NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued October 1, 2024
Decided October 10, 2024

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

Nos. 22-1902 & 23-2377

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT NARVETT,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 21-CR-50

William C. Griesbach,
Judge.

ORDER

Robert Narvett pleaded guilty to wire fraud and money laundering for conducting a Ponzi scheme. *See* 18 U.S.C. §§ 1343, 2; *id.* §§ 1956(a)(1)(A), 2(a). Because of a lost recording, however, no transcript of his change-of-plea hearing could be prepared. On appeal, Narvett argues that, without the benefit of a definitive record, we cannot determine that his guilty plea, which came with an appeal waiver, was knowing and voluntary, so his plea must be vacated. *See* 28 U.S.C. § 753(b); FED. R. CRIM. P. 11(b)(1)(N). But even assuming that during the plea colloquy the district court omitted a

"Appendix A"

required admonition about the plea waiver, Narvett fails to provide evidence that any error affected his substantial rights. We therefore affirm.

Background

From about 2009 until 2019, Narvett scammed friends, family, and strangers by inducing them to purchase promissory notes under the false pretense that he was investing those funds. Instead, he spent the money on personal expenses and paying out other victims of the scheme. In 2013, the U.S. Securities and Exchange Commission filed a civil complaint against Narvett, charging him with fraud, and judgment was later entered against him. Undaunted, he continued to con people for several more years, swindling over $2.3 million from at least fifty victims from 2014 to 2019. In 2021, a grand jury issued an eleven-count indictment charging Narvett with four counts of wire fraud, two counts of concealment money laundering, three counts of promotion money laundering, one count of bank fraud, and one count of aggravated identity theft. Narvett eventually agreed to plead guilty to one count of wire fraud, *see* §§ 1343, 2, and one count of promotion money laundering, *see* §§ 1956(a)(1)(A), 2(a).

Narvett's plea agreement contains an appeal waiver, which states he "knowingly and voluntarily waives his right to appeal his sentence in this case and further waives his right to challenge his conviction or sentence in any post-conviction proceeding." Narvett signed and dated an acknowledgment at the end of the agreement that reads in part: "I am entering into this plea agreement freely and voluntarily.... My attorney has reviewed every part of this agreement with me and has advised me of the implications of the sentencing guidelines." Narvett's trial attorney also signed and dated an acknowledgment affirming that he "carefully ... reviewed every part of this agreement with the defendant" and that, "[t]o [his] knowledge, [Narvett's] decision to enter into this agreement is an informed and voluntary one." The district court accepted Narvett's guilty plea at a hearing held by videoconference.

At the sentencing hearing, the parties discussed Narvett's motion to strike portions of the government's sentencing memoranda that, Narvett asserted, violated the plea agreement. In that context, Narvett's attorney confirmed to the court that Narvett was "not asking to withdraw the plea." During his allocution, Narvett took responsibility for his criminal scheme and said that the government's sentencing memorandum "was rock solid ... absolutely unequivocally rock solid." The district court then imposed a sentence of 180 months' imprisonment—83 months above the guidelines range—and restitution of over $1 million. Before concluding the hearing, the

court informed Narvett that he had "the right to appeal [his] conviction or [his] sentence." Although "there's a waiver here in the plea agreement," the court continued, "that has exceptions so keep in mind you have the right to appeal any conviction."

Narvett filed a notice of appeal, and his trial counsel then discovered that a transcript of the change-of-plea hearing could not be prepared.[1] The video hearing, which took place without a court reporter, was meant to be recorded for later transcription, if necessary. When counsel ordered the transcript, however, no recording of the hearing could be found.

Narvett's appellate counsel attempted to reconstruct the transcript in accordance with Federal Rule of Appellate Procedure 10(c). Neither Narvett nor his trial attorney could specifically recall the district court advising Narvett about the appeal-waiver provision. On the district court's contemporaneously filed hearing checklist, no check appears next to the box labeled, "Waiver of appeal rights." But a prosecutor's checklist indicates that the district court advised Narvett of the waiver of his right to appeal or to collaterally attack the conviction and sentence.

In the statement of evidence submitted to the district court, the government remarked that the appeal waiver "was part of the plea agreement from the outset of plea negotiations." But the government conceded that "discrepancies exist in the available evidence" as to whether the district court discussed the waiver with Narvett. The district court accepted the fragmented reconstruction of the hearing, adding, "I know I go over appeal waivers but, you know, I don't have a specific recollection other than what my practice is and the belief that I certainly would have followed it on a case like this."

Analysis

On appeal, Narvett argues that, without a transcript of his change-of-plea hearing, we cannot conclude that the district court, in compliance with Federal Rule of Criminal Procedure 11, advised him of the consequences of the appeal-waiver provision in his plea agreement. He further contends that the record as a whole demonstrates that the appeal waiver was not discussed with him, and that he did not fully understand the

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[1] After Narvett filed his first notice of appeal, the district court entered an amended judgment revising Narvett's restitution to over $1.6 million. Narvett then filed a second notice of appeal, and we consolidated the two appeals on our own motion.

consequences of his plea. Narvett asserts he would not have pleaded guilty if he had appreciated the significance of the waiver, so his plea should be considered unknowing and involuntary and must be vacated.

Narvett admits he did not object to the district court's alleged failure to comply with Rule 11 at the change-of-plea hearing, so we review the validity of the plea for plain error. *See United States v. Vonn*, 535 U.S. 55, 59 (2002). Narvett therefore must show that (1) there is error; (2) the error is plain; (3) the error affected his substantial rights; and (4) the error "affect[ed] the fairness, integrity, or public reputation of the court proceeding." *United States v. Olano*, 507 U.S. 725, 732 (1993) (citation omitted). When seeking to vacate a plea agreement under the plain-error standard, the defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

To ensure that Narvett's guilty plea was knowing and voluntary, the district court was required to determine that he understood by his plea agreement that he waived his right to appeal or to collaterally attack his sentence. FED. R. CRIM. P. 11(b)(1)(N). For this appeal, we assume the district court did not give this admonishment. Given the factual discrepancies in the attempted reconstruction of the unrecorded hearing, whether the district court advised Narvett about the consequences of the appeal-waiver provision in his plea agreement cannot be confirmed. And even if the district court discussed the waiver with Narvett, we would need a transcript to evaluate whether the court's advisement sufficiently complied with Rule 11(b)(1)(N). *See, e.g., United States v. Smith*, 618 F.3d 657, 664–65 (7th Cir. 2010) (concluding that "brief exchange," where district court "obliquely" referred to plea agreement's appellate waiver and asked defendant whether he understood, did not meet requirements of Rule 11(b)(1)(N)).

Still, the government argues we should not assume that the district court omitted the appeal-waiver advisement because there is "sufficient evidence" that the court complied with Rule 11. The government points to its own contemporaneous checklist, the court's statement that it was its standard practice to provide an appeal-waiver admonition, the plain language of the written waiver, and Narvett's lack of surprise or concern about the waiver. But these arguments are not responsive to our need to evaluate whether the admonition, if given, complied with Rule 11(b)(1)(N). Further, these arguments do not acknowledge that failing to record the Rule 11 colloquy is error.

As Narvett points out, even an inadvertent failure to preserve the recording violates Rule 11(g).[2]

Assuming that the district court did not discuss the appeal waiver during the plea colloquy, the first two plain-error inquiries are satisfied here. First, the district court had to determine that Narvett understood that his plea agreement waived his right to appeal his sentence and to collaterally attack his conviction and sentence. *See* FED. R. CRIM. P. 11(b)(1)(N). Assuming the district court did not, this deviation from a legal rule is error. *See Olano*, 507 U.S. at 732–32. Second, the error is plain. A district court's failure to discuss an appeal-waiver provision with the defendant and "to ensure the defendant understands the waiver" constitutes "plain" error, *United States v. Sura*, 511 F.3d 654, 662 (7th Cir. 2007), in that it is "clear under current law"—Rule 11(b)(1)(N). *Olano*, 507 U.S. at 734.

At the third step of plain error review, however, Narvett falls short. He has not established that the failure to advise him of the appeal-waiver provision affected his substantial rights. Narvett argues that, but for the omission, he would not have entered the plea, because he would have addressed his strategic position differently if he had understood that he could not appeal adverse court rulings, including the above-guidelines imprisonment sentence he received. *See United States v. Polak*, 573 F.3d 428, 431 (7th Cir. 2009); *Sura*, 511 F.3d at 661–62 (citing *Dominguez Benitez*, 542 U.S. at 83). He also points out that post-plea disputes show that the parties were not "on the same page" about the government's obligations as to sentencing recommendations. From there, Narvett posits that these disputes—in which his trial counsel incorrectly asserted that the government had breached the plea agreement—show that his trial counsel did not fully understand the agreement and therefore might have incorrectly explained other provisions, such as the appeal waiver.

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[2] Narvett also argues the court violated § 735(b)(1) of the Court Reporters Act, which enumerates among the "proceedings to be recorded" all proceedings in criminal cases had in open court. If, as Narvett's appellate counsel suggested at oral argument, the "record" button was never pushed, then Narvett might be correct. But there is also evidence that the hearing was "recorded ... locally." A failure to preserve a recording is arguably not covered by the Act. Regardless, at a minimum, there was error here under Rule 11(g). But the unavailability of the transcript did not prejudice Narvett because, as we discuss below, there was no reversible error committed at the plea colloquy. *See Smego v. Payne*, 854 F.3d 387, 394 (7th Cir. 2017).

But Narvett fails to explain how his trial counsel's advocacy at sentencing bears on Narvett's understanding of the unrelated appeal-waiver provision. Narvett's argument that he would not have entered his guilty plea is undercut by the fact that, at sentencing, his counsel confirmed that he did not want to withdraw his plea regardless of the outcome of his objections to the government's submissions on sentencing. Indeed, Narvett did not object or ask to withdraw his plea after the court ruled against him.

Without evidence that he would have proceeded differently had he been admonished about the appeal waiver, Narvett's protests, which arose only after he received a longer-than-expected sentence, are "*post hoc* assertions from a defendant about how he would have pleaded," which the Supreme Court disfavors. *United States v. Zacahua*, 940 F.3d 342, 346 (7th Cir. 2019) (quoting *Lee v. United States*, 582 U.S. 357, 369 (2017)). Narvett does not point to any evidence from the time of his plea hearing that suggests he did not understand or was unwilling to agree to an appeal waiver. *See Lee*, 582 U.S. at 369. Nor does he present any evidence now—"not even an affidavit"—to support appellate counsel's argument that Narvett would not have pleaded guilty had the colloquy included a discussion of the appeal waiver. *United States v. Stoller*, 827 F.3d 591, 598 (7th Cir. 2016).[3] Moreover, Narvett's case is distinguishable from cases in which failures to advise defendants about appeal-waiver provisions were reversible errors. *See Smith*, 618 F.3d at 662, 665 (plea agreement had no "written affirmation" that defendant was acting voluntarily when he executed agreement); *Sura*, 511 F.3d at 662 (elderly defendant was undergoing mental-health treatment and gave "confused responses" to court's questions at plea colloquy).

The plea agreement and colloquy at sentencing show that Narvett had adequate knowledge of his appeal waiver, and that his guilty plea was voluntary. His circumstances are similar to the defendant's in *Polak*, in which—despite the defendant not having been admonished about his appeal waiver before pleading guilty—we concluded that the plea was knowing and voluntary. *See Polak*, 573 F.3d at 432. In *Polak*, the defendant signed a statement that he reviewed all aspects of the agreement with his attorney; he confirmed with the court that he was aware of the appellate waiver, "albeit after he entered the plea"; and the plain text of the waiver indicated that it applied to

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[3] Narvett contends he could not have provided an affidavit because this court cannot consider factual material that was not presented to the district court. *See United States v. Noble*, 299 F.3d 907, 911 (7th Cir. 2002). But the failure to present the evidence at the appropriate time is a side effect of his forfeiture: Had he timely moved to withdraw his plea agreement, he could have supplied an affidavit then.

his plea and sentence. *Id.* Similarly, Narvett and his attorney signed acknowledgments that they had reviewed every part of the agreement together. At sentencing, the district court remarked that Narvett's plea agreement contained an appeal waiver, and Narvett did not object, express surprise or confusion, or request to withdraw his plea. And the plain text of the appeal waiver explains it applies to his plea and his sentence.

The record as a whole also underscores that Narvett's guilty plea was knowing and voluntary. First, Narvett's unsworn assertion that he would not have pleaded guilty if he had heard more about the plea waiver is implausible: Given the strength of the government's case, the government's significant concessions in the plea agreement, and the risk of putting the facts of this case before a jury, Narvett's guilty plea was the rational choice. In *Polak*, this court declared that the "overwhelming evidence" against the defendant made the defendant's acceptance of a plea agreement (with an appeal waiver) "highly reasonable." 573 F.3d at 432. By Narvett's admission, the case against him, as described in the government's sentencing memorandum, was "unequivocally rock solid." The evidence included a litany of recorded phone conversations between Narvett and his victims, as well as victim interviews and records that revealed the breadth and length of his scheme. *See Dominguez Benitez*, 542 U.S. at 85 (where the record contains strong evidence "and a confession, one can fairly ask a defendant seeking to withdraw his plea what he might ever have thought he could gain by going to trial"). And Narvett had previously been found liable for fraud in the civil proceeding brought by the SEC. Moreover, the plea agreement allowed Narvett to plead guilty to only two counts of an eleven-count indictment, avoiding a trial where he would likely have been convicted of nine more. Underscoring Narvett's advantages under the plea deal, one of the dismissed counts, aggravated identity theft, carried a mandatory-minimum, consecutive sentence of two years. *See* 18 U.S.C. § 1028A(a)(1).

Second, Narvett's personal characteristics and conduct during the prosecution support the conclusion that his plea was knowing and voluntary. A defendant's age and educational background are relevant considerations in determining a defendant's ability to comprehend the terms of a plea agreement. *See Stoller*, 827 F.3d at 598. Narvett is a sophisticated defendant. At the time of his guilty plea he was 57 years old, he had graduated high school, served in the U.S. Coast Guard, and built a successful career in the insurance industry. *See Polak*, 573 F.3d at 432 (defendant had a high-school education and a military career). Narvett also devised and executed a complex financial scheme for over a decade, duping dozens of victims out of millions of dollars. His allocution, as well as the supplemental written statement that he wrote for sentencing

consideration, convey the thoughts of an intelligent defendant who is keenly aware of his actions and his circumstances.

Our decision is based upon the facts and circumstances of this case and this defendant. We do not offer a rule about when unavailability of a transcript constitutes, or contributes to, a plain error requiring a guilty plea to be vacated. Based on this record, any failure by the district court to admonish Narvett about, and confirm his understanding of, the appeal-waiver provision in his plea agreement was not a reversible error because it did not affect Narvett's substantial rights.

AFFIRMED