

APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT DENYING BROWN'S MOTION TO RECALL THE MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.)
ARIAN LAMONT BROWN,)
Defendant-Appellant.)

FILED
Dec 19, 2019
DEBORAH S. HUNT, Clerk

ORDER

Arian Lamont Brown, a pro se federal prisoner, moves to recall the mandate in this case issued on January 24, 2019, after this court granted counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirmed Brown's convictions and sentence. *United States v. Brown*, No. 18-5084 (6th Cir. Oct. 16, 2018).

Pursuant to a plea agreement, Brown pleaded guilty to possession with intent to distribute 40 grams or more of a mixture containing a detectable amount of fentanyl, in violation of 21 U.S.C. §§ 841(a)(1) and 851, and possession with the intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 851. The parties agreed that Brown had previously been convicted of a felony drug offense and was subject to an enhanced punishment pursuant to 21 U.S.C. § 851.

A presentence report calculated Brown's total offense level as 35 and his criminal history category as VI. Brown was also determined to be a career offender, *see USSG § 4B1.1*, on the basis of his prior convictions in Kentucky for attempt to possess with the intent to distribute cocaine and for conspiracy to commit first-degree robbery. His guidelines range of imprisonment was calculated as 292 to 365 months for the fentanyl conviction and 292 to 360 months for the heroin conviction. The district court imposed a term of imprisonment of 330 months, to be followed by an eight-year term of supervised release.

On appeal, Brown's counsel filed a motion and brief pursuant to *Anders* and Sixth Circuit Rule 12(c)(4)(C), requesting permission to withdraw because of a lack of any good-faith issues to appeal. Brown requested, and was granted, a thirty-day extension of time to respond to counsel's motion, but he did not file a response within that time. After a review of the record, the panel found that no appealable issues could be raised in connection with Brown's guilty plea or sentence, granted counsel's motion to withdraw, and affirmed the judgment of the district court.

Two days later, Brown filed a motion for leave to file an untimely reply to counsel's *Anders* brief. This court denied the motion as moot. Brown then filed a petition for rehearing, asking the court to consider the issue raised in his untimely reply: whether his Kentucky conviction for conspiracy to commit a first-degree robbery qualified as a predicate offense for the purposes of the career-offender enhancement. He also moved for leave to file his late response and to have counsel appointed. On January 17, 2019, the panel granted his motion for leave to file the late response but, upon consideration of that response and his petition for rehearing, denied rehearing. The panel denied Brown's request for the appointment of counsel as moot. The mandate issued seven days later on January 24, 2019.

Brown filed this motion to recall the mandate on October 21, 2019. He argues two grounds upon which the mandate should be recalled: (1) his guilty plea was not entered knowingly and voluntarily and (2) his sentence is substantively unreasonable based on the June 6, 2019, decision of this court in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc), which held that the definition of "controlled substance offense" in the Sentencing Guidelines does not include attempt crimes.

This court has the inherent authority to recall its mandate. *Patterson v. Haskins*, 470 F.3d 645, 661-62 (6th Cir. 2006). However, the power to recall a mandate "is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). The party "seeking recall of a mandate must demonstrate good cause for that action through a showing of exceptional circumstances," including, but not limited to, 'fraud upon the

court, clarification of an outstanding mandate, [or] correction of a clerical mistake.'" *Patterson*, 470 F.3d at 662 (quoting *BellSouth Corp. v. FCC*, 96 F.3d 849, 851-52 (6th Cir. 1996)).

Such exceptional circumstances do not exist in this case. Brown has not alleged fraud or raised a clerical error. Rather, he challenges the validity of his guilty plea and the calculation of his sentencing guidelines range of imprisonment. *Cf. Bottone v. United States*, 350 F.3d 59 (2d Cir. 2003) (dismissing motion to recall mandate after en banc decision altered governing law).

Brown's motion to recall the mandate is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Eastern District of Kentucky
FILED

JAN 22 2018

AT LEXINGTON
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Central Division at Lexington

UNITED STATES OF AMERICA

v.

Arian Lamont Brown

JUDGMENT IN A CRIMINAL CASE

Case Number: 5: 16-97-S-DCR-1

USM Number: 13117-032

Andrew M. Stephens
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 2s and 3s

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|-----------------|--|---------------|-------|
| 21:841(a)(1) | Possession with Intent to Distribute 40 Grams or More of a Mixture or Substance Containing a Detectable Amount of Fentanyl | 08/25/2016 | 2s |
| 21:841(a)(1) | Possession with Intent to Distribute Heroin | 08/25/2016 | 3s |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) 1s and Underlying Indictment is are dismissed on the motion of the United States.

It is ordered that the defendant must 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.

January 12, 2018

Date of Imposition of Judgment

Signature of Judge

Honorable Danny C. Reeves, U.S. District Judge
Name and Title of Judge

January 22, 2018

Date

DEFENDANT: Arian Lamont Brown
CASE NUMBER: 5: 16-97-S-DCR-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Count 2s: 330 Months; Count 3s: 330 Months; Counts to run concurrently with each other, for a total term of THREE HUNDRED THIRTY (330) MONTHS. However, these terms shall run consecutively to the 36-month term of imprisonment imposed in ED/KY Case No. 5: 09-80-DCR-1.

The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the defendant participate in a program towards the completion of a GED.
It is recommended that the defendant participate in the 500-Hour RDAP Program.

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

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

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: Arian Lamont Brown
CASE NUMBER: 5: 16-97-S-DCR-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Count 2s: Eight (8) Years; Count 3s: Six (6) Years to run concurrently with Count 2s, for a total term of Eight (8) YEARS. This term shall run concurrently to the Four (4) Year term of supervision re-imposed in ED/KY Case No. 5: 09-80-DCR-1.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT AFFIRMING JUDGMENT AND SENTENCE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-5084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 16, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

1

Plaintiff-Appellee,

1

v.

1

ARIAN LAMONT BROWN.

1

Defendant-Appellant.

2

ORDER

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

Arian Lamont Brown, a federal prisoner, appeals the 330-month sentence imposed by the district court following his pleas of guilty to possession with intent to distribute fentanyl and heroin. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

Pursuant to a plea agreement, Brown pleaded guilty to possession with intent to distribute 40 grams or more of a mixture containing a detectable amount of fentanyl (Count 2), and possession with the intent to distribute heroin (Count 3), both in violation of 21 U.S.C. §§ 841(a)(1) and 851. He also agreed to forfeit currency that had been seized by the police during a search of his residence. The parties agreed that Brown was subject to an enhanced punishment pursuant to 21 U.S.C. § 851. Brown's plea agreement also contained a waiver of appeal of his "guilty plea and conviction."

No. 18-5084

- 2 -

A presentence report calculated Brown's total offense level as 35 and his criminal history category as VI. The report also determined Brown to be a career offender, based on his prior Kentucky convictions for a felony drug offense and conspiracy to commit first-degree robbery. His guidelines range of imprisonment was calculated as 292 to 365 months for Count 2, the fentanyl conviction, and 292 to 360 months for Count 3, the heroin conviction.

Brown filed several objections to the presentence report, but only the challenge to his career-offender designation impacted the guidelines calculation. In particular, Brown argued that his conspiracy conviction was not a predicate offense. The district court overruled Brown's objection and imposed a term of imprisonment of 330 months,¹ to be followed by an eight-year term of supervised release.

Appointed appellate counsel has filed a motion to withdraw and a brief pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967), and Sixth Circuit Rule 12(c)(4)(C), notifying the court that his review of the record and concomitant legal research revealed no good-faith issues to appeal. Counsel asserts that Brown's pleas were knowing and voluntary and that his waiver of appeal is valid. Counsel concludes that the waiver is therefore enforceable and precludes any appeal of Brown's conviction. Counsel further concludes that the district court did not err by determining that Brown's Kentucky conviction for conspiracy to commit first-degree robbery constituted a predicate offense for career-offender purposes. Finally, counsel asserts that Brown's 330-month sentence is reasonable. Brown has not responded to counsel's motion despite being advised of his right to do so. After independently examining the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 82-83 (1988), and counsel's brief, we agree that no arguable grounds for appeal exist.

First, no non-frivolous issue can be raised in connection with the validity of Brown's guilty pleas. A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." *See Brady v. United States*, 397 U.S. 742, 748 (1970). Determining whether a plea

¹ Brown committed the instant offense while on supervised release from a 2010 conviction for attempt to possess with intent to distribute cocaine. *See United States v. Brown*, No. 5:09-80-CR-1 (E.D. Ky. Mar. 1, 2010). As a result, the district court also imposed a consecutive 36-month term of imprisonment for the violation of the terms of his release.

No. 18-5084

- 3 -

was made voluntarily requires an evaluation of all the relevant circumstances surrounding the plea. *Id.* at 749. When a defendant enters a valid guilty plea, he waives his right to appeal any constitutional violations that occurred prior to the plea and may challenge only the voluntary nature of the plea. See *United States v. Kirksey*, 118 F.3d 1113, 1115 (6th Cir. 1997) (citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)).

At Brown's plea hearing, he was sworn in and advised that he could be subject to perjury charges for making false statements. The district court then inquired as to Brown's age, his education, his employment history, his mental health, and whether he was under the influence of any drugs or alcohol. The parties agreed that there was no reason to believe that Brown did not understand the nature of the charges against him or the plea proceedings. Brown also confirmed that he had received a copy of the indictment and had an opportunity to review it and discuss it with counsel. He stated that he was satisfied with counsel's advice and representation.

Brown confirmed that he reviewed his plea agreement, understood its conditions, discussed it with counsel, and signed it. Brown stated that he had not been promised anything that was not contained in the plea agreement. He further affirmed that he was not threatened or forced to sign the documents or to enter guilty pleas.

The district court informed Brown of the statutory penalties associated with the charges, including the enhanced sentence he was subject to under § 851. The district court also explained how the Sentencing Guidelines worked and informed Brown of the factors that would be considered when sentence was imposed. The court stated that any recommendations made by the parties in the plea agreement were non-binding and that the court had to make an independent decision about whether certain guideline provisions were appropriate.

The district court also specifically discussed with Brown the waiver of appeal contained in the plea agreement. The court explained that the plea agreement waived Brown's right to appeal his guilty plea and conviction but that he retained the right to appeal his sentence. Further, the court explained that Brown waived the right to collaterally attack his conviction or sentence, except to raise claims regarding the ineffective assistance of counsel. Brown affirmed that he had no questions about the waiver.

No. 18-5084

- 4 -

The district court next explained the rights that Brown was giving up by entering guilty pleas instead of proceeding to a jury trial, including his right to a trial, to have a jury determine his guilt beyond a reasonable doubt, to have the assistance of counsel at trial, to call witnesses and cross-examine witnesses, and to decide whether to testify on his own behalf.

The district court reviewed the elements of the charges that Brown had agreed to plead guilty to, as well as a claim of forfeiture to which Brown had also agreed. Brown then explained, in his own words, that, on August 25, 2016, in Fayette County, Kentucky, he purchased fentanyl and heroin to sell to others. Brown agreed that, if the case went to trial, the government could prove the elements of the charges beyond a reasonable doubt. He stated that he wanted to plead guilty to Count 2 and Count 3 and that he agreed to forfeit any interest in the property listed in the forfeiture allegation. The district court concluded that a sufficient factual basis existed for the court to accept Brown's pleas, that Brown was competent and capable of entering a knowing and informed plea, and that his plea was voluntary. Because the district court's colloquy demonstrated that Brown was aware of all of the consequences of his pleas, the validity of those pleas cannot, in good faith, be challenged.

The record also reveals that Brown's appeal waiver was valid and precludes a challenge to his conviction. "It is well settled that a defendant in a criminal case may waive any right, even a constitutional right, by means of a plea agreement." *United States v. McGilvery*, 403 F.3d 361, 362 (6th Cir. 2005) (quoting *United States v. Calderon*, 388 F.3d 197, 199 (6th Cir. 2004)). The waiver must be knowing and voluntary. *United States v. Fleming*, 239 F.3d 761, 763-64 (6th Cir. 2001). We review de novo whether a defendant knowingly and voluntarily waived his right to appeal his sentence. *United States v. Murdock*, 398 F.3d 491, 496 (6th Cir. 2005). Because the record of Brown's plea hearing demonstrates that he voluntarily and knowingly waived his right to appeal, his waiver is valid and precludes this court from reviewing his conviction. See *United States v. Bradley*, 400 F.3d 459, 465 (6th Cir. 2005).

We examine a sentence imposed by the district court for both procedural and substantive reasonableness under an abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). To determine whether a sentence is procedurally reasonable, we must "first ensure that

No. 18-5084

- 5 -

the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the [g]uidelines range, treating the [g]uidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Id.* at 51.

Brown objected to his classification as a career offender, challenging his Kentucky conviction for conspiracy to commit first-degree robbery. "A 'crime of violence' under the career-offender provision is interpreted identically to a 'violent felony' under [the] A[rmed] C[areer] C[riminal] A[ct]." *United States v. Young*, 580 F.3d 373, 379 n.5 (6th Cir. 2009). We have held that first-degree robbery in Kentucky is a violent felony under the ACCA. *See United States v. Elliott*, 757 F.3d 492, 495 (2014). In addition, the career-offender provision of the Guidelines states that a "[c]rime of violence" . . . include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG § 4B1.2(a), comment. (n.1) (emphasis added). Accordingly, no arguable issue could be raised on appeal that Brown was erroneously designated as a career offender. Moreover, at sentencing, the district court recognized the advisory nature of the guidelines, considered the § 3553(a) sentencing factors, and adequately explained the sentence imposed. As a result, Brown cannot raise an arguable issue on appeal that his 330-month sentence is procedurally unreasonable.

"A sentence is substantively unreasonable if the district court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors or gives an unreasonable amount of weight to any pertinent factor." *United States v. Tristan-Madrigal*, 601 F.3d 629, 633 (6th Cir. 2010) (citing *United States v. Walls*, 546 F.3d 728, 736 (6th Cir. 2008)). We presume that a within-guidelines sentence is reasonable. *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc).

Prior to imposing sentence, the district court noted that its starting point was the guidelines range, which was properly calculated. The court recognized that the career-offender enhancement increased Brown's range significantly, "as it should based upon the activities in which [Brown] ha[d] engaged himself over the years." The district court explained that Brown's offense was serious in that it involved drugs that created "lots of damage and destruction in the

No. 18-5084

- 6 -

community." The court also believed there was a need to protect the public, given that Brown's criminal history showed an inclination for violence. The district court considered sentencing disparities and acknowledged that federal courts varied below the guideline range for career offenders in some cases, but that it was not required and it was "certainly" not called for in this case.

The district court concluded that, upon consideration of all of the factors of § 3553, a guidelines sentence was appropriate. However, there were factors that caused the court to believe that a sentence at the upper end of the range was not necessary, namely Brown's work ethic and his family's support. As a result, the district court imposed a sentence of 330 months. The record does not reflect that the district court considered inappropriate sentencing factors, gave an unreasonable amount of weight to any single factor, or selected the sentence arbitrarily; accordingly, Brown can raise no arguable issue on appeal that the within-guidelines sentence was substantively unreasonable. *See United States v. Brown*, 501 F.3d 722, 724 (6th Cir. 2007).

The record contains evidence that Brown believed that his attorneys provided inadequate representation. To the extent that he would wish to raise any claims of the ineffective assistance of counsel, however, those claims are more appropriately raised on collateral review because the record before us is often insufficient to assess the merits of such claims. *See United States v. Warman*, 578 F.3d 320, 348 (6th Cir. 2009); *see also Massaro v. United States*, 538 U.S. 500, 504-05 (2003).

Counsel's motion to withdraw is **GRANTED**. The judgment of the district court is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARIAN LAMONT BROWN,

Defendant-Appellant.

FILED
Mar 02, 2020
DEBORAH S. HUNT, Clerk

ORDER

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

Arian Lamont Brown, a pro se federal prisoner, has filed a petition for rehearing of the December 19, 2019, order denying his motion to recall the mandate.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

We therefore **DENY** Brown's petition for rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk