

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-4235

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDREW LEE THOMPSON, II, a/k/a Slim,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (1:17-cr-00168-CMH-1)

Submitted: October 31, 2018

Decided: November 6, 2018

Before MOTZ and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed in part and dismissed in part by unpublished per curiam opinion.

Alan H. Yamamoto, Alexandria, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Maureen C. Cain, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Andrew Lee Thompson II pleaded guilty, pursuant to a plea agreement, to sex trafficking of a minor, in violation of 18 U.S.C.A. §§ 1591(a)(1), (b)(2), (c) (West Supp. 2018), 18 U.S.C. § 2 (2012). He received a 300-month sentence. On appeal, he contends that the district court abused its discretion in denying his motion to withdraw his guilty plea and challenges the application of several enhancements under the Sentencing Guidelines. The Government argues that Thompson's claims of sentencing error are barred by the appellate waiver contained in his plea agreement. We affirm in part and dismiss in part.

We review for abuse of discretion the denial of a motion to withdraw a guilty plea. *United States v. Nicholson*, 676 F.3d 376, 383 (4th Cir. 2012). “A defendant has no absolute right to withdraw a guilty plea, and the district court has discretion to decide whether a fair and just reason exists upon which to grant a withdrawal.” *Id.* at 383-84 (internal quotation marks omitted); *see* Fed. R. Crim. P. 11(d)(2)(B). “The most important consideration in resolving a motion to withdraw a guilty plea is an evaluation of the Rule 11 colloquy at which the guilty plea was accepted.” *Nicholson*, 676 F.3d at 384 (internal quotation marks omitted). “Thus, when a district court considers the plea withdrawal motion, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary.” *Id.* (internal quotation marks omitted). “[A] properly conducted Rule 11 guilty plea colloquy . . . raises a strong presumption that the plea is final and binding.” *Id.* (brackets, citation, and internal quotation marks omitted). “When considering a defendant’s motion to withdraw his guilty plea, the court may also consider other circumstantial factors that

relate to whether the defendant has advanced a fair and just reason.” *Id.* (internal quotation marks omitted). These factors include:

(1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary; (2) whether the defendant has credibly asserted his legal innocence; (3) whether there has been a delay between the entering of the plea and the filing of the motion to withdraw the plea; (4) whether the defendant had the close assistance of competent counsel; (5) whether withdrawal will cause prejudice to the government; and (6) whether it will inconvenience the court and waste judicial resources.

Id. United States v. Moore, 931 F.2d 245, 248 (4th Cir. 1991).

Upon review of the record, we conclude that the district court properly conducted the Rule 11 colloquy and that none of the factors weighs in favor of permitting Thompson to withdraw his guilty plea. Thus, we conclude that the district court did not abuse its discretion in denying Thompson’s motion.

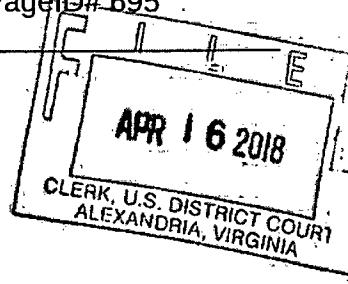
Next, Thompson raises numerous sentencing errors on appeal. The Government contends, however, that these claims are barred by the appellate waiver in Thompson’s plea agreement. We review the validity of an appellate waiver de novo and “will enforce the waiver if it is valid and the issue appealed is within the scope of the waiver.” *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016). “A criminal defendant may waive the right to appeal if that waiver is knowing and voluntary.” *United States v. Tate*, 845 F.3d 571, 574 n.1 (4th Cir. 2017). “Generally, if a district court questions a defendant regarding the waiver of appellate rights during the Rule 11 colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid.” *Id.* (internal quotation marks omitted).

Upon review of the plea agreement and the transcript of the Rule 11 hearing, we conclude that Thompson knowingly and voluntarily pleaded guilty and waived his right to appeal his sentence and that the issues Thompson seeks to raise on appeal fall squarely within the scope of his waiver of appellate rights. Thus, we conclude that the appellate waiver is valid and enforceable, and we dismiss Thompson's claims of sentencing error as barred by the appellate waiver.

Accordingly, we affirm in part the judgment of the district court and dismiss the appeal of Thompson's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED IN PART,
DISMISSED IN PART*

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division



UNITED STATES OF AMERICA

v.

Case Number: 1:17CR00168-001

ANDREW LEE THOMPSON, II
a/k/a SLIM

Defendant.

USM Number: 91272-083

Defendant's Attorney: Alan H. Yamamoto, Esquire

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count 2 of the Indictment.

Accordingly, the defendant is adjudicated guilty of the following counts involving the indicated offenses.

| <u>Title and Section</u> | <u>Nature of Offense</u> | <u>Offense Class</u> | <u>Offense Ended</u> | <u>Count</u> |
|---|----------------------------|----------------------|----------------------|--------------|
| 18 U.S.C. §§ 1591(a)(1), (b)(2), and (c) and 2 | Sex Trafficking of a Minor | Felony | 6/15/2017 | 2 |

On motion of the United States, the Court has dismissed Counts 1 and 3 of the Indictment.

As pronounced on April 6, 2018, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Signed this 16th day of April, 2018.

Claude M. Hilton
Claude M. Hilton
United States District Judge

Defendant's Name: **THOMPSON, II, ANDREW LEE**
Case Number: **1:17CR00168-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE HUNDRED (300) MONTHS.

The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be designated to FCI Marianna, Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows: _____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

Defendant's Name: **THOMPSON, II, ANDREW LEE**
Case Number: **1:17CR00168-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of LIFE.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of Supervised Release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of Supervised Release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant's Name: **THOMPSON, II, ANDREW LEE**
Case Number: **1:17CR00168-001**

SPECIAL CONDITIONS OF SUPERVISION

While on Supervised Release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

- 1) The defendant shall provide the probation officer access to any requested financial information.
- 2) The defendant shall participate in any programs for substance abuse or mental health treatment as directed by the probation officer.
- 3) The defendant shall not utilize any sex-related adult telephone services, websites, or electronic bulletin boards.
- 4) The defendant shall not possess any child pornography.
- 5) The defendant shall have no contact with minors unless supervised by a competent, informed adult, approved in advance by the probation officer.
- 6) The defendant shall not engage in employment or volunteer services that allow him access to minors.
- 7) The defendant shall register as a sex offender pursuant to the Adam Walsh Child Protection and Safety Act of 2006.
- 8) The defendant shall comply with any computer monitoring as required by the probation officer.

Defendant's Name: **THOMPSON, II, ANDREW LEE**
Case Number: **1:17CR00168-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

| <u>Count</u> | <u>Assessment</u> | <u>Fine</u> | <u>Restitution</u> |
|----------------|-------------------|---------------|--------------------|
| 2 | \$100.00 | \$0.00 | \$0.00 |
| TOTALS: | \$100.00 | \$0.00 | \$0.00 |

FINES

No fines have been imposed in this case.

Defendant's Name: **THOMPSON, II, ANDREW LEE**
Case Number: **1:17CR00168-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

The special assessment shall be due in full immediately.

The defendant shall forfeit the defendant's interest in the following property to the United States:

SEE Consent Order of Forfeiture entered by the Court on April 6, 2018.

- Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed. Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

The defendant understands that the Court has jurisdiction and authority to impose any sentence within the statutory maximum described above but that the Court will determine the defendant's actual sentence in accordance with 18 U.S.C. § 3553(a). The defendant understands that the Court has not yet determined a sentence and that any estimate of the advisory sentencing range under the U.S. Sentencing Commission's Sentencing Guidelines Manual the defendant may have received from the defendant's counsel, the United States, or the Probation Office, is a prediction, not a promise, and is not binding on the United States, the Probation Office, or the Court. Additionally, pursuant to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Court, after considering the factors set forth in 18 U.S.C. § 3553(a), may impose a sentence above or below the advisory sentencing range, subject only to review by higher courts for reasonableness. The United States makes no promise or representation concerning what sentence the defendant will receive, and the defendant cannot withdraw a guilty plea based upon the actual sentence.

The United States and the defendant agree that the defendant has assisted the government in the investigation and prosecution of the defendant's own misconduct by timely notifying authorities of the defendant's intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently. If the defendant qualifies for a two-level decrease in offense level pursuant to U.S.S.G. § 3E1.1(a) and the offense level prior to the operation of that section is a level 16 or greater, the government agrees to file, pursuant to U.S.S.G. § 3E1.1(b), a motion prior to, or at the time of, sentencing for an additional one-level decrease in the defendant's offense level.

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Cain, Maureen (USA/VAE)

From: Cain, Maureen (USA/VAE)
Sent: Thursday, August 31, 2017 2:59 PM
To: 'Maria Jacob'; 'Meredith Ralls'
Subject: Slim et al - more information re: obstruction/tampering

Maria and Meredith,

FBI called me just now to update me on a troubling jail call from my perspective that you should both know about.

There are a lot of jail calls and they are going back in time.

July 27 Slim was on the phone with adult prostitute Ashley Devaux. Slim had Ashley do a three way call (where Slim remained silent) to call Maria at the Federal Public Defender's office.

Ashley pretended to be "Ava McKenzie", Delberta's sister, while Slim was on the phone.

Meredith, please know that all of this obstructive conduct will at minimum go into Slim's guideline calculations.

As I stated before, if he continues, I will supersede with new charges.

Regards,
Maureen

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U.S. Attorney's Office
Eastern District of Virginia
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Probation Officer's Response: In this case, the defendant recruited, directed, managed and supervised McKenzie, Robillard and other prostitutes. All of the people Thompson supervised were necessary for his business to be successful and profitable; and Thompson received all of the profits from the prostitution activities. B.K. is a victim and is not considered a participant in the criminal activity; however, the victim's customers are all considered participants in the criminal activity. The Probation Office maintains Thompson was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; therefore, the presentence report has not been amended.

Paragraph 64 and 75: Defense counsel objects to the Probation Officer assessing a two-level enhancement for obstruction of justice pursuant to USSG §3C1.1. Counsel argues the defendant did not pay B.K.'s father to prevent B.K. from testifying, but arranged for B.K.'s father to come to Virginia to assert his custodial rights of B.K. in state court proceedings. She further asserts it was the defendant's goal to help get B.K. out of the custody of the Department of Social Services, and back with her family, where she would be more likely to exercise her right to remain silent. Counsel argues it was not the defendant's intention to encourage B.K. to evade the legal process, although the effect may have been the same, which was that B.K. would not have been called as a witness against the defendant. She further notes there is a difference between providing an atmosphere that is conducive to a person asserting their right to remain silent and impeding the legal process.

Probation Officer's Response: Although the Probation Office did not initially assess the two-level enhancement for Obstruction of Justice pursuant to USSG §3C1.1, and awarded the defendant the three-level reduction for Acceptance of Responsibility pursuant to USSG §3E1.1, review of additional evidence provided by the Government reflects the defendant repeatedly attempted to impeded and obstruct the investigation and prosecution into the offense, and this conduct is not indicative of someone who has accepted responsibility for their conduct.

According to USSG §3C1.1, comment (n. 1), obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction. USSG §3C1.1, comment (n. 4), outlines examples of conduct covered by this enhancement which include threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witnesses, or juror, directly or indirectly, or attempting to do so; committing, suborning, or attempting to suborn perjury; and destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding. In this case, the defendant, both directly and indirectly, attempted to impede and obstruct justice throughout the investigation and prosecution of the instant offense. The defendant's obstructive conduct began at the start of the investigation, when law enforcement made contact with Robillard and B.K. in Arlington, Virginia, and he instructed them not to say anything to law enforcement and not to provide consent to search. Thompson's obstruction continued when he, on numerous occasions, instructed co-defendants and witnesses to either not cooperate with law enforcement or to provide false information to law enforcement during the official investigation into the instant offense. The Probation Office asserts that even if the Court concurred with defense counsel's explanation regarding the defendant's payments to B.K.'s father, there is ample evidence to support the two-level enhancement for obstruction of justice pursuant to USSG §3C1.1.

Paragraph 77: Defense counsel objects to the Probation Officer assessing a five-level enhancement for the defendant engaging in a pattern of prohibited sexual conduct pursuant to USSG §4B1.5(b)(1). Counsel argues USSG §4B1.5(a) would apply if the defendant had a prior conviction for a sex offense against a minor, and subsection USSG §4B1.5(b) would apply if there was an alleged pattern of behavior but no conviction. Counsel asserts that under subsection (a), the defendant's adjusted offense level would be 37 (the adjusted level due to the maximum punishment of life in prison) or 40 (if none of his objections were sustained). However, because