United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3022 **September Term, 2019**

FILED ON: OCTOBER 29, 2019

UNITED STATES OF AMERICA,
APPELLEE

v.

AMBER R. CROWDER, ALSO KNOWN AS AMBER HINES,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cr-00186-1)

Before: TATEL and GRIFFITH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia and the briefs of the parties. 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 set out below, it is

ORDERED and **ADJUDGED** that this appeal is **DISMISSED**.

Amber R. Crowder, also known as Amber Hines, pleaded guilty to one count of mail fraud in November 2016. Crowder worked for District of Columbia Public Schools (DCPS) as a program manager in the Office of Special Education (OSE). She exploited her position to secure DCPS payments for businesses organized by close friend Shauna Marie Brumfield.

Most relevant here, Crowder was responsible for choosing a private contractor to provide OSE with administrative assistants. She told OSE that A Simple Solution, LLC—a firm Brumfield would soon organize—was the best option for the contract. She hid relevant information, including her ownership stake in the company and multiple vendor quotes that fell *below* A Simple Solution's $298,000 quote. OSE awarded the contract to A Simple Solution, and DCPS paid the firm $222,000 over the next two years. Brumfield transferred a portion of those earnings to Crowder's personal bank account.

A grand jury indicted Crowder on thirteen counts. Crowder agreed to plead guilty to one count of mail fraud in violation of 18 U.S.C. § 1341. The plea agreement's estimated Sentencing Guidelines calculation featured a ten-level enhancement based on a loss amount of $179,565. It also contained a broad waiver of appeal rights:

> Your client … agrees to waive the right to appeal the sentence in this case, … and the manner in which the sentence was determined, except to the extent the Court sentences your client above the statutory maximum or guidelines range determined by the Court. … Realizing the uncertainty in estimating what sentence the Court ultimately will impose, your client knowingly and willingly waives [her] right to appeal the sentence, to the extent noted above, in exchange for the concessions made by the Government in this Agreement.

The district judge read aloud this paragraph to Crowder at her plea colloquy, and Crowder said she understood it.

At sentencing, the parties debated the proper loss-amount calculation in fraud cases, like this one, in which the defrauding party provides value to its victim. The judge calculated a Guidelines range of eighteen to twenty-four months based on a loss figure lower than the figure used in the plea agreement. Even so, the judge determined that the enhancement for the loss amount triggered an excessive Guidelines range and sentenced Crowder to only thirteen months.

Crowder appeals. She argues that the district judge's loss-amount calculations were clearly erroneous and inconsistent with the relevant Sentencing Guidelines. She must first demonstrate, however, that we should decline to enforce her appeal waiver. We review de novo the validity and scope of such waivers. *United States v. Hunt*, 843 F.3d 1022, 1027 (D.C. Cir. 2016).

First, Crowder expresses surprise at the district court's loss-amount calculation and the resulting Guidelines range and argues that her waiver was not "knowing, intelligent, and voluntary," as our cases require. *See, e.g.*, *United States v. Adams*, 780 F.3d 1182, 1183 (D.C. Cir. 2015) (internal quotation marks omitted). But "[a]n anticipatory waiver—that is, one made before the defendant knows what the sentence will be—is nonetheless a knowing waiver if the defendant is aware of and understands the risks involved in his decision." *United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009). And the record shows that Crowder—who has a bachelor's degree and worked for years in the District of Columbia school system—repeatedly affirmed her comprehension of the plea agreement and its appeal waiver.

Crowder next argues that the miscalculation of her Guidelines range was so serious an error that we should refuse to enforce the waiver. We will not enforce an appeal waiver when "the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice." *Id.* at 531. For instance, if a district court utterly fails to consider the 18 U.S.C. § 3553(a) factors, imposes a sentence in excess of the statutory maximum, or sentences the defendant based on impermissible factors like race or religion, we will hear an appeal notwithstanding an anticipatory waiver. *Id.*

The error Crowder alleges is not a "miscarriage of justice." As we've explained before, "an allegation that the sentencing judge misapplied the Sentencing Guidelines … is not subject to appeal in the face of a valid appeal waiver." *Adams*, 780 F.3d at 1184 (quoting *United States v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003) (en banc)). Other circuits agree. *See, e.g.*, *United States v. Buissereth*, 638 F.3d 114, 117 (2d Cir. 2011) ("While [the] appeal waiver did not relieve the District Court of its responsibility to follow the procedural requirements related to the imposition of a sentence, [it] does preclude this Court from correcting the errors alleged to have occurred below."); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992). Like Crowder, the defendant in *United States v. Feichtinger* argued that the court must hear "an appeal based on an incorrect application of the [G]uidelines" notwithstanding an anticipatory waiver. 105 F.3d 1188, 1190 (7th Cir. 1997). But because "[m]ost sentencing appeals involve what are alleged to be incorrect applications of the [G]uidelines," such an exception would swallow the rule. *Id.* ("If Feichtinger is right, what, we wonder, does a waiver waive?"). While our approach may seem strict, it's worth noting that, "[u]nlike a defendant who is sentenced after trial, a defendant who enters a plea bargain has some control over the terms of [her] sentence." *United States v. Bolinger*, 940 F.2d 478, 480 n.1 (9th Cir. 1991). She may condition her appeal waiver on a maximum sentence or decline to waive her appeal rights at all. Crowder chose not to take those routes, and her broad waiver presumably "improve[d] [her] bargaining position" vis-à-vis the government. *Guillen*, 561 F.3d at 530.

Crowder relies on *Molina-Martinez v. United States*, which labeled the miscalculation of a Guidelines range a "significant procedural error." 136 S. Ct. 1338, 1346 (2016) (internal quotation marks omitted). But *Molina-Martinez* did not address the enforceability of appeal waivers, much less establish a categorical rule exempting Guidelines miscalculations from voluntary waiver. It held that a Guidelines error will, "in most cases," satisfy the prejudice prong of plain-error review. *Id.* In other words, an incorrect Guidelines range presumably affects a defendant's sentence. That fact, standing alone, does not allow us to look past a valid appeal waiver. If it did, appeal waivers would apply only to harmless sentencing errors—a proposition that no court has embraced.

Enforcing this valid waiver would not license a miscarriage of justice. Therefore, we must enforce the waiver if it covers Crowder's appeal. It does. The only potentially relevant exception in the waiver provision allows Crowder to appeal a sentence that exceeds the "[G]uidelines range determined by the Court." Multiple circuits have held that an exception phrased in this manner "defers to the district court's discretion in calculating [the] Guidelines range and permits [the defendant] to challenge the resulting sentence only if it exceeds the top end of the range *the court calculates*." *United States v. Beals*, 698 F.3d 248, 255 (6th Cir. 2012) (emphasis added); *see also United States v. Corso*, 549 F.3d 921, 924, 928 (3d Cir. 2008); *United States v. Chandler*, 534 F.3d 45, 49 (1st Cir. 2008); *United States v. Rosa*, 123 F.3d 94, 99-102 (2d Cir. 1997). Crowder urges us to disregard these cases because they were decided prior to *Molina-Martinez*, but nothing in that decision affects our interpretation of Crowder's appeal waiver.

Finally, Crowder contends that our decision in *United States v. Flores*, 912 F.3d 613 (D.C. Cir. 2019), forecloses the government's waiver argument. There we explained that "[w]hile parties may enter into stipulations of fact," they "may not stipulate to the legal conclusions to be reached

by the court." *Id.* at 619 (internal quotation marks omitted). *Flores* is not relevant here; a defendant who knowingly waives her appeal rights has not stipulated to any legal conclusion.

For the foregoing reasons, we **DISMISS** this appeal.

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 timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk