UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: September 02, 2022

Ms. Debra A. Breneman

Ms. Valarie Linnen

Mr. Donnie Smith

Re: Case No. 21-5876, USA v. Donnie Smith
Originating Case No. 3:16-cr-00122-1

Dear Mr. Smith and Counsel,

The Court issued the enclosed Order and Judgment today in this case.

Sincerely yours,

s/Michelle R. Lambert
Case Manager
Direct Dial No. 513-564-7035

cc: Ms. LeAnna Wilson

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

No. 21-5876

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
v.	)	THE EASTERN DISTRICT OF
	)	TENNESSEE
DONNIE SMITH,	)	
	)	
Defendant-Appellant.	)	

ORDER

Before: BATCHELDER, GRIFFIN, and MURPHY, Circuit Judges.

Donnie Smith appeals the district court's judgment of conviction and sentence for conspiracy to distribute methamphetamine. His counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). The government has filed a motion to dismiss based on an appeal-waiver provision in Smith's plea agreement. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Pursuant to a written plea agreement, Smith pleaded guilty to conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), and 846. The parties made no agreement as to sentencing. The plea agreement included an appeal-waiver provision, pursuant to which Smith agreed to not file a direct appeal of his conviction and sentence unless the sentence exceeded the greater of the guideline range determined by the district court or any mandatory minimum sentence deemed applicable by the court. Smith also waived the right to appeal the district court's determination as to whether the sentence would be served

consecutively or partially concurrently to any other sentence and agreed to not file any motions under 28 U.S.C. § 2255 or otherwise collaterally attack his conviction and sentence, except with respect to claims of ineffective assistance of counsel and prosecutorial misconduct.

The probation officer prepared a presentence report. Based on Smith's prior convictions in Tennessee for delivery and sale of cocaine and methamphetamine, the report applied an enhanced offense level of 37, pursuant to the career-offender provision of the Sentencing Guidelines, USSG § 4B1.1(b). After a three-level reduction for acceptance of responsibility, the total offense level was 34. *See id.* § 3E1.1. That total offense level and Smith's criminal history category of VI resulted in a guidelines imprisonment range of 262 to 327 months. Smith did not object to the presentence report. He asked the court for a downward variance from the applicable guidelines range. The court granted Smith's request and sentenced him to 235 months' imprisonment, which the court explained represented the low end of the guidelines range if the career-offender enhancement did not apply (with no adjustment for acceptance of responsibility). The court imposed a five-year term of supervised release.

Smith now appeals. His attorney has filed a brief and a motion to withdraw pursuant to *Anders*, stating that she has examined the record and found no non-frivolous grounds to raise on appeal but discussing whether Smith knowingly and voluntarily waived his right to appeal. Smith has filed a brief in response and a motion to supplement the certified record. Counsel has filed an adequate *Anders* brief and properly concludes that there are no issues present on the record that would support an appeal. *See Anders*, 386 U.S. at 744.

We review de novo the question of whether a defendant waived his right to appeal. *United States v. McGilvery*, 403 F.3d 361, 362 (6th Cir. 2005). A waiver provision in a plea agreement is binding so long as it is entered into knowingly and voluntarily. *See, e.g.*, *United States v. Smith*, 344 F.3d 479, 483 (6th Cir. 2003); *Hunter v. United States*, 160 F.3d 1109, 1113 (6th Cir. 1998). "A guilty plea is valid if it is entered knowingly, voluntarily, and intelligently . . . ." *United States v. Dixon*, 479 F.3d 431, 434 (6th Cir. 2007) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970). In accordance with Federal Rule of Criminal Procedure 11, the district court "must verify that 'the defendant's plea is voluntary and that the defendant understands his or her applicable

constitutional rights, the nature of the crime charged, the consequences of the guilty plea, and the factual basis for concluding that the defendant committed the crime charged.'" *Dixon*, 479 F.3d at 434 (quoting *United States v. Webb*, 403 F.3d 373, 378-79 (6th Cir. 2005)). Where a defendant does not object to a Rule 11 violation at the plea hearing, we review the plea for plain error. *United States v. Vonn*, 535 U.S. 55, 59 (2002). To establish a plain error, a defendant must demonstrate "(1) that an error occurred in the district court; (2) that the error was . . . obvious or clear; (3) that the error affected the defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. McCreary-Redd*, 475 F.3d 718, 721 (6th Cir. 2007) (quoting *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998)).

Our review of the record confirms that, before accepting Smith's plea, the district court substantially complied with the Rule 11 requirements. The court reviewed the charges, the potential penalties, and the terms of the plea agreement with Smith and ensured that Smith's plea was knowing and voluntary, that he understood the terms and consequences of the appeal waiver and the rights he was waiving by pleading guilty, and that there was a factual basis for the plea. The court also reviewed the appeal-waiver provision of Smith's plea agreement, and Smith confirmed that he understood the terms. Given the district court's thorough colloquy, Smith has no basis for challenging the voluntariness of his guilty plea. And, because he entered a valid and unconditional guilty plea, Smith has waived any non-jurisdictional claims that he may have regarding the pre-plea proceedings. *See Tollett v. Henderson*, 411 U.S. 258, 261-67 (1973). Moreover, Smith was sentenced to a below-guidelines term of 235 months' imprisonment, which did not exceed the applicable statutory maximum. *See* 21 U.S.C. § 841(b)(1)(A). Thus, the exceptions that would allow Smith to appeal his conviction or sentence are not met.

In his pro se brief, Smith argues that the appeal waiver should not be enforced because the district court improperly found that he was a career offender and thus his sentence exceeded the applicable guidelines range. He bases his argument on the Supreme Court's recent decision in *Wooden v. United States*, 142 S. Ct. 1063 (2022), where the Court clarified the meaning of the phrase "committed on occasions different from one another" as used in the Armed Career Criminal

Act, 18 U.S.C. § 924(e)(1), in reference to prior convictions that would result in a sentence enhancement. The court explained that "[o]ffenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." *Wooden*, 142 S. Ct. at 1071. It is not clear whether Smith mistakenly believes that he was sentenced under the Armed Career Criminal Act or whether he seeks to have *Wooden* extended to the career-offender provision of the Sentencing Guidelines.

As discussed above, Smith waived his right to appeal his conviction and sentence and at no point did he argue that his predicate convictions could be considered only one prior conviction. To the extent he now argues that *Wooden* compels a finding that he has only one prior conviction and that the district court's guidelines calculation is wrong, he is mistaken. *Wooden* concerned language found only in the Armed Career Criminal Act and did not address the guidelines' career-offender provision. Thus, any change in the Supreme Court's interpretation of language in § 924(e)—a statute not applicable here—does not render Smith's guilty plea or his assent to the appeal waiver unknowing or involuntary. Moreover, even if *Wooden* could be extended to the guidelines, it would not help Smith. Based on the record before this court, Smith's prior convictions were properly counted as separate convictions. He states that the convictions arose from a single investigation, a single arrest, a single indictment, and concurrent sentences and seeks to supplement the certified record with copies of grand jury records from these state court proceedings. But the presentence report indicates that the convictions were for four separate sales of cocaine and/or methamphetamine over the course of over two months' time in two separate counties. *See Wooden*, 142 S. Ct. at 1071 ("In many cases, a single factor—especially of time or place—can decisively differentiate occasions. Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a 'significant distance.'" (quoting *United States v. Rideout*, 3 F.3d 32, 35 (2d Cir. 1993))). Whether the offenses were charged in a single indictment is of no moment. The appeal-waiver provision in the plea agreement is enforceable.

Accordingly, we **GRANT** counsel's motion to withdraw, **DENY** Smith's motion to supplement the certified record, **AFFIRM** the district court's judgment, and **DENY** the government's motion to dismiss as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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No. 21-5876

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONNIE SMITH,

Defendant-Appellant.

Before: BATCHELDER, GRIFFIN, and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk