IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10849-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRIL KINCHEN,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before: WILSON, MARTIN, and ROSENBAUM, Circuit Judges.

BY THE COURT:

Terril Kinchen moves for reconsideration of our order granting the government's motion to dismiss pursuant to his appeal waiver, in part, and granting the government's motion for summary affirmance, in part. Kinchen contends that the Supreme Court's intervening decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), warrants reconsideration as to his challenges to his 18 U.S.C. § 924(c) convictions.

We allow motions for reconsideration of our orders, provided that the motion is filed within 21 days of the entry of the order. 11th Cir. R. 27-2. A motion for reconsideration cannot be used to relitigate old matters, raise new arguments, or present evidence that could have been considered prior to the entry of judgment. *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009).

Distinct from the ACCA, § 924(c) provides for a mandatory consecutive sentence for any defendant who uses or carries a firearm during a drug-trafficking crime or crime of violence. 18 U.S.C. § 924(c)(1). Under § 924(c), a crime of violence is a felony that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. § 924(c)(3)(A), (B). We have held that substantive Hobbs Act robbery is a crime of violence under the use-of-force clause in § 924(c)(3)(A). *United States v. St. Hubert*, 883 F.3d, 1319, 1328–29 (11th Cir. 2018).

Under the prior precedent rule, we are bound to follow a prior binding decision by a panel of this Court, unless that decision is overruled or undermined to the point of abrogation by this Court *en banc* or the Supreme Court. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Published opinions from this Court are binding precedent, regardless of whether a mandate has been issued. 11th Cir. R. 36, I.O.P. 2; *see also Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (noting that the fact that a mandate has not issued "in no way affects the duty of [a] panel and the courts in this circuit to apply now [the issued decision] as binding authority").

Here, Kinchen has stated no ground for reconsideration because his substantive Hobbs Act robbery offenses remain categorical crimes of violence under the use-of-force clause. While he notes that we determined that his predicate offenses for his § 924(c) convictions were his substantive Hobbs Act robberies, Kinchen argues in his motion that *Dimaya* and its effects on *Ovalles v. United States*, 861 F.3d 1267 (11th Cir. 2017), warrant reconsideration in his case. However, neither *Dimaya* nor *Ovalles* impact his case, as substantive Hobbs Act robbery

remains a categorical crime of violence under § 924(c)(3)(A)'s use-of-force clause. *St. Hubert*, 883 F.3d, at 1328–29. Further, Kinchen has not presented any argument that we erred in relying on his substantive Hobbs Act robbery convictions. Accordingly, his challenges are foreclosed by our binding panel precedent. *Archer*, 531 F.3d at 1352. Finally, while Kinchen notes that the mandate in *St. Hubert* has been withheld, it remains binding panel precedent regardless of the mandate's status, and as a result, Kinchen's § 924(c) arguments are foreclosed. *Id.*; 11th Cir. R. 36, I.O.P. 2.

Kinchen's motion for reconsideration is DENIED.

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Before WILSON, MARTIN, and ROSENBAUM, Circuit Judges.

BY THE COURT:

Terril Kinchen appeals from his convictions and sentences after he pled guilty, pursuant to a written plea agreement, to one count of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), and two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). On appeal, Kinchen argues the district court (1) plainly erred by accepting his guilty plea as to the § 924(c) charges, and (2)

imposed an unreasonable sentence. The government has moved to dismiss Kinchen's appeal, arguing that he waived the right to appeal on these grounds in light of his guilty plea and the sentence appeal waiver in his plea agreement.

We review the validity of a sentence appeal waiver de novo. United States v. Johnson, 541 F.3d 1064, 1066 (11th Cir. 2008). Such waivers are valid and enforceable if they are made knowingly and voluntarily. United States v. Bushert, 997 F.2d 1343, 1351 (11th Cir. 1993). The government can demonstrate a waiver was knowing and voluntary by showing either that (1) the district court specifically questioned the defendant about the waiver during the plea colloquy, or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver. Id. When reviewing the plea colloquy, we look for clear language from the district court explaining what the defendant is giving up. See id. at 1325–53 (concluding the district court's confusing language about the sentence-appeal waiver made it unclear whether the defendant understood that he was giving up his appeal rights). Also, we "strong[ly] presum[e] that the statements made during the colloquy are true." United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994).

Kinchen argues in his response to the government's motion to dismiss that his guilty plea was not knowing and voluntary. He says that at sentencing, he expressed "his dissatisfaction" with his attorney to the district court and said he pled guilty only "under threat by the government to indict the mother of his child."

These arguments hold no force. At his change-of-plea hearing, Kinchen was asked whether he was pleading guilty under threat and answered no. Kinchen also said he was satisfied with his lawyer's representation of him. We strongly presume these statements to be true. See Medlock, 12 F.3d at 187. And Kinchen's statements at his sentencing do not convince us otherwise. Although he said he was pleading guilty because of the threat to the mother of his child, he did not seek to withdraw his guilty plea. The district court also asked Kinchen if he wanted a different attorney, and he said, "I don't want a different lawyer because I feel like [defense counsel] is fighting for me." Kinchen's guilty plea was knowing and voluntary so his sentence appeal waiver is valid and due to be enforced. See Bushert, 997 F.2d at 1351. Thus, his claim that his sentence was substantively unreasonable is barred.

To the extent Kinchen presents a jurisdictional challenge to his § 924(c) convictions, however, his guilty plea does not bar it. United States v. St. Hubert, 883 F.3d 1319, 1324, 1327 (11th Cir. 2018). The government alternatively argues that summary affirmance is appropriate because this challenge is foreclosed by binding circuit precedent. Generally, summary disposition is appropriate when "time is truly of the essence," when "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the

outcome of the case," or when the appeal is "frivolous." Groendyke Transp., Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969).[1]

Kinchen argues that his conviction for conspiracy to commit Hobbs Act robbery cannot serve as a predicate offense for his § 924(c) convictions because conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the use-of-force clause in 18 U.S.C. § 924(c)(3)(A) and the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague in light of the Supreme Court's decision in Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015). However, the record shows that Kinchen's conspiracy conviction was not the predicate offense underlying his § 924(c) convictions. Instead, his § 924(c) convictions were based on two substantive Hobbs Act robberies that were charged in the second superseding indictment but dismissed as part of the plea agreement. This Court has held that substantive Hobbs Act robbery is a crime of violence under the use-of-force clause in § 924(c)(3)(A). See St. Hubert, 883 F.3d at 1328–29.

And it does not matter that the substantive Hobbs Act robbery counts were dismissed because a § 924(c) conviction "does not require that a defendant be convicted of, or even charged with, the predicate offense." United States v. Frye,

[1] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

402 F.3d 1123, 1127 (11th Cir. 2005) (per curiam). Section 924(c) only requires a showing that the predicate offense is one the government could have prosecuted, meaning a showing that the defendant used or carried a firearm during and in relation to a crime of violence or a drug trafficking crime. Id. at 1127–28; see 18 U.S.C. § 924(c)(1)(A). As part of his plea agreement, Kinchen signed a factual proffer admitting that, on April 21, 2015 and on May 17, 2015, he entered a store and ordered those inside to give him money and property "at gunpoint." This was sufficient to establish the substantive Hobbs Act robbery counts as the predicates for Kinchen's § 924(c) convictions. See Frye, 402 F.3d at 1128–29. Because Kinchen's § 924(c) convictions were not actually predicated on his conspiracy conviction, his arguments with respect to his conspiracy conviction are unavailing.

Therefore, the government's motion to dismiss the appeal based on Kinchen's guilty plea and the sentence appeal waiver is GRANTED IN PART as to Kinchen's challenge to the reasonableness of his sentence, and otherwise DENIED. The government's alternative request for summary affirmance is GRANTED as to Kinchen's challenge to his § 924(c) convictions.