

APPENDIX

No. 24-3192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Feb 4, 2025

KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,

)

Plaintiff-Appellee,

)

v.

)

BENJAMIN DALE MARSHALL,

)

Defendant-Appellant.

)

OR D E R

Before: NORRIS, KETHLEDGE, and LARSEN, Circuit Judges.

Benjamin Dale Marshall appeals his sentence imposed by the district court following his guilty plea to a methamphetamine offense. The government moves to dismiss Marshall's appeal based on the appeal waiver contained in his plea agreement. Marshall opposes the government's motion. As set forth below, we grant the government's motion and dismiss Marshall's appeal.

Marshall and Kelsey Kamm sold 26.6 grams of actual methamphetamine to an undercover officer in July 2020. They were not arrested at that time.

Six months later, in January 2021, police officers stopped a vehicle driven by Marshall and observed a firearm in the passenger compartment. The officers also found a small amount of methamphetamine in Marshall's pocket. Marshall subsequently pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1) and was sentenced to 38 months of imprisonment followed by three years of supervised release. *United States v. Marshall*, No. 5:21-CR-147 (N.D. Ohio Nov. 15, 2021).

In September 2022, a federal grand jury returned an indictment charging Marshall and Kamm with distributing five grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(viii)—the transaction with the undercover officer more than two years earlier. Marshall pleaded guilty to the indictment in accordance with a plea agreement, which

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included an appellate-waiver provision. At sentencing, the district court calculated Marshall's guidelines range as 92 to 115 months of imprisonment based on a total offense level of 23 and a criminal history category of VI. Varying downward from that range, the district court sentenced Marshall to 84 months of imprisonment, to be served consecutively to his firearm sentence, and five years of supervised release.

This timely appeal followed. Marshall argues (1) that the district court erred in failing to make his sentence concurrent with his firearm sentence and (2) that the government's delay in prosecuting him prejudiced him at sentencing. The government moves to dismiss Marshall's appeal based on his plea agreement's appeal waiver.

"It is axiomatic that as part of a valid plea agreement, criminal defendants may waive many of their most fundamental legal rights, including their right to appeal." *United States v. Milliron*, 984 F.3d 1188, 1192-93 (6th Cir. 2021) (cleaned up). "A waiver provision is binding and forecloses appellate review if (1) the defendant's claim falls within the scope of the appeal waiver provision; and (2) the defendant 'knowingly and voluntarily' agreed to the plea agreement and waiver." *Id.* at 1193 (citing *United States v. Toth*, 668 F.3d 374, 377-78 (6th Cir. 2012)). We review de novo Marshall's waiver of his appeal rights. *See United States v. Ferguson*, 669 F.3d 756, 764 (6th Cir. 2012).

In his plea agreement, Marshall waived his right to appeal his conviction or sentence but reserved the right to appeal:

(a) any punishment in excess of the statutory maximum; or (b) any sentence to the extent it exceeds the maximum of the sentencing imprisonment range determined under the advisory Sentencing Guidelines in accordance with the sentencing stipulations and computations in this agreement, using the Criminal History Category found applicable by the Court.

Those reservations do not apply: Marshall's 84-month sentence did not exceed either the 40-year statutory maximum, *see 21 U.S.C. § 841(b)(1)(B)(viii)*, or the maximum of the guidelines range as determined in accordance with the parties' stipulations in the plea agreement and the criminal history category found applicable by the district court. Marshall's sentencing claims, including his challenge to the district court's imposition of a consecutive sentence, fall within the scope of

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his broad waiver of the right to appeal his sentence. *See United States v. Hollins-Johnson*, 6 F.4th 682, 683-84 (6th Cir. 2021); *see also United States v. Watkins*, 603 F. App'x 387, 391-92 (6th Cir. 2015); *United States v. Callier*, 565 F. App'x 423, 425-26 (6th Cir. 2014); *United States v. Darby*, 549 F. App'x 499, 500-01 (6th Cir. 2014).

The appellate-waiver provision does not bar Marshall from “perfecting any legal remedies [he] may otherwise have on appeal or collateral attack with respect to claims of ineffective assistance of counsel or prosecutorial misconduct.” In response to the government’s motion to dismiss, Marshall argues that his claims fall within this exception to the appeal waiver.

With respect to his challenge to the district court’s imposition of a consecutive sentence, Marshall contends that his trial counsel was ineffective for failing to argue that his firearm offense is relevant conduct to his methamphetamine conviction and that the sentence for his methamphetamine conviction should therefore be imposed to run concurrently with the remainder of his undischarged firearm sentence in accordance with USSG § 5G1.3(b)(2). But we “typically will not review a claim of ineffective assistance on direct appeal except in rare cases where the error is apparent from the existing record.” *United States v. Lopez-Medina*, 461 F.3d 724, 737 (6th Cir. 2006). There is no apparent error here. Marshall’s ineffective-assistance claim should be raised in a motion to vacate under 28 U.S.C. § 2255, “where the record regarding counsel’s performance can be developed in more detail.” *Id.*

Marshall also argues that the government’s delay in prosecuting him prejudiced him at sentencing, asserting that the separate federal prosecutions denied him the benefit of the grouping rules under the sentencing guidelines. *See USSG § 3D1.2*. According to Marshall, this claim falls within the appeal waiver’s exception for prosecutorial-misconduct claims. But Marshall’s appellate brief does not frame this issue as a prosecutorial-misconduct claim. *See United States v. Johnson*, 440 F.3d 832, 845-46 (“[A]n appellant abandons all issues not raised and argued in its initial brief on appeal.”) (citation omitted). And even if Marshall adequately framed his argument as a prosecutorial-misconduct claim to fall within the appeal waiver’s exception, his claim is not supported by the record. As Marshall concedes, “[t]he record here does not tell us why the prosecutor delayed.”

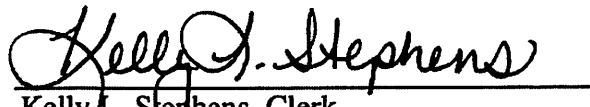
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Marshall does not suggest that his plea agreement or appeal waiver was invalid. Under Federal Rule of Criminal Procedure 11(b)(1)(N), the district court “must inform the defendant of, and determine that the defendant understands, . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.” During the plea hearing, the district court discussed the plea agreement with Marshall and reviewed the terms of the appellate-waiver provision, confirming that he understood that provision. The record reflects that the district court fully complied with Rule 11 in conducting the plea hearing and that Marshall’s guilty plea and appeal waiver were knowing and voluntary.

For these reasons, we **GRANT** the government’s motion and **DISMISS** Marshall’s appeal.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk