

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-16377
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
March 11, 2005
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D. C. Docket No. 03-00093-CR-1-CG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECIL RAY FRYE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(March 11, 2005)

Before CARNES, MARCUS and PRYOR, Circuit Judges.

PER CURIAM:

We withdraw our previous opinion, which was published at United States v.

Frye, ___ F.3d ___, 2005 WL 315563 (11th Cir. Feb. 10, 2005), and substitute the following judgment and opinion. We now dismiss the appeal of the alleged sentencing errors based on the appeal waiver in the plea agreement.

This appeal presents four issues, the second of which is an issue of first impression in the Eleventh Circuit: (1) whether Cecil Ray Frye Jr.'s guilty plea to one count of conspiracy to manufacture methamphetamine under 21 U.S.C. section 846 and two counts of using or carrying a firearm in connection with a drug felony under 18 U.S.C. section 924(c) was knowing and voluntary; (2) whether Frye was properly convicted of the firearms charges under section 924(c) when he was not convicted of the predicate offenses; (3) whether there was an insufficient factual basis to support the firearms convictions; and (4) whether Frye's sentence violated United States v. Booker, 125 S. Ct. 738 (2005). We conclude that (1) Frye's plea was knowing and voluntary, (2) a conviction on the predicate offense is not necessary for a conviction under section 924(c), (3) the firearms convictions are supported by the record, and (4) Frye waived his right to appeal his sentence in his plea agreement with the government. We, therefore, affirm the judgment of conviction and dismiss the appeal of Frye's sentence.

I. BACKGROUND

On May 29, 2003, Frye was charged by superseding indictment with seven

counts related to drug trafficking and firearms possession, four counts of which are relevant to this appeal. Count One of the indictment charged Frye with conspiracy to manufacture more than 500 grams of methamphetamine. Count Four charged Frye with an attempt to manufacture more than 50 grams of methamphetamine. Count Five charged that during and in relation to the offense charged in Count Four, Frye knowingly used, carried, and possessed a firearm, and Count Six charged that during and in relation to the offense of attempting to manufacture methamphetamine, Frye knowingly used, carried, and possessed a firearm. Count Six did not reference any other count in the indictment.

Frye pleaded guilty to Counts One, Five, and Six, and the government dismissed the remaining charges. The plea agreement contained a limited waiver of the right to appeal the sentence with three exceptions:

20. The defendant acknowledges that he is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal his sentence. In exchange for the recommendations made by the United States in this agreement, the defendant knowingly waives the right to appeal any sentence imposed in the instant case, except for those rights specifically reserved in paragraph 22 below.

....

22. The defendant reserves the right to contest in any appeal or post-conviction proceeding any of the following:

- a. Any punishment imposed in excess of the statutory

- maximum;
- b. Any punishment that constitutes an upward departure from the guidelines range; or
- c. A claim of ineffective assistance of counsel.

Before accepting the plea, the district court extensively questioned Frye in a Rule 11 colloquy concerning his knowledge of the charges against him, the rights he possessed as a criminal defendant, including the right to a jury trial, and the consequences of pleading guilty, including the waiver of the right to appeal. Frye then pleaded guilty. The district court determined that the plea was voluntary and knowing, and it accepted the plea.

After the sentencing hearing, at which Frye stated that he had no objections to the presentence investigation report that would affect the guideline calculations, the district court sentenced Frye to a total term of 548 months' imprisonment and five years' supervised release. Frye filed a timely notice of appeal.

II. STANDARD OF REVIEW

The voluntariness of a guilty plea is reviewed de novo. United States v. Brown, 117 F.3d 471, 474 (11th Cir. 1997). We review issues of statutory construction de novo. United States v. Mikell, 102 F.3d 470, 474 (11th Cir. 1996). “[W]e will not overturn a judge’s decision to accept a guilty plea unless there has been an abuse of discretion.” United States v. Owen, 858 F.2d 1514, 1516 (11th

Cir. 1988).

III. DISCUSSION

“A plea of guilty cannot support a judgment of guilt unless it was voluntary in a constitutional sense.” Brown, 117 F.3d at 476. A plea is voluntary in a constitutional sense if the defendant receives real notice of the charge against him and understands the nature of the constitutional protections he is waiving. Id. Frye contests the knowing and voluntary nature of his guilty plea. We first, therefore, determine whether Frye knowingly and voluntarily pleaded guilty. We then address Frye’s remaining arguments on appeal.

To circumvent the detailed Rule 11 colloquy, Frye contends that the criminal proceeding as a whole undermined the knowing and voluntary nature of his plea. Specifically, Frye argues that the district court neglected to inquire adequately concerning the motion to withdraw due to irreconcilable differences that Frye’s counsel had filed the morning of the plea hearing. This argument fails.

To determine that a guilty plea is knowing and voluntary the district court must establish that “(1) the guilty plea [is] free from coercion; (2) the defendant . . . understand[s] the nature of the charges; and (3) the defendant . . . know[s] and understand[s] the consequences of his guilty plea.” United States v. Mosely, 173 F.3d 1318, 1322 (11th Cir. 1999). Here the district court explicitly asked Frye

about the motion to withdraw, and Frye responded that he was satisfied with his representation and that the difficulty had passed. The district court further discussed with Frye in detail the plea agreement, elements of each offense, burden of proof, and consequences of pleading guilty. Frye stated under oath that he was not coerced into pleading guilty, that he understood the charges and consequences of pleading guilty, and that he pleaded guilty. The record shows that Frye understood the charges against him and his options, and that he voluntarily and knowingly pleaded guilty.

Second, Frye argues that he could not be convicted of using or carrying a firearm in connection with a drug trafficking crime under 18 U.S.C. section 924(c) because he was not convicted of the predicate drug offense for Count Five or charged with the predicate offense for Count Six. Whether a defendant can be found guilty under section 924(c) when he was not convicted of the predicate offense or separately charged with the predicate offense is an issue of first impression in this circuit. We hold that conviction under section 924(c) does not require either that the defendant be convicted of or charged with the predicate offense.

Section 924(c)(1)(A) makes it a crime for any person to use or carry a firearm “during and in relation to any . . . drug trafficking crime . . . for which the

person may be prosecuted in a court of the United States” 18 U.S.C. § 924(c)(1)(A). A “drug trafficking crime” includes any crime punishable under the Controlled Substances Act, 21 U.S.C. section 801, et seq. 18 U.S.C. § 924(c)(2). By its plain language, section 924 does not require that a defendant be convicted of, or even charged with, the predicate offense to be found guilty of using or carrying a firearm in relation to the predicate offense. Section 924(c) requires only that the drug trafficking crime be one that “may be prosecuted.” Frye, therefore, was properly convicted of violating section 924(c)(a) despite that he was not convicted of the predicate offense on Count Five or charged with a predicate offense on Count Six.

The other circuits that have addressed this issue have reached the same conclusion we reach today. United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); United States v. Lake, 150 F.3d 269, 274-75 (3d Cir. 1998); United States v. Nelson, 27 F.3d 199, 200 (6th Cir. 1994); United States v. Myers, 993 F.2d 171, 172 (8th Cir. 1993); United States v. Hill, 971 F.2d 1461, 1467 (10th Cir. 1992); United States v. Munoz-Fabela, 896 F.2d 908, 910-11 (5th Cir. 1990); United States v. Hunter, 887 F.2d 1001, 1003 (9th Cir. 1989). In Munoz-Fabela, the Fifth Circuit held that “only the fact of the offense, and not a conviction, . . . is needed to establish the required predicate,” and concluded that the charge of possession of

cocaine with intent to distribute, which was contained in the first indictment but of which Munoz was not convicted, was a sufficient “drug trafficking offense” within the meaning of section 924(c). 896 F.2d at 910-11. Similarly, in Hunter, the Ninth Circuit held that “a defendant charged with violating section 924(c)(1) must be proven to have committed the underlying crime, but nothing in the statute or the legislative history suggests he must be separately charged with and convicted of the underlying offense.” 887 F.2d at 1003. We agree with their reading of the plain language of section 924.

Third, Frye argues that there was an insufficient factual basis in the record to support the convictions on Counts Five and Six. Rule 11(b)(3) requires that, before accepting a guilty plea, a district court “must determine that there is a factual basis for the plea.” Fed. R. Crim. P. 11(b)(3). “The purpose of this requirement is to protect a defendant who mistakenly believes that his conduct constitutes the criminal offense to which he is pleading.” United States v. Lopez, 907 F.2d 1096, 1100 (11th Cir. 1990) (citing McCarthy v. United States, 394 U.S. 459, 467, 89 S. Ct. 1166, 1171 (1969)). “The standard for evaluating challenges to the factual basis for a guilty plea is whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty.” Id. The facts presented by the parties to enable the trial court to perform its role, under

Rule 11(b)(3), were contained in nine pages of admissions by Frye, which the parties entitled the “factual resume,” so we must evaluate Frye’s argument against his admissions in that factual resume.

To convict a defendant under section 924(c)(1), the government must demonstrate that the defendant used or carried a firearm, during and in relation to a drug trafficking crime. Smith v. United States, 508 U.S. 223, 227-28, 113 S. Ct. 2050, 2053 (1993). A defendant carries a firearm if it is carried directly on his person or carried in his vehicle. Muscarello v. United States, 524 U.S. 125, 131, 118 S. Ct. 1911, 1916 (1998). To prove the “in relation to” requirement, the government must demonstrate that the firearm had “some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.” Smith, 508 U.S. at 238, 113 S. Ct. at 2058-59. “The gun at least must facilitate, or have the potential of facilitating, the drug trafficking offense.” Id. at 238, 113 S. Ct. at 2059 (citations and internal punctuation omitted).

The factual resume provides sufficient facts for the district court reasonably to have determined that the defendant was guilty. The resume states that, during the attempt to manufacture methamphetamine at issue in Count Five, Frye carried a Colt revolver in his left jacket pocket while transporting chemicals and equipment.

The resume also states that Frye carried a Ruger 9 mm semi-automatic pistol during the attempted theft of anhydrous ammonia for making methamphetamine at issue in Count Six because the Ruger was found in plain view in the vehicle with Frye. A reasonable factfinder could have concluded that in each case the gun facilitated or had the potential to facilitate the offense. The district court did not abuse its discretion when it accepted the plea.

Finally, Frye argues that the district court erroneously enhanced his sentence using mandatory sentencing guidelines, but the government correctly responds that this argument should be dismissed because it is within the scope of the sentence appeal waiver. In the plea agreement, Frye waived his right to appeal his sentence on any ground other than that (1) the sentence was imposed in excess of the statutory maximum; (2) the sentence constitutes an upward departure from the guideline range; or (3) he was deprived of effective assistance of counsel. Frye's appeal does not fall within any of the exceptions to his appeal waiver. "An appeal waiver includes the waiver of the right to appeal difficult or debatable legal issues or even blatant error . . . Specifically, 'the right to appeal a sentence based on Apprendi/ Booker grounds can be waived in a plea agreement. Broad waiver language covers those grounds of appeal.'" United States v. Grinard-Henry, __ F.3d __, 2005 WL 327265, *2 (11th Cir. Feb. 11, 2005) (citing United States v. Rubbo, __

F.3d __, 2005 WL 120507, *5 (11th Cir. Jan. 21, 2005) (internal citation omitted)).

Frye's only response to the argument of the government that he waived his right to appeal is that the plea agreement was not knowing and voluntary. As discussed earlier, we reject Frye's argument that his plea agreement was not knowing and voluntary. Frye's appeal of his sentence, therefore, is barred by the knowing and voluntary appeal waiver contained in his plea agreement. See Rubbo, 396 F.3d 1330.

IV. CONCLUSION

Because Frye knowingly and voluntarily pleaded guilty, the district court did not abuse its discretion when it accepted the guilty plea. We dismiss Frye's appeal of his sentence, because Frye waived his right to appeal that issue.

AFFIRMED in part and DISMISSED in part.