

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

UNITED STATES OF AMERICA,

v.

FRITZROY BROWN

CRIMINAL ACTION
NO. 14-596-01

PAPPERT, J.

August 14, 2018

MEMORANDUM

Fritzroy Brown worked for Brotherly Love, an ambulance company that defrauded Medicare by transporting patients whose medical condition did not require ambulance services. Brown performed unnecessary ambulance transports, falsified documents and received referral payments for recruiting new patients to the fraudulent scheme. As part of a twenty-two count indictment against six defendants, he was charged with one count of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349, one count of making false statements in health care matters in violation of 18 U.S.C. § 1035, one count of theft of government property in violation of 18 U.S.C. § 641, and three counts of wire fraud in violation of 18 U.S.C. § 1343.

On June 30, 2015 Brown plead guilty, pursuant to a written Guilty Plea Agreement, to the conspiracy, making false statements and theft charges. (ECF Nos. 107 & 108.) The Government agreed to move to dismiss the wire fraud counts at his sentencing. (ECF Nos. 108 & 185.) On March 9, 2016 the Court sentenced Brown to 37 months imprisonment, 3 years of supervised release, a \$300 special assessment and \$2,029,862.52 in restitution. (ECF Nos. 184 & 187.) His sentence was within the 37 to 46 month Guidelines range, as calculated in the Pre-Sentence Report and explained by

the Court. (Pre-Sentence Report at 23; Tr. of Hr'g at 9:10–13, ECF No. 209.) Brown did not appeal his sentence.

On March 29, 2018 he filed a *pro se* motion for declaratory relief under 28 U.S.C. §§ 2201–2202 and 8 U.S.C. § 1228, contending that he is entitled to a reduced sentence. (Mot for Declaratory Relief., ECF No. 205.) First, Brown, who is not a citizen of the United States, believes he is entitled to a reduction in his sentence under *Smith v. United States*, 27 F.3d 249 (D.C. Cir. 1994), which held that a court may consider a defendant's status as a deportable alien when determining the defendant's sentence. (*Id.* at 1–5.) Second, Brown argues that he deserves a reduced sentence because he anticipates serving additional time in the custody of immigration authorities after serving his criminal sentence. (*Id.* at 5–7.)¹

Brown's motion, however styled, is an attempt to appeal his sentence, something Brown waived the right to do when he pled guilty. Even had he not done so, his effort, when properly styled, is time-barred as well as completely meritless.

¹ As a deportable alien, Brown also argues that the Court should order the Bureau of Prisons to transfer him to a facility with an Institutional Hearing Program to expedite his removal after serving his sentence, citing 8 U.S.C. § 1228(a)(3)(A). (Mot. at 12–14.) Section 1228(a)(3)(A) provides that “the Attorney General shall provide for the initiation and, *to the extent possible*, the completion of removal proceedings...in the case of any alien convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony.” 8 U.S.C. § 1228(a)(3)(A) (emphasis added). The statute does not *require* the government to institute removal proceedings prior to the conclusion of an alien's sentence. *See* 8 U.S.C. § 1228(a)(3)(B). Moreover, § 1228(a)(1) makes clear that nothing in § 1228 “shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States[.]” 28 U.S.C. § 1228(a)(1). Brown has no right to a transfer under § 1228, and the BOP is responsible for designating the place of his imprisonment. *See* 18 U.S.C. § 3621(b).

I

In his Guilty Plea Agreement, Brown waived his right to appeal or collaterally attack his sentence:

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.²

(Plea Agmt. at ¶ 13, ECF No. 108.) 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 237.³ In determining whether a waiver is knowing and voluntary, the Court “must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands...the

² There were four exceptions to this broad appellate waiver: if the government appealed his sentence; his 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 19:11–19; Plea Agmt. at ¶ 13.) Brown does not raise any of those claims in his motion, none of which apply in any event.

³ Brown contests the length of his sentence under 28 U.S.C. §§ 2201–2202 and 8 U.S.C. § 1228, but habeas corpus is the way a person in custody may challenge the duration of a sentence. *See Heck v. Humphrey*, 512 U.S. 477, 481–82 (1994); *see also Muhammad v. Close*, 540 U.S. 749, 750 (2004) (“Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus[.]”). The Court liberally construes Brown’s motion as one made pursuant to 28 U.S.C. § 2255. *See, e.g., Sobell v. Attorney General of United States*, 400 F.2d 986, 988 (3d Cir. 1968) (interpreting motion for declaratory judgment as motion made pursuant to § 2255); *Abdel-Whab v. United States*, 175 F. App’x 528 (3d Cir. 2006) (same); *Flood v. United States*, 867 F. Supp. 2d 539, 544 (D. Del. 2012) (same); *United States v. Moscony*, 1996 WL 411275, at *1 (E.D. Pa. July 12, 1996) (same).

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)).

At his change of plea hearing, Judge Yohn ensured that Brown’s waiver was knowing and voluntary, informing Brown that:

[Y]ou ordinarily have a right to bring later proceedings known as collateral attack by filing a federal habeas corpus motion to vacate, set aside, or correct your sentence under Section 2255. Your guilty plea absolutely prohibits you from using these later proceedings under Section 2255, except in some very restricted situations, one of which is you could allege ineffective assistance of counsel by your counsel here. You understand that?

(Hr’g Tr. at 19:11–19, ECF No. 208.) Brown responded affirmatively. (*Id.* at 19:19.)

Moreover, Brown understood that his guilty plea would “result in hi[m] being subject to immigration proceedings, and [would] likely result in him being removed from and prevented from ever returning to the United States.” (Plea Agmt. at ¶ 10.) He agreed to waive “any and all challenges to his guilty plea and his sentence based on any immigration consequences[.]” (*Id.*) The Court ensured that Brown had discussed the Guilty Plea Agreement with his counsel and decided to sign that Agreement containing the waiver. (*Id.* at 21:19–22, 22:4–16.) Only after reviewing these limitations with Brown and his counsel did the Court determine that Brown’s plea and its associated waivers were knowing, intelligent and voluntary. *See* (Hr’g Tr. at 15:21–21, 21:15–22:22).

Enforcing Brown’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). The Third Circuit Court of Appeals has recognized this 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. Apr. 25, 2016) (citing *United States v. Shedrick*, 493 F.3d 292, 298 (3d Cir. 2007); *Wilson*, 429 F.3d at 458). Brown makes no such arguments, his 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)).⁴

An appropriate Order follows.

BY THE COURT:

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

⁴ Even if Brown had not waived his right to appeal or collaterally attack his sentence, his purported petition is time-barred. Section 2255(f)(1) imposes a one year statute of limitations, running from the date “on which the judgment of conviction becomes final[.]” 28 U.S.C. § 2255(f)(1). Brown did not file a direct appeal of his sentence, and judgment was entered on March 10, 2016. (ECF No. 187.) Brown had until March 10, 2017 to file a petition under § 2255. His petition was not filed until March 29, 2018, more than one year after his judgment of conviction became final. *See* (ECF No. 205). To the extent he argues that equitable tolling applies, *see* (Mot. at 9–11), it does not. *See Pabon v. Mahanoy*, 654 F.3d 285, 399 (3d Cir. 2011) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).