments of counsel. 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

ORDERED and **ADJUDGED** that the District Court's judgment of May 12, 2017, following its acceptance of Appellant's plea of guilty, is **AFFIRMED**.

I.

In 2008, after a jury trial in the United States District Court for the District of Columbia, Appellant was convicted of conspiracy to distribute and possess with intent to distribute drugs. **S.A. 15-16**. The District Court imposed a sentence of life imprisonment. **S.A. 28-29**. On appeal, however, this Court reversed Appellant's conviction. *United States v. Glover*, No. 10-3075 (D.C. Cir. July 29, 2014). Appellant's new trial was set for February 2017. **A. 125**. But before it he entered into a written plea agreement with Appellee pursuant to Fed. R. Crim. P. 11(c)(1)(C). **A. 104-16**. Under its terms, he agreed to a sentence of twenty-one years of incarceration. **A. 105.** Appellant and his counsel both signed the agreement, which included a waiver of appeal of the sentence. **A. 111**; **A. 116**. On February 13, 2017, after a hearing, the District Court accepted

Appellant's plea. **A. 101**. On May 12, 2017, the District Court entered judgment. **A. 160**. On May 23, 2017, Appellant filed notice of appeal. **A. 167.**

Appellant seeks vacatur of the District Court's judgment on the ground that his plea was invalid. Appellant advances four principal arguments: (1) he did not knowingly and intelligently enter his plea because he did not understand the appeal waiver; (2) his plea was not voluntary because defense counsel and the District Court coerced him into entering it; (3) the District Court, in contravention of Rule 11, failed at the hearing to address several aspects of his plea agreement; and (4) he was not afforded effective assistance of counsel because defense counsel did not ensure that he understood the appeal waiver. None of the errors Appellant alleges was preserved, and none of his arguments has merit.

II.

In assessing whether a defendant knowingly, intelligently, and voluntarily waived the right to appeal, we analyze the entire record. *See In re Sealed Case*, 702 F.3d 59, 63 (D.C. Cir. 2012); *United States v. Guillen*, 561 F.3d 527, 529–30 (D.C. Cir. 2009). Where, as here, a defendant seeks reversal of a conviction after a guilty plea on the ground of plain error under Rule 11, he "must show a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

III.

Appellant argues first that his plea was not knowing and intelligent because the District Court failed to satisfy its obligation under Rule 11(b)(1)(N) to determine that he understood the appeal waiver. But this is not so. At the plea hearing, the District Court addressed this issue on three occasions. A. 89-90; A. 92; A. 100-01. Moreover, even assuming the District Court erred in this regard, which it did not, Appellant has not shown a reasonable probability that but for this error he would not have entered the plea. Finally, Appellant is not appealing his sentence, thus even if we voided the appeal waiver there would be no practical effect because, given that the alleged error would not warrant vacatur of the entire plea, we would merely sever the waiver and enforce the remainder of the agreement. *See Lee* 888 F.3d at 507 n.2 (noting that where an appeal waiver is not knowingly or intelligently entered, it is within the Court's discretion to decide whether to void it while maintaining the plea or vacate the agreement altogether).

Next, Appellant argues that he was coerced into entering the plea because defense counsel refused to file a motion for grand jury minutes, and the District Court, in contravention of Rule 11(b)(2), failed to sufficiently inquire as to whether his plea was voluntary. In addition, Appellant argues that the District Court coerced him into entering the plea because, at one point in the hearing, it stated to Appellant that he "*would* get a life sentence without parole" if he were convicted after a trial. A. 79 (emphasis added). The record clearly demonstrates that the District Court sufficiently inquired as to the voluntariness of Appellant's plea. Indeed, the District Court provided Appellant ample opportunity to discuss his concern as to the motion for grand jury minutes. *See* A. 77-79. Moreover, defense counsel's choice not to file this motion is simply not

the type of conduct that renders a plea legally involuntary. *See United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992). Finally, it is true that the District Court's statement that Appellant, if convicted after a trial, *would* receive a life sentence was ill-advised. This is because it could reasonably be interpreted as having pressured Appellant to accept the plea and thus approaches improper judicial participation in the plea process. But at other points in the hearing, the District Court described a life sentence as an "option," "possible," or as a potential consequence. A. 82; A. 85; A. 101. Moreover, when defendant was initially convicted after trial, the District Court did sentence him to life without parole. S.A. 29. In this context, therefore, the District Court's statement appears to be less of a threat and more of a description of the likely consequence of conviction after a second trial. Finally, Appellant has not demonstrated that but for the District Court's statement he would not have entered the plea. *See United States v. Davila*, 569 U.S. 597, 609–10 (2013) (holding that improper judicial involvement in plea discussion does not warrant automatic vacatur, and, where not objected to, is reviewed for plain error).

Third, Appellant alleges that the District Court committed eight separate technical Rule 11 violations. We do not enumerate them here because the record clearly demonstrates that the District Court did not commit any of these alleged errors. Moreover, Appellant failed to argue, let alone demonstrate, that but for these errors he would not have entered the plea.

Finally, Appellant argues that he received ineffective assistance of counsel because defense counsel did not ensure that he understood the appeal waiver. When a colorable claim for ineffective assistance of counsel is raised for the first time on direct review, our ordinary practice is to remand for an evidentiary hearing, *see, e.g., United States v. Laureys*, 653 F.3d 27, 34 (D.C. Cir. 2011), except where, as here, "the trial record alone conclusively shows that the defendant . . . is not entitled to relief," *United States v. Harris*, 491 F.3d 440, 443 (D.C. Cir. 2007) (internal citation and quotation marks omitted). For reasons already explained, we affirm the District Court's finding that Appellant understood the appeal waiver. Accordingly, Appellant's claim that defense counsel was ineffective because he did not ensure Appellant understood the appeal waiver is plainly insupportable, and we reject it.[1]

Accordingly, we affirm the District Court's judgment of May 12, 2017.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any

[1] We note that this Circuit has yet to pass on the question of whether a petitioner who raises an ineffective assistance claim that a court of appeals decides on direct review is procedurally barred from bringing a subsequent ineffective assistance claim in a 28 U.S.C. § 2255 proceeding. Our sister circuits are split as to this question. *Compare Yick Man Mui v. United States,* 614 F.3d 50, 57 (2d. Cir. 2010) (ineffective assistance claim resolved on direct review does not bar assertion of subsequent ineffective assistance claim, based on different grounds, in § 2255 proceeding), *and United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (same), *with Peoples v. United States*, 403 F.3d 844, at 847-48 (7th Cir. 2005) (ineffective assistance claim resolved on direct review bars assertion of subsequent ineffective assistance claim even where subsequent claim alleges different instances of ineffectiveness). We express no opinion as to the propriety or impropriety of any such future claim by Appellant, if ever brought.

timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk