United States Court of Appeals
For the First Circuit

No. 18-1484

UNITED STATES OF AMERICA,

Appellee,

v.

BRIAN PRICE,

Defendant, Appellant.

Before

Torruella, Thompson, and Kayatta,

Circuit Judges.

JUDGMENT

Entered: August 30, 2019

Defendant Brian Price appeals as procedurally unreasonable a thirty-six-month prison sentence for conspiracy to distribute cocaine powder and cocaine base (crack) in violation of 21 U.S.C. § 846. Here's his story. In 2015, federal and state law enforcement began an investigation into a cocaine-trafficking organization operating primarily out of the Brockton, Massachusetts area. As a result of the investigation, charges were brought, and a federal grand jury returned a superseding indictment on July 13, 2016 charging Price (and eight codefendants) with conspiracy to distribute both powder and crack. See 21 U.S.C. § 846. The indictment charged Luis Rivera ("Rivera"), the ringleader of the hub-and-spoke organization, with being responsible for 280-plus grams of crack through the conspiracy the government says he ran and served as the source of supply for lower-level dealers. Price and three codefendants/fellow dealers were charged with being responsible for 28 grams or more of crack, a charge that carries a five-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B)(iii).

At the plea hearing, Price pled guilty to conspiring to distribute powder, but not crack. He waived his right to a jury trial on the issues of drug weight and drug type (powder versus crack), so a bench trial ensued to resolve these remaining two issues. The district judge explained how she would sentence Price, specifically that she intended to apply two separate standards to the drug

type and weight evidence presented: if at trial the government proved beyond a reasonable doubt that Price conspired to distribute 28-plus grams of crack (not just powder), he'd be subject to the five-year mandatory minimum; if the government was unable to prove it beyond a reasonable doubt, then the district judge would "have to ratchet back and decide whether it was proven by a preponderance for the Guidelines [sentence]." Price's counsel agreed to the plan: "I understand what the Court is saying, and I'm in agreement with that." The district judge said: "So, in other words, it's a lower standard of proof for the sentencing." After taking the district judge up on her offer to further discuss this with his counsel, Price said he understood the two separate standards of proof that would apply.

The bench trial began on March 21, 2018. At the outset, the district judge revisited the two standards she planned to apply: "So for each one of these disputed [drug] transactions, I think I have to make a decision, A, under reasonable doubt with the Rules of Evidence firmly in mind, and, B, by a preponderance without the Rules of Evidence." There was no objection from Price.

The government's trial theory was that Price conspired to distribute by engaging in a powder drug deal with Rivera, then "whipping" (cooking, says the government) the powder into crack. As such, the government's evidence focused on demonstrating: "whip it" meant cooking powder into crack; Price cooked 31 grams of powder from a March 1, 2016 deal; and Price obtained another 31 grams of cocaine powder to cook into crack on March 17, 2016 (Price also stipulated to doing a 31-gram powder deal with Rivera in February 2016). Relevant to this appeal, the government introduced a video recording (of a drug deal between Rivera and a cooperating witness in which the term "whip it" was used), elicited testimony from two law enforcement witnesses (both of whom testified, inter alia, that "whip it" is a phrase commonly used to describe cooking powder into crack), and submitted a series of intercepted text messages (showing a deal for powder going down) and a phone call recording from the same day (discussing the drugs and whipping). At the end of the trial, the district judge concluded that "whip" meant cooking powder into crack, but she made no additional findings relative to the government's ultimate burdens of proof.

At the May 10, 2018 sentencing, the key issue then was whether the March 2016 deal involved crack or powder. The district judge found that the government failed to prove beyond a reasonable doubt that Price conspired to distribute 62 grams of crack (so the five-year mandatory minimum was off the table), but succeeded in proving it by a preponderance of the evidence. As a result, since she found "it was likely 62 grams was intended to be cooked into crack," when she applied the guidelines, she used the 62 grams.

The base offense level ("BOL") was set at 24 based on those 62 grams of crack. See U.S.S.G. § 2D1.1(c)(8). The district judge asked Price's counsel if he agreed with the BOL, and he replied "sounds right, yes, Judge." The district judge subtracted three levels for acceptance of responsibility and confirmed Price's criminal history put him at category III. With Price's total offense level now at 21, the guidelines sentencing range ("GSR") was forty-six to fifty-seven months. The district judge said "is there any objection to that calculation," and Price's counsel responded "no, not to your calculations, Judge." The district judge imposed a below-guidelines incarcerative term of thirty-six months, to be followed by three years of supervised release. Price's counsel did not object.

Now, Price takes issue with his sentence and the means by which it was fashioned. His big-ticket arguments break down into two primary contentions. First, Price targets the use of the acquitted conduct in sentencing, saying the indictment charged him with conspiracy to distribute both powder and crack, but the crack "was a separate offense included in Count One." As such, Price says when he was acquitted of the crack part of the charge, that acquittal negated the separate element of crack altogether, meaning it couldn't be used in sentencing. And while Price acknowledges that caselaw permits relevant acquitted conduct being used as a sentencing enhancement,[1] he says his crack conduct isn't relevant conduct that was used as a sentencing factor to levy an enhancement -- instead, it was a now-negated element of a separate, aggravated offense that wasn't proven beyond a reasonable doubt that impermissibly served as the basis for the BOL.

Price's second chief contention is that the BOL, GSR, and resulting sentence were based on flawed evidence: the district judge used inadmissible hearsay (the texts and phone call recording) to which no exception applied when she made her sentencing findings; and the drug quantity determination (which set the BOL) rested on facts that were erroneously found. All told, Price says, the BOL, GSR, and ultimate sentence were all off kilter and procedurally unreasonable due to these missteps. The government, of course, disagrees across the board.

But we do not wade into the merits of any of these arguments, and that is because they are not properly before us. "A litigant waives a claim when he or she '"intentionally relinquishes or abandons" a known right.'" United States v. Corbett, 870 F.3d 21, 30 (1st Cir. 2017) (quoting United States v. Walker, 538 F.3d 21, 23 (1st Cir. 2008)); see also United States v. Torres-Rosario, 658 F.3d 110, 115-16 (1st Cir. 2011). "Although a forfeited claim will be reviewed for plain error, 'a waived issue ordinarily cannot be resurrected on appeal.'" Id. (quoting Walker, 538 F.3d at 23).

Here, Price waived his claims of sentencing error because he both failed to object and affirmatively agreed with what was happening.[2] As we have explained before, "when the 'subject matter [is] unmistakably on the table, and the defense's silence is reasonably understood only as signifying agreement that there was nothing objectionable,' the issue is waived on appeal." Corbett, 870 F.3d at 30-31 (1st Cir. 2017) (quoting United States v. Soto, 799 F.3d 68, 96 (1st Cir.

[1] Price explicitly acknowledges United States v. Watts, 519 U.S. 148, 157 (1997), but other particularly relevant case law on this point includes, for example, United States v. González, 857 F.3d 46, 58 (1st Cir. 2017), United States v. Alejandro-Montañez, 778 F.3d 352, 361 (1st Cir. 2015), and United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001).

[2] In his brief, Price doesn't exactly confront head-on his failure to object to this evidence. Instead, he seems to suggest that he did object. But our review of the transcript does not at all support that take, and, to the extent he believes an objection of a codefendant preserved the objection as to Price as well, we disagree. See, e.g., United States v. Flores-Rivera, 787 F.3d 1, 27 n.20 (1st Cir. 2015) (citing United States v. Acosta-Colón, 741 F.3d 179, 189 (1st Cir. 2013) (rebuffing an (undeveloped) argument that codefendants may "piggyback" on each other's objections)); see also United States v. García-Pastrana, 584 F.3d 351, 387 (1st Cir. 2009) (citing United States v. Harris, 104 F.3d 1465, 1471 (5th Cir. 1997) ("[T]he greater weight of authority counsels that a party can rely upon the objection of his codefendant only if he joins in the objection.") (citing cases)).

2015)); United States v. Christi, 682 F.3d 138, 142 (1st Cir. 2012).

In Price's case, his counsel's silences and affirmative agreements -- taken together -- tell a story. Indeed, Price's counsel not only remained silent rather than voicing his objections to the things he now contests on appeal -- all of which are directed at the district judge's calculation of the BOL, GSR, and ultimate sentence imposed -- but also he affirmatively said "no objection" and "sounds right." Let's recap:

- At the plea hearing, Price's counsel agreed with the district judge's announced plan with respect to the standards of proof she'd be applying ("I understand what the Court is saying, and I'm in agreement with that"), then Price affirmed his agreement after talking it over with his counsel;
- At the outset of trial, when the district judge restated her intended approach with those standards of review, Price's counsel lodged no objection;
- As to what he now says was inadmissible hearsay evidence, Price's counsel said "no objection" when the intercepted texts were introduced, and he did not object to the admission of the recorded call or the transcript of it -- in fact, Price's counsel would later quote from those texts and the recorded call in his post-trial memorandum, still making no mention of what he now says was their inadmissibility;
- When the district judge laid out her findings and stated the BOL of 24, Price's counsel said that BOL "sounds right, yes, Judge";
- Then, when the district judge did her sentencing calculus to arrive at the GSR of forty-six to fifty-seven months, asking "is there any objection to that calculation," Price's counsel said "no, not to your calculations, Judge"; and
- Price voiced no objection when the district judge pronounced sentence or at the close of the sentencing hearing.

Cumulatively, Price's lack of objections (when the issues were clearly "on the table") and affirmative agreements amount to waiver. See Corbett, 870 F.3d at 30-31 (quoting Soto, 799 F.3d at 96 (concluding that a challenge to a jury instruction was waived where "the district [judge] informed [defendants] exactly how it was planning to instruct the jury, . . . sought their feedback, twice asking if they were okay with those specific instructions" and counsel for one defendant "affirmatively stated there was no objection" while counsel for other defendants "remained silent" because, "[g]iven the judge's invitation to speak up with any disagreement, these reactions can only be interpreted as signifying approval with the instructions as previewed")); see also United States v. Hansen, 434 F.3d 92, 105-06 (1st Cir. 2006) (holding that a challenge to the district judge's handling of a juror note was waived because, when the district judge proposed a curative instruction, "defense counsel responded, 'Something along those lines, Judge, fine'"); United States v. Falú-González, 205 F.3d 436, 440 (1st Cir. 2000) (finding waived an appellant's challenge to drug quantity findings at sentencing, explaining that if the appellant was dissatisfied with those findings, "or was unclear as to how [the district judge] arrived at those findings, [the appellant] should have requested more specific findings at that time, rather than remain silent and postpone his challenge of the district [judge]'s findings until appeal").

We need say no more. Affirmed.[3]

By the Court:

Maria R. Hamilton, Clerk

cc:
Cynthia A. Young
Emily O. Cannon
Michael J. Crowley
George F. Gormley
Brian Price

[3] With all of this said, though, we pause to observe important and continuing constitutional concerns on the state of the law, which, as much discussed here, allows for judicially found facts being used to enhance a defendant's sentence based on conduct that the defendant was either not charged with or -- as in Price's case -- was acquitted of. See, e.g., United States v. Alejandro-Montañez, 778 F.3d 352, 362 (1st Cir. 2015) (Torruella, J., concurring); United States v. St. Hill, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring).

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Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron,

Circuit Judges.

ORDER OF COURT

Entered: October 24, 2019

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Cynthia A. Young, Donald Campbell Lockhart, Emily O. Cannon,
Michael J. Crowley, George F. Gormley, Brian Price