

Pet. App. 1a

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-4628

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANA DUARTE-PINEDA,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:19-cr-00308-D-2)

Submitted: November 30, 2021

Decided: January 5, 2022

Before GREGORY, Chief Judge, and MOTZ and QUATTLEBAUM, Circuit Judges.

Affirmed in part and dismissed in part by unpublished per curiam opinion.

G. Alan DuBois, Federal Public Defender, Stephen C. Gordon, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Jennifer P. May-Parker, Assistant United States Attorney, Joshua L. Rogers, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Pet. App. 2a

PER CURIAM:

Ana Duarte-Pineda pled guilty, pursuant to a written plea agreement, to distribution of 50 grams or more of methamphetamine, and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2. Under the plea agreement, Duarte-Pineda agreed to waive her right to appeal her conviction and any sentence within the advisory Sentencing Guidelines range. The district court sentenced Duarte-Pineda to 262 months' imprisonment, the low end of the Guidelines range. Duarte-Pineda timely appealed.

Counsel for Duarte-Pineda has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there are no meritorious grounds for appeal but questioning whether the district court erred by failing to sentence Duarte-Pineda to the statutory mandatory minimum term of imprisonment. Duarte-Pineda filed pro se supplemental briefs challenging her conviction and sentence and asserting claims of ineffective assistance of trial counsel. The Government moves to dismiss the appeal as barred by the appellate waiver included in Duarte-Pineda's plea agreement. We affirm in part and dismiss in part.

We review the validity of an appeal waiver de novo and "will enforce the waiver if it is valid and the issue[s] appealed [are] within the scope of the waiver." *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016). Generally, if the district court fully questions a defendant regarding the waiver of her right to appeal during a plea colloquy performed in accordance with Fed. R. Crim. P. 11, and the record shows that the defendant understood the waiver's significance, the waiver is both valid and enforceable. *United States v. Thornsberry*, 670 F.3d 532, 537 (4th Cir. 2012). Our review of the record confirms that

Pet. App. 3a

Duarte-Pineda knowingly and voluntarily waived her right to appeal, and that the magistrate judge properly found that her plea was supported by an adequate factual basis. We therefore conclude that the waiver is valid.

In accordance with *Anders*, we have reviewed the entire record in this case and have found no meritorious grounds for appeal. We therefore grant the Government's motion to dismiss in part and dismiss the appeal as to all issues within the waiver's scope. We affirm the remainder of the judgment. This court requires that counsel inform Duarte-Pineda, in writing, of the right to petition the Supreme Court of the United States for further review. If Duarte-Pineda requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Duarte-Pineda. 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
 FOR THE EASTERN DISTRICT OF NORTH CAROLINA
 WESTERN DIVISION

NO. 5:19-CR-00308-D-2

FILED IN OPEN COURT

ON 3/11/2020

Peter A. Moore, Jr., Clerk
 US District Court
 Eastern District of NC

UNITED STATES OF AMERICA)
)
 v.) MEMORANDUM OF PLEA
) AGREEMENT
)
 ANA DUARTE-PINEDA)

The United States of America ("United States"), by and through the United States Attorney for the Eastern District of North Carolina ("USA-EDNC"), and the Defendant, with the concurrence of the Defendant's Attorney, Deirdre A. Murray, have agreed that the above-captioned case should be concluded in accordance with this Memorandum of Plea Agreement as follows:

1. This Memorandum constitutes the full and complete record of the Plea Agreement. There are no other agreements between the parties in addition to or different from the terms herein.

2. The Defendant agrees:

- a. To plead guilty to Count One of the Information herein.
- b. To make restitution to any victim in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 3663 and 3663A. Said restitution shall be due and payable immediately.
- c. To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal the conviction and whatever sentence is imposed on any ground, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial

misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

- d. To waive all rights, whether asserted directly or through a representative, to request or receive from the United States any records pertaining to the investigation or prosecution of this matter, except as provided in the Federal Rules of Criminal Procedure. This waiver includes, but is not limited to, rights conferred by the Freedom of Information Act and the Privacy Act of 1974.
- e. To assist the United States in the recovery and forfeiture of any assets which facilitated and/or were acquired through unlawful activities, including all such assets in which the defendant has any interest or control. Specifically, the Defendant agrees to voluntarily forfeit and relinquish to the United States the property specified in the Information. The Defendant further agrees to sign any documents necessary to effectuate the forfeiture and waives any further notice. In addition, the Defendant forfeits and otherwise waives any ownership right in all items seized during the investigation of the acts alleged in the Information. The Court has jurisdiction over the disposition of such items and may order the investigative agency to dispose of the items in such manner as provided by the agency's regulations. The Defendant forfeits and abandons all right, title, and interest in any firearms seized during the investigation of any of the acts alleged in the Information. The Defendant further agrees that the Preliminary Order of Forfeiture shall be final as to the Defendant as of entry by the Court, as allowed by Fed. R. Crim. P. 32.2 (b)(4)(A).
- f. To pay a special assessment of \$100.00 for Count One, pursuant to the provisions of 18 U.S.C. § 3013. The assessment shall be paid by the Defendant at sentencing. The Defendant or Defendant's counsel shall provide a check in payment of the said assessment directly to the Clerk, U.S. District Court/EDNC. If the assessment is not paid at sentencing, the Defendant agrees (1) that the assessment is due in full immediately, and (2) to participate in the Inmate Financial Responsibility Program while incarcerated.

- g. To complete and submit a financial statement under oath to the Office of the USA-EDNC no later than two weeks after the entry of the guilty plea.
- h. To abide by any conditions of release pending sentencing and report timely for service of sentence.
- i. Whenever called upon to do so by the United States, (1) to disclose fully and truthfully in interviews with Government agents information concerning all conduct related to the Information and any other crimes of which the Defendant has knowledge, and (2) to testify fully and truthfully in any proceeding. These obligations are continuing ones. The Defendant agrees that all of these statements can be used against the Defendant at trial if the Defendant withdraws from this plea agreement or is allowed to withdraw the guilty plea.
- j. If the Defendant provides false, incomplete, or misleading information or testimony, this would constitute a breach of this Agreement by the Defendant, and the Defendant shall be subject to prosecution for any federal criminal violation. Any information provided by the Defendant may be used against the Defendant in such a prosecution.
- k. To submit to a polygraph examination whenever requested by the Office of the USA-EDNC. The results of these examinations will be admissible only at the Defendant's sentencing, and at any hearing as to whether there has been a breach of this agreement. The United States may rely on these results in determining whether the Defendant has fulfilled any obligation under this Agreement.
- l. To knowingly and expressly waive any and all rights, under the Fifth and Sixth Amendments to the United States Constitution and any cases interpreting them, to have the existence and applicability of any prior convictions (1) charged in the Information, (2) submitted to a jury, and (3) proved beyond a reasonable doubt. The defendant hereby consents to having the existence and applicability of any such convictions decided by the sentencing judge based on a preponderance of the evidence. The defendant reserves the right to contest at sentencing the existence of any such prior conviction and whether such conviction qualifies to increase the statutory minimum and maximum sentence, but consents to the resolution of any such

objection by the sentencing judge using a preponderance-of-the-evidence standard.

3. The Defendant understands, agrees, and admits:

a. That as to each Count of the Information to which the Defendant is pleading guilty, the charge, code section, elements, and applicable penalties are as follows:

Count One:

(1) **Charge: Distribution of fifty (50) grams or more of methamphetamine, a Schedule II controlled substance**

(2) Code sections violated: 21 U.S.C. §§ 841 (a)(1) and 18 U.S.C. § 2

(3) Elements: On or about July 12, 2019, in the Eastern District of North Carolina,

First: The Defendant, aiding and abetting another, did knowingly and intentionally distribute fifty (50) grams or more of methamphetamine, a Schedule II controlled substance; and

Second: At the time of such distribution, the Defendant knew that the substance was methamphetamine.

(4) Maximum term of imprisonment: Life

(5) Minimum term of imprisonment: 10 years

(6) Maximum term of supervised release: Life
 (6a) Minimum term of supervised release: 5 yrs. (KLS)

(7) Maximum term of imprisonment upon revocation of supervised release: 5 years *DM*

(8) Maximum fine: \$ 10,000,000 *AD*

(9) Restitution pursuant to 18 U.S.C. §§ 3663 and 3663A, and as agreed to in Paragraph 2.b. above.

(10) Special assessment: \$ 100

Total Statutory Minimum and Maximum Sentence: Maximum of Life Imprisonment; 10 years minimum imprisonment, a \$10,000,000 fine, maximum of Life Supervised Release; minimum of 5 years supervised release, and a \$100 Special Assessment.

- b. That any sentence imposed will be without parole.
- c. That the Court will take into account, but is not bound by, the applicable United States Sentencing Guidelines, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.
- d. That, unless Defendant is found unable to pay, the Court will impose a fine, and failure to pay it will subject Defendant to additional criminal and civil penalties pursuant to 18 U.S.C. §§ 3611-14.
- e. That pleading guilty may have consequences with respect to the Defendant's immigration status if the Defendant is not a natural born citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense(s) to which the Defendant is pleading guilty, and some offenses create a presumption of mandatory removal from the United States. Removal and other immigration consequences are the subject of a separate proceeding, however, and the Defendant understands that no one, including the Defendant's attorney and the Court, can predict with certainty the effect of the Defendant's conviction on the Defendant's immigration status. The Defendant nevertheless affirms that Defendant wants to plead guilty, regardless of any immigration consequences that may result from this conviction, including the Defendant's automatic removal from the United States, denial of citizenship, denial of admission to the United States in the future, denaturalization, and any other similar consequence.

4. The United States Attorney for the Eastern District of North Carolina agrees:

- a. That it reserves the right to make a sentence recommendation.
- b. That it reserves the right at sentencing to present any evidence and information pursuant to 18 U.S.C. § 3661, to offer argument or rebuttal, to recommend imposition of restitution, and to respond to any motions or objections filed by the Defendant.
- c. That, pursuant to Fed. R. Crim. P. 11(c)(1)(A), the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the Information; however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities.
- d. That it will make known to the Court at sentencing the full extent of the Defendant's cooperation pursuant to this agreement, but the United States is not promising to move for departure pursuant to USSG §5K1.1, 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35.
- e. Pursuant to USSG §1B1.8, that self-incriminating information provided by the Defendant pursuant to this Agreement shall not be used against the Defendant in determining the applicable advisory Guideline range, except as provided by §1B1.8 and except as stated in this Agreement. The United States may provide to the United States Probation Office any evidence concerning relevant conduct.
- f. That the USA-EDNC agrees not to share any information provided by the Defendant pursuant to this Agreement with other state or federal prosecuting entities except upon their agreement to be bound by the terms of this Agreement.
- g. That, provided that the defendant complies with this agreement, the USA-EDNC agrees not to directly use information provided by the defendant pursuant to this plea agreement to prosecute the defendant for additional criminal offenses, except for crimes of violence, but the USA-EDNC may make derivative use of such information against the defendant and pursue any investigative leads suggested by such information.

5. The parties agree, pursuant to Fed. R. Crim. P. 11(c)(1)(B), to the following positions as to the below-listed sentencing factors only, which are not binding on the Court in its application of the advisory Guideline range; provided that if Defendant's conduct prior to sentencing changes the circumstances with respect to any such factors, the United States is no longer bound to its positions as to those factors:

- a. The relevant and readily provable quantity of methamphetamine ("Ice") to be used in determination of the base offense level pursuant to U.S.S.G. §2D1.1 is at least 500 grams but less than 1.5 kilograms, which results in a base offense level of 34.
- b. A downward adjustment of 2 levels for acceptance of responsibility is warranted under USSG §3E1.1, unless the offense level determined prior to the operation of USSG 3E1.1(a) is level 16 or greater, in which event a downward adjustment of 3 levels is warranted.
- c. An upward adjustment of two levels for maintaining a premises for the purpose of manufacturing or distributing a controlled substance is warranted under U.S.S.G. §2D1.1(b)(12).

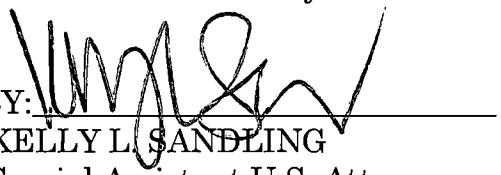
[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

d. An upward adjustment of two levels in that the defendant used a person less than eighteen years of age to commit the offense is warranted under U.S.S.G. § 3B1.4.

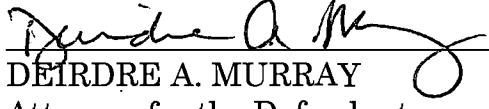
e. An upward adjustment of two levels in that the defendant made a credible threat or directed the use of violence is warranted under U.S.S.G. § 2D1.1(b)(2);

This the 11th day of March, 2019. ^{2020 COMM} ^{JD} (KLS)

ROBERT J. HIGDON, JR.
United States Attorney

BY: 
KELLY L. SANDLING
Special Assistant U.S. Attorney
Criminal Division

ANA DUARTE
ANA DUARTE-PINEDA
Defendant


DEIRDRE A. MURRAY
Attorney for the Defendant

Conditionally approved this 12 day of March, 2019. Final acceptance is deferred pending the Court's review of the Presentence Report.

APPROVED, this _____ day of _____, 2019.

J. Dever
JAMES C. DEVER, III
UNITED STATES DISTRICT JUDGE

Hello. I hope each and every one of you are having a good day.

My reason in writing is to request that you grant me a few minutes of your time to request that you have mercy for a mother who is dealing with a difficult time. My name is Ana Pineda-Duarte, I'm 47 years old and am the mother of 7 beautiful children. All my children were born in the United States. Their ages are 28, 24, 22, 21, 20, 17 and 13.

I want to let you know that I believe that an injustice was committed since the day of my arrest. For 30 years I lived in Florida with all my children and my husband, Carlos. The moment I decided to move to North Carolina is the moment when a horrible tragedy began. My oldest child was murdered in Mexico by the cartel. From that moment forward I've suffered an agony for which reason I never want to be apart from my children, not even for a moment. Because of what happened to my oldest and the pain I've felt I decided to move North ...

because since they lost their brother, they no longer wanted to go to school. That's why I made that decision with the goal of keeping them from running the streets and doing drugs.

I'd been living in the Carolinas for two years when I was arrested. I've been father and mother to my children since being abandoned by my husband. He abandoned me along with all my children.

Sometimes we can't criticize parents because we don't know what problems or needs they might be dealing with to get their kids ahead and we see ourselves in such desperate need that we make these mistakes. How many parents wouldn't have done the same as I did such that your children wouldn't lack their sacred nourishment or roof.

How many of us aren't here with the same purpose. I'm no one to judge others but I ask that you listen to me and, by God, help me.

I believe that in my case an injustice was committed. They were very unjust. Do you believe that the person that ...

put me in this place would not have done the same to get their family ahead? I'd like justice to be done for everything that I'm going through. What would I not do to be able to see my children. I feel useless not being able to be with my children.

It was horrible for me and my children when I was arrested. My daughter was arrested as if she was of adult age. There's a lot of racism in North Carolina against Hispanics. I never resisted my arrest. When I left the restaurant, I was detained. At that moment my life completely changed. After a few days in county [detention] social services wanted to take my minor children from me. I didn't understand why since my son, my youngest, wasn't with me. He was in Florida with my mother. It was very difficult. They wanted to drive me crazy and a month into being separated from my children, my son - the 17-year-old -- fell into the vice of alcohol. I lost him because they are immature and don't understand, ...

because they had never seen me jailed.

Because of this problem I'm dealing with I don't remember, but I think that about 2 months into this they gave me an attorney that didn't know how to deal with her clients. Either she was a bad attorney or maybe because they are free (appointed) they don't fight to help a person. On the first day she treated me terribly when I had already been in county detention for 4 months. That's when I saw my attorney for the first time. She came 4 times to read me the charges. It was always the same, nothing ever changed. One time when she came, I asked her to please, by God, help me, that my children were having many problems and she never changed, it was always the same. She always told me, "Don't worry about them because you're going to be in prison for many years." I would beg her to not tell me that and I would ask her why she was telling me that. She would say to me, "What did you think? ...

Did you think that your boyfriend was selling gold or something?" Although she always ignored me, I would just humble myself so that she would do something to help me. The only words she ever had in her mouth were these: "You're looking at a lot of years." I would answer saying, "Supposedly you're here to help me. Not to sink a person further." Supposedly, an attorney is there to fight for your rights, not to give you more time.

When I was moved to another detention facility that is called Elizabeth City, she went to see me twice in 15 months that I was being kept in that detention facility. I had come to think that she was no longer my attorney because I would send her letters and she never replied. My daughter would call her, and she would never answer her calls. She always ignored me. To me it was an injustice because she never read me my rights, she never told me how many charges I had, she never told me how many felonies I had. She never told me my rights. She always told me that ...

if I cooperated it would help me. In what way do they want me to cooperate if the one that always did everything was my boyfriend, all I did was accompany him that day because he told me to drive. I never knew why they sentenced me to so many years. 262 months seemed like an injustice to me. To me, my attorney seemed racist.

For that reason, I'm begging you to pardon me the harm I committed. For the sake of God, please have mercy. I'm asking for clemency so that you can review my case and tell me why I was dealt with unjustly. I beg for your forgiveness. By God, I ask that you reduce my sentence. I need my family. Seven years ago, they killed my son and then my separation from my husband and then my arrest and then in October they killed the father of my children in Mexico. They killed him on October 23, 2021. Just 8 months ago. That was quite the blow for me and my children and then to receive another

...

hard blow. I ask God to touch the heart of each of you such that you might forgive me all the harm I've done. By God, I think all the time was an injustice. I beg you to re-open my case and help me get back home to my children.

This prison they brought me to is so horrible. They give us food that has gone rotten. They put the milk in the sun, and they try to give it to us the following day. When we try to speak with them, they tell us to not get near them. The drinking water is yellow, they don't want us to use the ice. They lock the room on us so that we can't get to it. When we go to eat at mealtime, they only give us 10 minutes to eat and if we want to take leftovers with us, they make us throw it in front of all their ...

partners. It's a nightmare from which one just wants to wake up. Because of everything we're going through, by God, help me such that justice is realized.

Thank you very much. I'm Mrs. Ana Duarte-Pineda. May God hear you all such that justice may be seen and you might help me.

May you have a good day.