

No. 22-1854

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

May 12, 2023

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE FLACK,

Defendant-Appellant.

O R D E R

BEFORE: MOORE, KETHLEDGE, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

*Judge Davis recused herself from participation in this ruling.

NOT RECOMMENDED FOR PUBLICATION

No. 22-1854

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Mar 23, 2023

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,) ON APPEAL FROM THE UNITED
v.) STATES DISTRICT COURT FOR
LAWRENCE FLACK,) THE EASTERN DISTRICT OF
Defendant-Appellant.) MICHIGAN

O R D E R

Before: MOORE, KETHLEDGE, and MURPHY, Circuit Judges.

Lawrence Flack appeals the district court's judgment sentencing him to 262 months' imprisonment for his conviction on one count of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). His attorney has filed a brief and a motion to withdraw as counsel, pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967). 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).

A grand jury returned an indictment charging Flack with distribution of child pornography (count one), receipt of child pornography (count two), possession of child pornography (count three), possession with intent to distribute controlled substances (count four), and being a felon in possession of a firearm (count five). Pursuant to a written plea agreement, Flack pleaded guilty to counts two and three of the indictment. The parties agreed to a sentencing guidelines range of 262 to 327 months' imprisonment, and, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B),

the government agreed to recommend a sentence no more than the high end of the agreed-upon range. Pursuant to the agreement, Flack waived any right to appeal his conviction and waived his right to appeal his sentence as long as the sentence imposed did not exceed the maximum of the agreed-upon guidelines range. The court sentenced Flack to concurrent terms of imprisonment of 262 months on count two and 240 months on count 3 and a five-year term of supervised release.

Flack did not directly appeal. Instead, he filed a pro se motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. In it, he raised several claims of ineffective assistance of counsel, including claims that counsel was ineffective for failing to challenge the indictment on the ground that it contained duplicative charges in violation of his right against double jeopardy, failing to object to the presentence report on the ground that his convictions on counts two and three violated his double jeopardy rights, and failing to file a notice of appeal. The district court denied the motion. On appeal, the government conceded that Flack's convictions on counts two and three violate double jeopardy and moved for remand with instructions to vacate the possession conviction and enter an amended judgment. We found that Flack's convictions violated double jeopardy because they were based on the same pornography. We therefore granted the government's motion, vacated the judgment, and remanded the matter to the district court, explaining that “[a] general remand granting the district court discretionary authority over which of Flack's convictions to vacate and whether to conduct a resentencing hearing [wa]s the appropriate remedy.” *Flack v. United States*, No. 17-1316, slip op. at 2 (6th Cir. Mar. 23, 2018). Our order noted that, following entry of an amended judgment, Flack could file a direct appeal.

Id.

On remand, Flack moved to dismiss count two of the indictment. The district court denied that motion and, without holding a resentencing hearing, entered an amended judgment of conviction on count two with a sentence of 262 months' imprisonment. Flack then appealed from the original judgment of conviction and the amended judgment. He raised the following claims: (1) the district court abused its discretion on remand by failing to grant a full resentencing and by failing to address his arguments in favor of dismissal of the receipt count; (2) his guilty plea and the appellate waiver were invalid due to counsel's ineffective assistance; (3) the district court erred

during the original sentencing hearing by repeatedly misstating the mandatory minimum, and counsel was ineffective for failing to object; and (4) the court erred by applying a distribution enhancement under the Guidelines based on use of a peer-to-peer sharing network. We held that, although the error was one that our court had invited due to the wording of the remand order in Flack's previous appeal, the district court erred by resentencing Flack without holding a hearing. *United States v. Flack*, 941 F.3d 238, 241-42 (6th Cir. 2019). The matter was again remanded to the district court.

On remand, the district court conducted a sentencing hearing. The court addressed Flack's outstanding objections to the presentence report, heard arguments from the prosecution and the defense along with Flack's allocution, and, after consideration of the sentencing factors set forth in 18 U.S.C. § 3553(a), sentenced Flack to 262 months' imprisonment and five years of supervised release.

Flack now appeals, and his attorney has filed a brief and a motion to withdraw, pursuant to *Anders*, concluding that there is no non-frivolous ground on which to appeal in light of Flack's waiver of his right to appeal. Nevertheless, counsel briefly addresses the validity of Flack's guilty plea and the appellate waiver provision of the plea agreement, the reasonableness of the sentence, and counsel's effectiveness at the resentencing hearing. Flack has filed a response, arguing that counsel's brief is inadequate and misleading because it fails to address the two resentencing hearings that were scheduled but then adjourned to allow Flack more time to review the presentence report and make objections. He also acknowledges that he waived his right to appeal but asserts that "the prosecutor's lies reared during the sentencing hearing." Our independent review of the record supports counsel's conclusion that there are no appealable issues of arguable merit. *See Anders*, 386 U.S. at 744; *see also Penson v. Ohio*, 488 U.S. 75, 89 (1988) (O'Connor, J., concurring).

At the outset, it is noted that no arguable issues could be raised on appeal other than those stemming from the district court's resentencing proceeding. "The law-of-the-case doctrine bars challenges to a decision made at a previous stage of the litigation which could have been challenged in a prior appeal, but were not." *United States v. Adesida*, 129 F.3d 846, 850 (6th Cir.

1997). “A party who could have sought review of an issue or a ruling during a prior appeal is deemed to have waived the right to challenge that decision thereafter” *Id.* Here, in his appeal from the original judgment of conviction and the amended judgment entered on remand, Flack raised claims challenging the validity of his guilty plea and appeal waiver, the original sentencing, and the guidelines calculation. He, however, made clear that a decision granting him a full resentencing would “address [his] core constitutional concerns[] and . . . obviate [the] need to address the issue of whether [his] appellate waiver and initial sentencing hearing were valid and reasonable.” *See United States v. Flack*, No. 18-1676, D. 16 at 6 (6th Cir. Dec. 6, 2018). We granted Flack a full resentencing and therefore did not address his other claims. Thus, to the extent Flack seeks to reassert those challenges or raise any other claims regarding the validity of his guilty plea and appeal waiver or his original sentencing hearing, he has already had the opportunity to challenge those proceedings—and did so—in his prior appeal.

As explained above, Flack waived his right to appeal his conviction for any reason and waived his right to appeal his sentence unless the sentence imposed exceeded the agreed-upon guidelines range. The district court sentenced Flack at the bottom of that range to 262 months’ imprisonment. Thus, the conditions that would allow an appeal have not been met. Flack makes a vague allegation that the prosecutor lied during his sentencing hearing and suggests that this renders his appeal waiver invalid. But he provides no specific factual allegations or citations to the record to support this assertion. Flack is barred from appealing the sentence imposed at the resentencing hearing.

We therefore **GRANT** counsel’s motion to withdraw and **AFFIRM** the district court’s judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk