IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41337
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD LOUIS DUCKETT, a/k/a
Ronald Louis Washington, a/k/a
Michael Lincoln, a/k/a
Ronald Washington Duckett,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:93-CR-35)

(June 6, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Ronald Louis Duckett was convicted on a plea of guilty for violating 18 U.S.C. § 922(g)(1), felon in

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

possession of a firearm. In this, his second appeal, he contends that the district court erred in denying his motion to withdraw his guilty plea, abused its discretion in connection with Duckett's attempt to attack prior convictions collaterally, and potentially exceeded the statutory maximum sentence in the combination of imprisonment and supervised release imposed. We decline to consider Duckett's complaint regarding withdrawal of his pleas, as he failed to assign such error in his original appeal; we find no abuse of discretion in the district court's ruling on the issue of collateral attack on prior convictions; and, for lack of an Article III case or controversy, we are without jurisdiction to consider Duckett's hypothetical complaint regarding the statutory maximum sentence. For the reasons set forth below, we affirm.

I

FACTS AND PROCEEDINGS

Represented by counsel appointed under the Criminal Justice Act, Duckett pleaded guilty to possession of a Smith and Wesson .357 magnum revolver, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year. Duckett agreed, inter alia, to waive his right to appeal any issue except those related to the application of the Sentencing Guidelines or the basis for any upward departure that the district court might impose.

Prior to sentencing, counsel informed the district court that Duckett no longer wished to plead guilty. The district court declined to entertain a request to withdraw the guilty plea and

permitted Duckett to consult further with his attorney before sentencing.

The district court imposed a term of imprisonment of 60 months, a three-year term of supervised release, a $5,000 fine, and a special assessment of $50. Duckett appealed the sentence in this court.[1] We concluded that Duckett had not received a copy of the presentence report (PSR) timely, vacated the sentence, and remanded for resentencing.

On remand, Duckett filed a motion to withdraw his guilty plea, which the district court denied. It found that Duckett's plea was knowing and voluntary and that Duckett understood that there was no agreement under which he was to receive a sentence of between 27 and 33 months imprisonment. The district court also found that if Duckett were allowed to withdraw his plea, the government would suffer prejudice, the court would suffer substantial inconvenience, and judicial resources would be wasted.

The district court imposed the same sentence with the exception of the fine, which the court eliminated. Duckett timely filed a notice of appeal.

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[1] Lester W. Vance, the appointed attorney of record filed a motion to withdraw from representation on appeal. The reasons given were that the relationship had irretrievably broken down and that Duckett did not wish to be represented by Vance. The district court granted the motion to withdraw and appointed Scott Smith to represent Duckett.

II

ANALYSIS

A. Denial of Motion to Withdraw Plea

Duckett contends that the district court erred in denying his motion to withdraw his guilty plea before sentencing. He argues that his guilty plea was not knowing and voluntary because he was misled by counsel regarding the sentence. Duckett asserts that he was not aware that he had been misled because he did not timely receive a copy of the PSR; that once he became aware of his potential sentence, he asked to withdraw his plea at the first opportunity. Duckett also argues that the district court erred when, on remand, it did not conduct an evidentiary hearing on the motion to withdraw the plea.

The government argues that the district court's denial of the motion to withdraw is not appealable because (1) Duckett waived his right to appeal the conviction in the plea agreement, and (2) he relinquished the right to have the claim reviewed by not asserting it in his first appeal.

"[A] defendant may, as a part of a valid plea agreement, waive his statutory right to appeal his sentence." United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992). "[T]he waiver must be informed and voluntary." Id. at 567. As the issue presented by Duckett on appeal is whether the plea agreement was valid, it would be inappropriate to enforce the waiver.

Duckett may nevertheless have relinquished his right to challenge his guilty plea when he failed to raise that issue in his

first appeal. On the first appeal, we only addressed the issue whether the district court complied with 18 U.S.C. § 3552(d) and Fed. R. Crim. P. 32(c)(3)(A) in imposing sentence when Duckett was given only 30 minutes to review the PSR with his counsel. Duckett made no contention on the first appeal that his conviction was invalid because his plea was not knowing and voluntary.

Duckett could have raised the issue in the prior appeal. Although he had not filed a written motion to withdraw his plea before sentencing, defense counsel announced at sentencing that Duckett had informed counsel that he did not wish to plead guilty. The district court declined to entertain any request to withdraw the guilty plea, gave Duckett 30 minutes to consult with his attorney, and proceeded with the sentencing.

A party may not omit an argument on a first appeal and present it on a second appeal. Paul v. United States, 734 F.2d 1064, 1066 (5th Cir. 1984) (citing inter alia J. Moore, J. Lucas, T. Currier, 1B Moore's Federal Practice ¶ 0.404[1] n. 15 (1983)). "When a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter." United States v. Wright, 716 F.2d 549, 550 (9th Cir. 1983). We decline to consider this issue raised for the first time in a second appeal.

B. Collateral Attack on Prior Convictions

Duckett contends that the district court erred in calculating his criminal history points. He asserts that his criminal history category should be IV, based on seven criminal history points,

rather than VI, based on 14 criminal history points. Duckett argues that he received a harsher sentence in violation of the Ex Post Facto Clause because he was not permitted to challenge constitutionally insufficient convictions. He states that the district court applied the 1993 amended version of § 4A1.2, comment. (n.6), which explicitly provides that "this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence."

Duckett concedes that we have held in United States v. Canales, 960 F.2d 1311, 1314-15 (5th Cir. 1992) that the amendment to application note six is only a procedural provision and does not involve an ex post facto violation. He urges this court to revisit the issue because the change does in fact increase the sentence as applied to him.

Duckett contends that the district court believed that it was prohibited from exercising its discretion to examine the prior convictions given the Supreme Court's holding in Custis v. United States, 114 S. Ct. 1732 (1994). In Custis, the Supreme Court held that a defendant in a federal sentencing proceeding cannot collaterally attack the validity of a previous state conviction used to enhance his sentence under 18 U.S.C. § 924(e) unless he does so on the basis that he was denied counsel in the prior proceeding. Custis, 114 S. Ct. at 1735-39. Duckett contends that Custis is a very narrow holding and has not affected Canales. Thus, he argues, the district court should have exercised its discretion to examine the prior convictions.

"The guidelines in effect at the time of sentencing are the appropriate source for determining a sentence absent an ex post facto problem." United States v. Gonzales, 988 F.2d 16, 18 (5th Cir.), cert. denied, 114 S. Ct. 170 (1993). Commentary (n.6) to § 4A1.2 was amended effective November 1990. Canales, 960 F.2d at 1313. "The background note to that same section explicitly reserves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." Id. (internal quotation and citation omitted). Application note 6 is "a procedural provision that governs how challenges to prior convictions may be brought" and does not involve the Ex Post Facto Clause. Id. at 1314.

In his brief, Duckett asserts that he was previously sentenced under the 1991 version of the guidelines. The PSR indicates that the version effective November 1992 was used to prepare the report, even though sentencing was scheduled for November 19, 1993. Although at resentencing on December 2, 1994, the November 1993 version was used, whether the district court used the 1992 or 1993 version of the guidelines at resentencing is immaterial. The two versions are virtually identical except that the amendment concerning collateral attack of prior convictions is part of application note 6 in the 1993 version but appears in the background comments in the 1992 version. The fact that the wording is slightly different presents no ex post facto problem.

"[A] court is only required to exclude a prior conviction from the computation of the criminal history category if the defendant

shows it to `have been previously ruled constitutionally invalid'; otherwise, the district court has discretion as to whether or not to allow the defendant to challenge the prior conviction at sentencing." Canales, 960 F.2d at 1315.

Duckett raised this issue in his objections to the PSR on resentencing, and the district court permitted argument on the objections prior to resentencing. The record reflects that both Duckett and the district court were aware that a collateral challenge to the convictions used to calculate the criminal history category was discretionary under Canales. The district court exercised its discretion and allowed a collateral challenge only to those prior convictions in which Duckett was uncounseled. The district court agreed that Custis involved enhancement under the career offender statute but applied the reasoning in Custis to Duckett's situation.[2]

Duckett argued in the district court that, contrary to the PSR, he was not represented by counsel in his 1984 larceny and assault convictions. Duckett testified that he was arrested for public intoxication in Tennessee and was held to answer to the 1974 charges at that time. He insists that, to obtain release, he pleaded guilty to the 1974 charges without consulting with an

[2] We have not yet addressed the question whether Custis should be expanded beyond prior convictions used to enhance a sentence under 18 U.S.C. § 924(e). The government cites authority in other circuits that have addressed the issue, but we need not decide the issue in this case because the district court relied on Canales and used the reasoning of Custis as a guideline to determine whether to permit Duckett to attack his prior conviction.

attorney.

On cross-examination, Duckett was questioned concerning his conversation with James Parsons, the probation officer who prepared the PSR, and was asked why he had not previously objected to that portion of ¶ 22 that stated that he had retained an attorney to represent him in the Tennessee plea agreement. Duckett was unable to give a clear answer. Parsons testified that he interviewed Duckett on two occasions. At the presentence interview, Duckett told Parsons that he did not have a court-appointed attorney in the Tennessee case but had hired an attorney to represent him. Parson reviewed the NCIC rap sheet with Duckett but discerned no need to contact the probation office in Tennessee because Duckett was able to answer all of his questions, including telling Parsons that he had an attorney.

The district court found not credible Duckett's testimony that he did not have counsel. The court based its credibility determinations on the testimony of the probation officer and the fact that Duckett had not objected to the PSR on this point. Duckett objected on this ground only after the district court ruled that Duckett could collaterally attack only uncounseled convictions. The district court further stated that it would not permit Duckett to attack a conviction on the ground that it did not comply with the Tennessee Speedy Trial Act because the Act presumably had been waived and because "it couldn't be attacked on that basis at this time in this proceeding." We conclude that the district court did not abuse its discretion in disallowing a

collateral attack on Duckett's prior convictions.

C. Statutory Maximum Sentence

Duckett contends that the district court erred in imposing supervised release in excess of the statutory maximum sentence. He asserts that, if his supervised release were to be revoked on the last day of his three-year term, and he was then sentenced to three years in prison, his total sentence would exceed the ten-year statutory maximum under § 922(g)(1).

We have no jurisdiction to address Duckett's claim on this point. See United States v. Schoenborn, 4 F.3d 1424, 1434 (7th Cir. 1993). To be justiciable, a claim must "present a real and substantial controversy which unequivocally calls for adjudication of the rights claimed." Poe v. Ullman, 367 U.S. 497, 509 (1961) (Brennan, J. concurring); U.S. Const. Art. III, § 2, cl. 1. At this juncture, Duckett's claim is purely hypothetical; it "has not ripened into the definite and concrete controversy" necessary for adjudication. See Cross v. Lucius, 713 F.2d 153, 159 (5th Cir. 1983). A hypothetical claim does not present us with the Article III case or controversy requisite to our jurisdiction.

For the foregoing reasons, the rulings of the district court are, in all respects,

AFFIRMED.