

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 11-cr-00001-GP-1
v.	:	
	:	CIVIL ACTION
DAVID DEVINE	:	NO. 13-844

MEMORANDUM

PRATTER, J.

MAY 3, 2013

INTRODUCTION

David Devine entered a counseled guilty plea, pursuant to a written guilty plea agreement, on November 14, 2011. In doing so, Mr. Devine admitted his guilt for two of four counts in a superceding indictment by which he had been charged with distribution of child pornography, a violation of 18 U.S.C. § 2252(a)(2), and possession of child pornography, a violation of 18 U.S.C. § 2252(a)(4). Three months later Mr. Devine was sentenced to a below-Guidelines sentence of 78 months' imprisonment, or roughly half of the incarceration time recommended by the Guidelines and even more significantly below the statutory total of 30 years.

Mr. Devine, operating pro se, has filed a petition pursuant to 28 U.S.C. § 2255. The Government argues, by way of a motion to dismiss, that the Court can and should dismiss Mr. Devine's petition, doing so without a hearing and without addressing the substance of the petition,¹ given the repeated waivers by Mr. Devine of his direct and indirect appellate options. As detailed below, the Court agrees that Mr. Devine indeed has waived pursuit of his proposed

¹The upshot of Mr. Devine's arguments is that his counsel during the guilty plea and sentencing phases of this case was ineffective.

collateral attack of his guilty plea and/or his sentence.

DISCUSSION

The conduct at issue in this prosecution reaches back to 2009 with Mr. Devine's posting over the internet certain pornographic images of children. Law enforcement authorities in Delaware County, Pennsylvania had traced those activities to Mr. Devine, and they had obtained a search warrant on August 4, 2010 for Mr. Devine's home. The county authorities seized from his home various laptops, CD's, DVD's, and other paraphernalia. They took a statement from Mr. Devine after he had been advised of, and waived, his Miranda rights.

Mr. Devine is a college graduate and has worked as a teacher. He has no cognitive impairments that have been brought to the Court's attention. He has been represented by experienced counsel² throughout the subject proceedings.

Soon after having been located by local authorities, he was brought to the attention of federal authorities. After a period of various negotiations between and among local and federal law enforcement authorities and defense counsel, a superceding indictment was returned by the federal grand jury. Thereafter, a negotiated plea agreement was entered into, together with a written acknowledgment of rights. The plea agreement provides, in pertinent part:

9. In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

²Defense counsel appears frequently in this Court. He is a former federal prosecutor, and now is a member of the CJA panel from which counsel are selected for appointment to represent impecunious federal defendants.

- a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
- b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:
 - (1) the defendant's sentence on any count of conviction exceeds the statutory maximum for that counsel as set forth in paragraph three above;
 - (2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; and/or
 - (3) the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 543 U.S. 220 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

The hearing at which Mr. Devine actually entered his guilty plea and confirmed his intention to waive his direct and indirect appellate options provided the Court with the opportunity to be sure that Mr. Devine's waiver was both voluntary and knowing. United States v. Mabry, 536 F.3d 231 (3d Cir. 2008). To do so, the Court specifically addressed the gravity of Mr. Devine's situation, the scope of his guilty plea agreement, the reach of his waiver and his prior and then-extant opportunities to consider all such issues. The Court first encouraged Mr. Devine to be sure he fully heard and understood all of the Court's questions and to consult with counsel at any time he so desired during the hearing (11/14/11 Hrg. N.T. 4). The Court reminded Mr. Devine that if he entered a guilty plea he would be "knowingly and voluntarily giving up some very important rights" (11/14/11 Hrg. N.T. 5).

Among other biographical information the Court confirmed Mr. Devine's educational pursuit of a master's degree in elementary education, having earned a bachelor's degree in 2007, as well as documented his most recent employment as a first grade teacher. (11/14/11 Hrg. N.T. 7-9). The Court also confirmed the absence of any impairment at the time of the hearing in terms of illnesses, drug or other medicinal intake or omissions, alcohol and the like. (11/14/11 Hrg. N.T. 10-11). Furthermore, Mr. Devine confirmed that he had had sufficient time to confer with his lawyer about his case and that he was satisfied with counsel's representation and with counsel's advice. (11/14/11 Hrg. N.T. 12).

After delineating various rights and privileges a guilty plea would abrogate, the Court directed Mr. Devine's attention to his written guilty plea agreement and his understanding of it, including the waiver of his appellate rights. (11/14/11 Hrg. N.T. 14-18). With respect to the waiver of his appellate rights, the Court re-emphasized with Mr. Devine that by pleading guilty he was "giving up [his] right to appeal" other than "in a few limited circumstances," and "severely limit[ing] and cut[ting] back" his appellate options. (11/14/11 Hrg. N.T. 21-22; 27). As to sentencing issues, with the appropriate verbal contributions from counsel for the Government, Mr. Devine was expressly reminded that he was "giving up the right to attack his sentence" unless the Government appeals the sentence, or if the Court imposed a sentence above the statutory maximum or if the Court exceeded the Sentencing Guidelines without appropriate justification. (11/14/11 Hrg. N.T. 22-24). In fact, the Court directed Mr. Devine to re-read during the hearing his entire written appellate waiver, which he did in consultation with his counsel. Id.

Furthermore, the Court explained to Mr. Devine that he was waiving any potential appeal

from the Court's conclusions with respect to sentencing enhancements, specific elements of his conduct, numbers of images of pornography, or the like. (11/14/11 Hrg. N.T. 25-26). Indeed, the Court went to considerable lengths to make sure Mr. Devine fully understood that sentencing was very significantly a matter for the sound discretion of the Court, so much so that he was reminded that no one could guarantee what the sentence would be and that Mr. Devine's disappointment or dismay with the sentence (including conditions of supervision) or any such negative reaction would be of no consequence in terms of the lasting effect of his appellate waiver. (11/14/11 Hrg. N.T. 35-38; 47). The specific potential sentences were expressly reiterated for Mr. Devine (11/14/11 Hrg. N.T. 38-39) and he testified that he understood what the maximum punishment could be. (11/14/11 Hrg. N.T. 43). Mr. Devine repeatedly testified throughout the hearing that he knew he was waiving his appellate options if he entered a guilty plea and yet he proceeded to do so. (11/14/11 Hrg. N.T. 49).

Accordingly, having observed Mr. Devine's demeanor and clarity of communication in court, the Court determined that the plea and the waiver were knowing and voluntary and covered his direct and indirect post-conviction rights. (11/14/11 Hrg. N.T. 51-53). The Court saw no miscarriage of justice by accepting Mr. Devine's plea, along with his waiver, and perceives none now in response to Mr. Devine's pro se petition. United States v. Mabry, 536 F.3d at 236-37; United States v. Khattak, 273 F.3d 557 (3d Cir. 2001). See also, United States v. Wilson, 429 F.3d 455, 458 (3d Cir. 2005); United States v. Gwinnett, 483 F.3d 200, 206 (3d Cir.

2007). Therefore, an order consistent with this Memorandum will be filed following this Memorandum dismissing the § 2255 petition.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT COURT JUDGE

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ORDER

AND NOW, this 3rd day of May, 2013, having reviewed the docketed filings referenced herein, and as explained in greater detail in the accompanying Memorandum, it is hereby **ORDERED** that the Government's motion to dismiss is hereby GRANTED, inasmuch as Mr. Devine waived in his written plea agreement and under oath at his plea hearing the right to present any collateral challenge to his conviction and sentence, and has not alleged any miscarriage of justice potentially sufficient to overcome that waiver. See United States v. Khattak, 273 F.3d 557 (3d Cir. 2001). No certificate of appealability shall issue.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge