

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

UNITED STATES OF AMERICA,

v.

AYIDA DELOATCHE

CRIMINAL ACTION
NO. 15-115

PAPPERT, J.

March 6, 2017

MEMORANDUM

On March 24, 2015 Ayida Deloatche was charged by information with one count of attempted robbery which interferes with interstate commerce and one count of aiding and abetting in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2. (ECF No. 1.) Deloatche drove two accomplices to rob a man she believed to be a drug dealer and drove the robbers away from the scene of the crime with a safe they stole from his home. (Gov't Resp. in Opp'n, at 3, ECF No. 38.) Deloatche pled guilty on June 17, 2015 and was sentenced to 57 months imprisonment, 3 years of supervised release, assessed \$100 and fined \$1,000 on September 15, 2015. (ECF No. 26.) Deloatche's sentence fell within the applicable Sentencing Guidelines range of 51–63 months.

On July 27, 2016 Deloatche filed a *pro se* motion pursuant to 28 U.S.C. § 2255 requesting that the Court set aside her sentence, release her from incarceration 24 months early and add those 24 months to her supervised release term, effectively giving her a 30-month sentence followed by 5 years of supervised release.¹ (ECF No. 30.)

On November 3, 2016 she filed a second *pro se* motion, also purportedly under § 2255, seeking to reduce her sentence in accordance with Amendment 794 to the Sentencing Guidelines.

¹ Deloatche also wishes to be “resentenced” so she “can go to an inpatient rehabilitation center.” (Def.'s Mot., at 2, ECF No. 30.) At another point in her motion, she requests a “two-year suspended sentence.” (*Id.* at 3.)

(ECF No. 32.) Deloatche argues in that motion that the two-level “minor role” adjustment found in Amendment 794 both applies to her conduct in this case and is retroactive. *See* (Deloatche Mot., at 1–2, ECF No. 32).

Deloatche waived her right to collaterally attack her sentence and enforcing that waiver will not work a miscarriage of justice. Her motions are denied accordingly. Furthermore, Delaotche has not made a substantial showing of a denial of a constitutional right, and reasonable jurists would not debate the disposition of her claims, the Court will not issue a certificate of appealability for either motion. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).²

I.

A.

Deloatche waived her right to collaterally challenge her sentence. Criminal defendants “may waive both constitutional and statutory rights, provided they do so voluntarily and with knowledge of the nature and consequences of the waiver.” *United States v. Mabry*, 536 F.3d 231, 236 (3d Cir. 2008). When a criminal defendant waives collateral challenge rights, the Court must evaluate the validity of the waiver by examining two factors: (1) whether the waiver was knowing and voluntary; and (2) whether enforcing the waiver “would work a miscarriage of justice.” *Id.* at 237. In determining whether a waiver is knowing and voluntary, the Court “must

² Third Circuit Local Appellate Rule 22.2 states:

At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue. If the district judge issues a certificate, the judge must state the specific issue or issues that satisfy the criteria of 28 U.S.C. § 2253. If an order denying a petition under § 2254 or § 2255 is accompanied by an opinion or a magistrate judge’s report, it is sufficient if the order denying the certificate references the opinion or report. If the district judge has not made a determination as to whether to issue a certificate of appealability by the time of the docketing of the appeal, the clerk will enter an order remanding the case to the district court for a prompt determination as to whether a certificate should issue.

address the defendant personally in open court and inform the defendant of, and determine that the defendant understands . . . the terms of any provision in a plea agreement waiving the right to appeal or collaterally attack the sentence.” *United States v. Khattak*, 273 F.3d 557 (3d Cir. 2001) (citing FED. R. CRIM. P. 11(c)(6)).

In the her guilty plea agreement with the government, Deloatche agreed that:

In exchange for the promises 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.

(Plea Agmt., at 5, ECF No. 17-1.) At her change of plea hearing, the Court ensured that Deloatche’s waiver was knowing and voluntary. During the colloquy, the Court asked Deloatche:

Do you understand that if you plead guilty, your guilty plea will prevent you from using later proceedings like a collateral attack or habeas corpus, including under 28 United States Code § 2255 and 2241, to challenge your conviction, your sentence, or any other matter?

(Hr’g Tr., at 26:16–20, ECF No. 38-1.) Deloatche responded affirmatively. (*Id.* at 26:21.) The Court further ensured that Deloatche had discussed the issue with her counsel and accepted her counsel’s advice and recommendation on the waiver. (*Id.* at 26:22–27:1.) The Court informed Deloatche of the narrow grounds upon which she would be permitted to appeal her sentence.³ The Court also ensured that Deloatche’s counsel was satisfied that her plea and waiver were made with a full understanding of the nature of the charges and her limited legal rights to attack her sentence. (*Id.* at 36:21–37:2.) Only after reviewing these limitations with Deloatche and her

³ Deloatche could appeal her sentence in four circumstances: if the government appealed her sentence; her sentence exceeded the statutory maximum; the Court departed upward pursuant to the sentencing guidelines; or the Court imposed a sentence above the guideline range. (*Id.* at 24:14–24.) Deloatche does not raise any of those claims in her motion, none of which apply in any event.

counsel did the Court determine that Deloatche's plea and its associated waivers were knowing, intelligent and voluntary. *See (id. at 37:11 –16)*.

Enforcing Deloatche's waiver would not "work a miscarriage of justice." *See Mabry*, 536 F.3d at 237. Courts should apply the "miscarriage of justice" exception to a collateral attack waiver "sparingly and without undue generosity." *United States v. Wilson*, 429 F.3d 455, 458 (3d Cir. 2005). Nevertheless, the Court has an affirmative duty to examine the issue. *Mabry*, 536 F.3d at 237. The Third Circuit Court of Appeals has recognized the "miscarriage of justice" exception in only "a few limited circumstances, such as where 'constitutionally deficient lawyering prevented the defendant from understanding his plea,'" where a defendant should have been permitted to withdraw a guilty plea, or where the waiver itself was the product of ineffective assistance of counsel. *United States v. Spivey*, 182 F. Supp. 3d 277, 280 (E.D. Pa. 2016) (citing *United States v. Shedrick*, 493 F.3d 292, 298 (3d Cir. 2007); *Wilson*, 429 F.3d at 458). This case does not fall into any of those categories, and none of the relevant considerations suggest that enforcing the collateral attack waiver will work a miscarriage of justice. *Khattak*, 273 F.3d at 563 (quoting *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001)).

Deloatche's first motion is denied.

B.

In her second motion, Deloatche contends that Amendment 794 to the Sentencing Guidelines should be retroactively applied to reduce her sentence. Because Deloatche is proceeding *pro se*, the Court should liberally construe her filings with an eye toward substance, rather than form. *United States v. Delgado*, 363 F. App'x 853, 855 (3d Cir. 2010) (citing *United States v. Miller*, 197 F.3d 644, 648 (3d Cir. 1999)). The Court will therefore construe Deloatche's motion as one to modify her sentence pursuant to 18 U.S.C. § 3582(c)(2), which

permits the Court to modify a term of imprisonment of a defendant who was sentence based on a “sentencing range that has subsequently been lowered by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2).⁴

Again, Deloatche’s guilty plea waiver applies to collateral attacks brought “under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.” (Plea Agmt., at 5 (emphasis added)). As noted above, the waiver was knowing, intelligent and voluntary, and it would not work a miscarriage of justice to apply the waiver here.⁵ In any event, whether Amendment 794 applies retroactively is unsettled in this circuit, *see United States v. Montgomery*, ___ F. App’x ___, 2016 WL 7478499, at *2 n.2 (3d Cir. 2016), and the case Deloatche relies on to support the retroactive effect of Amendment 794 addresses retroactivity with regard to direct appeals, not collateral attacks. *See United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016); *see also United States v. Casas*, 632 F. App’x 1003, 1005 (11th Cir. 2015) (finding Amendment 794 retroactive on direct appeal). As the government notes, other courts that have addressed the retroactivity of Amendment 794 in the context of collateral attacks have found the Amendment non-retroactive. *See, e.g., Chavez-Ramirez v. United States*, no. 16-00456, 2016 WL 6634866, at *3 (D. Haw. Nov. 8, 2016); *West v. United States*, No. 16-2540, 2016 WL 6652992, at *1 (N.D. Tex. Oct. 20, 2016). For this reason, in addition to Deloatche’s knowing, intelligent and voluntary waiver, her second motion is denied.

⁴ The Government argues that Deloatche’s second motion is time barred by § 2255(f), which precludes claims filed over one year after sentencing or more than one year after the date on which the right asserted was initially recognized by the Supreme Court. This is correct, as the judgment of conviction became final on September 16, 2015, (ECF No. 26), Amendment 794 took effect on November 1, 2015, and Deloatche did not file her second motion until November 3, 2016, (ECF No. 32). However, the one-year limitation period applies to motions under § 2255, and the Court has construed Delaotche’s motion as one under 18 U.S.C. § 3582, which does not impose the same time limits as 28 U.S.C. § 2255. The Court will therefore evaluate Deloatche’s second motion.

In any event, if Deloatche’s second motion were evaluated as a petition under § 2255, it would also be barred as an uncertified second or successive motion. *See* 28 U.S.C. § 2255(h).

⁵ Section 3582(c)(2) also permits the Court to reduce a term of imprisonment “on its own motion.” The Court will not do so here.

An appropriate order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.