[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13061
Non-Argument Calendar

D.C. Docket Nos. 4:16-cv-00249-LGW-GRS,
4:13-cr-00004-LGW-GS-3

JUAN CARLOS PENA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(September 20, 2018)

Before TJOFLAT, ROSENBAUM and JULIE CARNES, Circuit Judges.

PER CURIAM:

Juan Carlos Pena, a federal prisoner proceeding *pro se*, appeals the denial of his 28 U.S.C. § 2255 motion to vacate his conviction and sentence. A judge of this

Court granted Pena a certificate of appealability on the sole issue of "[w]hether, in light of this Court's decision in *Burgess v. United States*, [874 F.3d 1292 (11th Cir. 2017)], the District Court erred by dismissing Mr. Pena's 28 U.S.C. § 2255 motion to vacate by *sua sponte* applying the collateral-attack waiver in his plea agreement."

In Pena's opening brief,[1] he primarily argues the collateral-attack waiver does not bar the claim that his plea was not knowing and voluntary because it was the result of ineffective assistance of counsel. Thus, Pena concludes, the District Court erred by relying on his plea agreement's collateral-attack waiver. But Pena makes no arguments to support the claim that the District Court erred by applying the collateral-attack waiver on its own. As such, Pena abandoned the only issue specified in the certificate of appealability.

I.

Pena pled guilty to conspiring to engage in sex trafficking. In his plea agreement, Pena "voluntarily and expressly waive[d] the right to appeal the conviction and sentence and the right to collaterally attack the conviction and sentence in any post-conviction proceeding, including a § 2255 proceeding."

[1] Pena did not file a reply brief.

More than two and a half years after he was sentenced, Pena filed a § 2255 motion to vacate.[2] Pena claims his attorney provided ineffective assistance of counsel, and, as a result, his plea was neither knowing nor voluntary. Without requiring the Government to respond, the Magistrate Judge issued a report and recommendation. The Magistrate Judge noted that "Pena waived [as part of his plea agreement] his direct and collateral appeal rights except on grounds here not applicable." But the Magistrate Judge did not rely on this waiver in recommending the motion be denied. Instead, the Magistrate Judge found that the § 2255 motion was untimely because Pena failed to file it within one year of his conviction.[3] The Magistrate Judge also found that no certificate of appealability should issue.

Relying on Pena's testimony at the plea hearing, the District Court found that Pena's plea was in fact knowing and voluntary, so that argument failed on the

[2] Pena actually styled the motion as a "Motion for Leave to Amend the Motion to Vacate, Set Aside or Correct a Sentence and Motion for Appointment of Counsel." He was trying to amend a "Motion to Dismiss Indictment Conviction and Sentence for [] Exclusive Legislative and S[u]bject Matter Jurisdiction P[u]rsuant to Rule 12(b)(1) Federal Rules of Civil Procedure[]" that he had previously filed in his underlying criminal case. The Magistrate Judge warned Pena that the motion to dismiss would be recharacterized as a § 2255 motion. The Magistrate Judge then advised Pena that he may "(1) have his motion ruled upon as filed, but treated as a § 2255 motion; (2) amend [his motion] or replace it outright to include any other § 2255 claims; or (3) withdraw [his motion] entirely." The Magistrate Judge also warned that if Pena failed to "affirm, supplement, replace, or withdraw his" motion to dismiss, the Magistrate Judge would advise the District Court to dismiss the motion without prejudice for failure to obey a court order. Pena filed objections to the Magistrate Judge's report and recommendation, but he did not say whether he wanted to proceed with a § 2255 motion or withdraw the motion. To date, the District Court has not acted on the motion or the report and recommendation.

[3] The Magistrate Judge also concluded that Pena's previous "Motion to Dismiss" was still a motion to dismiss because Pena never responded to the Magistrate Judge's recharacterization warning. Thus, the Magistrate Judge concluded the "Motion for Leave to Amend the Motion to Vacate, Set Aside or Correct a Sentence and Motion for Appointment of Counsel" was the one and only § 2255 motion Pena had filed. As such, it was untimely.

merits.[4] As such, the District Court held that Pena's "plea-agreement collateral review waiver continues to do its work to bar his § 2255 motion." The District Court denied the motion and found that no certificate of appealability should issue.

Pena appealed, and a judge of this Court granted him a certificate of appealability on the sole issue of "[w]hether, in light of this Court's decision in *Burgess v. United States*, [874 F.3d 1292 (11th Cir. 2017)], the District Court erred by dismissing Mr. Pena's 28 U.S.C. § 2255 motion to vacate by *sua sponte* applying the collateral-attack waiver in his plea agreement."

Like Pena, Burgess had pled guilty to a crime and waived his right to appeal. *Burgess*, 874 F.3d at 1293. Later, Burgess filed a § 2255 motion. *Id.* at 1294. The District Court ordered the Government to respond and explicitly inquired about several affirmative defenses. *Id.* at 1294–95. The Government raised no affirmative defenses in its response and instead argued the merits of Burgess's motion. *Id.* at 1295. The District Court later denied the motion. *Id.* In doing so, the Court denied one claim "based solely on the collateral-action waiver in Burgess's plea agreement." *Id.* The District Court did not give the parties notice that it was considering relying on the waiver, and it did not ask the Government whether it wanted to invoke the waiver. *Id.* A judge of this Court granted a

[4] The District Court also found that Pena's unintelligent-plea claim is procedurally barred because Pena could have raised the claim on direct appeal but did not.

certificate of appealability on the issue of whether the district court erred by *sua sponte* applying Burgess's sentence-appeal waiver. *Id.*

This Court found that the District Court did err. *Id.* at 1301. The Court explained that, "while a district court may not invoke a collateral-action waiver in a plea agreement, in a case where such a waiver exists, the court may ask the government to state whether it intends to rely on the waiver." *Id.*

So, the issue we are reviewing here is whether the District Court invoked the collateral-action waiver in Pena's plea agreement when it denied his § 2255 motion. We are not reviewing the merits of Pena's ineffective assistance of counsel claim or whether the waiver in his plea agreement bars that type of claim.

II.

When reviewing the denial of a § 2255 motion, our review is limited to the issues specified in the certificate of appealability. *Murray v. United States*, 145 F.3d 1249, 1250–51 (11th Cir. 1998); *see also* 28 U.S.C. § 2253(c)(3) (certificate of appealability "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)").

"We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). Indeed, a party abandons an issue by "simply

stating that an issue exists, without further argument or discussion." *Singh v. U.S. Attorney Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009).

III.

Pena's brief mentions the District Court's *sua sponte* application of the collateral-attack waiver just three times.

First, under the heading "Jurisdiction," Pena explains that this Court granted his certificate of appealability on one issue: whether the District Court erred by *sua sponte* applying the collateral-attack waiver in his plea agreement. This is background information, and Pena makes no arguments under the "Jurisdiction" heading.

Second, Pena correctly identifies the issue—"whether the district court erred by dismissing Pena's 28 U.S.C. § 2255 motion to vacate [by] sua sponte applying the collateral attack waiver per the plea agreement"—under the heading "Statement of Issues." He cites five cases,[5] but all of those cases deal with either knowing and voluntary pleas or the relationship between guilty pleas and ineffective assistance of counsel claims. Pena does not cite *Burgess* itself, and none of the cases he cites deal with *Burgess*-related issues. Nor does Pena make any arguments in this section; he simply states the issue and cites the unrelated cases.

[5] *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468–69 (1970); *Mabry v. Johnson*, 467 U.S. 504, 508, 104 S. Ct. 2543, 2546–47 (1984); *Patel v. United States*, 252 F. App'x 970, 975 (11th Cir. 2007); *Arrelo v. Sec'y, Fla. Dep't of Corrs.*, 788 F.3d 1345 (11th Cir. 2015); *Agnew v. Florida*, No. 16-14451-CIV-MARTINEZ/LYNCH, 2017 U.S. Dist. LEXIS 14809 (S.D. Fla. Feb. 1, 2017).

Third, under the heading "Summary of the Argument," Pena writes, "The District court err[ed] in adopting the Report [and] Recommendation by the Magistrate Judge to dismiss[] Pena's 28 U.S.C. § 2255 Motion to Vacate on its own by applying the collateral attack waiver as outlined in his plea agreement." Pena then argues that an ineffective assistance of counsel claim based on pre-plea conduct cannot be waived. He again cites two cases that he cited in the "Statement of the Issues" section.

In the argument section of his brief, Pena fails to mention the District Court's *sua sponte* application of the waiver. Instead, he argues (1) the merits of his underlying ineffective assistance of counsel claim and (2) a plea agreement waiver does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims that challenge the validity of the plea itself.

We find that Pena waived the issue of whether the District Court erred by *sua sponte* applying the waiver. He makes just three passing references to the issue, and he offers no supporting arguments or related authority. *Sapuppo*, 739 F.3d at 681 ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority."); *see also Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) ("While we read briefs filed by *pro se* litigants liberally, issues

not briefed on appeal by a *pro se* litigant are deemed abandoned." (citations omitted)).

Although Pena does raise the claim as a discrete issue under the heading "Statement of the Issues," that, by itself, is insufficient to raise the issue. *See, e.g.*, *Singh*, 561 F.3d at 1278 (explaining that "an appellant's brief must include an argument containing 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies'" and that "simply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal" (quoting Fed. R. App. P. 28(a)(9)(A))). Pena makes passing reference to the issue in his "Summary of the Argument," but, again, that is insufficient to raise the issue because Pena fails to elaborate further in the argument section. *See Sapuppo*, 739 F.3d at 681.

As we explained above, our review of a denied § 2255 motion is limited to the issues specified in the certificate of appealability. *Murray*, 145 F.3d at 1250–51. Although we "construe the issue specification in light of the pleadings and other parts of the record," *id.* at 1251, that does not save Pena. Both the certificate of appealability and Pena's arguments deal with the collateral-attack waiver in his plea agreement. But the issue in the certificate of appealability is whether the District Court erred in light of *Burgess*, and *Burgress* is about form, not substance:

whether a district court may raise a waiver defense without even asking the Government whether it intends to rely on the defense. 874 F.3d at 1295. Pena argues the substance of his ineffective assistance claim and whether his waiver bars that type of claim. The certificate of appealability did not address these issues, which means Pena has not satisfied the certificate of appealability standard as to these claims. Thus, we may not review the issues Pena raised in his brief.

IV.

Because Pena abandoned the only issue we may review on appeal, the District Court's denial of Pena's § 2255 motion is affirmed.

AFFIRMED.