

NOT RECOMMENDED FOR PUBLICATION

No. 20-1019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

SHIRLEY DOUGLAS,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
MICHIGAN

FILED
Feb 23, 2021
DEBORAH S. HUNT, Clerk

ORDER

Before: GUY, SILER, and GRIFFIN, Circuit Judges.

Shirley Douglas, a federal prisoner represented by counsel, appeals her criminal conviction and sentence. Douglas also moves the court to consider her pro se appellate brief, which the government opposes. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Douglas pleaded guilty, in accordance with a plea agreement, to conspiracy to distribute controlled substances, *see* 21 U.S.C. § 846, for her participation in a so-called pill mill. The district court sentenced Douglas to 132 months of imprisonment, followed by three years of supervised release. Pursuant to the government's unopposed motion to amend or correct the judgment, the district court issued an amended judgment to include a forfeiture provision.

On appeal, Douglas argues through counsel that: (1) the appeal-waiver provision in her plea agreement does not bar her appeal; (2) she was not competent to plead guilty; and (3) her sentence was procedurally unreasonable.

Douglas has also filed a pro se brief in which she seeks to argue that her trial attorney was ineffective and that her guilty plea was unsupported by a factual basis. She moves this court to

consider her pro se arguments in addition to those raised by counsel. But “[i]t is well settled that there is no constitutional right to hybrid representation,” *United States v. Cromer*, 389 F.3d 662, 681 n.12 (6th Cir. 2004), and Douglas does not move to withdraw her counseled brief. In any event, her proposed ineffective-assistance claim can and should be raised in a collateral proceeding under 28 U.S.C. § 2255, *see Massaro v. United States*, 538 U.S. 500, 505 (2003), and her plea agreement plainly contradicts her argument that there was no factual basis for her guilty plea. *See United States v. Hawkins*, 793 F. App’x 416, 417 n.1 (6th Cir. 2020).

Douglas first asserts that her appeal is not prohibited by the appeal-waiver provision in her plea agreement. A defendant may waive any right, including the right to appeal, through a plea agreement. *United States v. Toth*, 668 F.3d 374, 377 (6th Cir. 2012). An appeal waiver is enforceable if it was knowing and voluntary. *Id.* at 378. Douglas argues that she was not competent to plead guilty and therefore that her appeal waiver is invalid.

We review a district court’s competency determination for clear error. *United States v. McCarty*, 628 F.3d 284, 294 n.1 (6th Cir. 2010). A defendant is competent to stand trial or plead guilty if she has “(1) sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding, and (2) a rational and factual understanding of the proceedings against [her].” *United States v. Abdulmutallab*, 739 F.3d 891, 899 (6th Cir. 2014) (citing *Godinez v. Moran*, 509 U.S. 389, 399 (1993); *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

Douglas received two competency evaluations and hearings before she entered into her plea agreement and pleaded guilty. In both instances, the district court determined that she was competent to stand trial. Her attorney moved for the second competency evaluation after Douglas was admitted to a psychiatric unit and placed under suicide watch. Her husband brought her to the hospital after she hit herself in the head with a hammer, damaged a wall, and stated that she had auditory and visual hallucinations. She was diagnosed with “Bipolar I Disorder, Depressed Severe w[ith] Psychosis,” “Generalized Anxiety Disorder,” and “Panic Disorder Sever Due to Extreme Stress.” She underwent a competency evaluation by the same doctor who performed her first evaluation, and the doctor again found her competent to stand trial. At the ensuing competency

hearing, the government submitted into evidence the doctor's written report, and the defense stipulated to its accuracy and offered no evidence of its own. On that basis, the district court found Douglas to be competent.

Two months later, Douglas entered into her plea agreement and pleaded guilty. At her plea hearing, the district court asked whether she had "ever been treated for any mental illness," and Douglas stated that she was being treated for "bipolar and depression." Douglas stated that she was receiving treatment at the time of the hearing. She stated that she was prescribed and had taken medication—Abilify—and that it did not "interfere with [her] ability to understand or comprehend." The court asked her if it helped, and Douglas stated that it "help[ed] a great deal." The district court then asked her attorney if he "had any difficulty communicating with Ms. Douglas over the last few days," and counsel replied, "Not over the last few days, your Honor, I have not." The district court then found Douglas competent to plead guilty.

Douglas argues that, given her history, "the district court had an independent obligation to *sua sponte* order a competency hearing" once her attorney stated during the plea hearing that he had had no "communication issues 'over the last few days.'" But that comment did not suggest that Douglas lacked the ability to consult with her attorney or understand the proceedings. Douglas emphasizes the "last few days" part of counsel's comment to argue that the court should have suspected that counsel did have problems communicating with Douglas at other times. Yet counsel was simply responding to the district court's own question whether he had problems "communicating with Ms. Douglas over the last few days." The subtext that Douglas sees is, therefore, not apparent. And while Douglas recounts her mental health history to show that she was not competent, the district court had twice ordered her to undergo a competency evaluation, and each time the court found her competent based on the medical expert's opinion. At the later competency hearing—which took place a mere two months before Douglas's plea hearing—defense counsel put on no evidence and stipulated to the accuracy of the expert's competency evaluation. We cannot conclude, then, that the district court should have inquired further about

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Douglas's competency based on counsel's comment that he had *not* had any recent communication problems with her.

In short, Douglas has not shown that the district court's competency determination was not clearly erroneous. Consequently, she has not shown her plea was unknowing or involuntary. Therefore, Douglas has not established that the appeal waiver in her plea agreement is unenforceable.

In her plea agreement, Douglas "waive[d] any right to appeal her conviction" if her sentence did not exceed 150 months of imprisonment, which it did not. She "retain[ed] [her] right to directly appeal the Court's adverse determination of any disputed sentencing issue that was raised at or before the sentencing hearing." Douglas argues that her sentence was procedurally unreasonable because the district court did not adequately explain its reasoning for the chosen sentence. Yet she acknowledges that "this matter was not raised on the trial court level." Therefore, it falls within the scope of her appeal waiver. *See Toth*, 668 F.3d at 377-78.

Accordingly, we **DENY** Douglas's motion to consider her pro se brief and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk