

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17257
Non-Argument Calendar

D.C. Docket No. 2:15-cr-00524-WKW-WC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES VERNON BATTLE,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(October 5, 2017)

Before TJOFLAT, WILLIAM PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

James Battle challenges his 61-month total sentence for aggravated identity theft and wire fraud. On appeal, Battle argues that the government committed prosecutorial misconduct at his sentencing hearing by making misleading statements to the court and relying on a witness's testimony that it knew to be false. The government, in its response, argues that Battle's claims are, in fact, recast challenges to his guideline calculation and thus are barred by a sentence-appeal waiver in his plea agreement.

I.

We review the validity of a sentence-appeal waiver *de novo*. *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008). A sentence-appeal waiver will be enforced if it was made knowingly and voluntarily. *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993). To establish that the waiver was made knowingly and voluntarily, the government must show either that: (1) the district court specifically questioned the defendant about the waiver during the plea colloquy; or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver. *Id.* We have determined that a defendant may not recast a waived challenge to his sentence as an ineffective-assistance-of-counsel claim so as to fit within an express exception to the waiver for such claims. *See Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005).

Battle's plea waiver expressly stated that it "does not include the right to appeal on the ground of ineffective assistance of counsel or prosecutorial misconduct." (Doc. 46 at 8). In this appeal, Battle's claim that the government committed prosecutorial misconduct at his sentencing hearing falls directly within this exception to the sentence-appeal waiver. Battle's arguments that the government committed prosecutorial misconduct at the sentencing hearing are not barred by the appeal waiver in the plea agreement.

II.

We ordinarily review claims of prosecutorial misconduct *de novo*. *United States v. Merrill*, 513 F.3d 1293, 1306 (11th Cir. 2008). However, where a defendant did not object to the prosecutor's conduct in the district court, we review these claims for plain error. *See id.* at 1306-07. Under plain error review, the appealing party bears the burden of establishing that: (1) the district court erred; (2) the error was plain or obvious; (3) the error affected her substantial rights; and (4) the error damaged the fairness, integrity, or reputation of the court proceedings. *United States v. Schmitz*, 634 F.3d 1247, 1268 (11th Cir. 2011). To show that an error was plain, the error must be contrary to an explicit statutory provision or on-point precedent from this Court or the Supreme Court. *United States v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013).

To establish prosecutorial misconduct, a defendant must show that the prosecutor made improper remarks that prejudiced his substantial rights. *Merrill*, 513 F.3d at 1307. A prosecutor's remarks prejudice a defendant's substantial rights when there is a reasonable probability that, but for the remarks, the outcome of the case would have been different. *See id.*

We have determined that a prosecutor's statements in opening, closing, and rebuttal arguments at trial did not amount to prosecutorial misconduct where, even considered cumulatively, the prosecutor's comments did not deny the defendant a fair trial. *See United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006).

Under Model Rule of Professional Conduct 3.1, attorneys may not make assertions in a proceeding that do not have a non-frivolous basis in law and fact. Model Rules of Prof'l Conduct 3.1 (Am. Bar Ass'n 2014).

Battle has failed to meet his burden of proof under plain error review. First, Battle must demonstrate that the district court's alleged error was plain or obvious, which requires that the error be contrary to on point precedent from this Court or the Supreme Court. However, Battle fails to point to a single circuit or Supreme Court precedent that recognizes prosecutorial misconduct at the sentencing phase, rather than at trial.

Second, Battle must show that the government's misconduct affected his substantial rights. Battle contends that his rights were affected with regards to both

the denial of a two-point sentence reduction for acceptance of responsibility and the imposition of a two-point sentence enhancement for obstruction of justice. For acceptance of responsibility, Battle argues that the government's statement that Battle tried to "sabotage some of the case" when he attempted to withdraw his guilty plea constitutes misconduct and affected his substantial rights. The district court gave four reasons for overruling Battle's objection to the lack of a reduction for accepting responsibility: (1) he violated his bond condition; (2) he failed to terminate his criminal conduct by possessing a firearm while under indictment; (3) he tampered with, and retaliated against, a witness; and (4) he moved to withdraw his guilty plea. (Doc. 100 at 5-6). Further, the court noted that an enhancement for obstruction of justice ordinarily indicates the defendant has not accepted responsibility. Battle fails to demonstrate the government's misconduct caused the court's denial of a sentence reduction for acceptance of responsibility.

For obstruction of justice, Battle argues that the government's reliance on Ms. Webster's testimony was misconduct that affected his substantial rights. However, Ms. Webster's testimony was supported by security footage. Additionally, Battle has presented no evidence that the government knew Ms. Webster's testimony was false..

Battle has not met his burden under plain error review in demonstrating prosecutorial misconduct. He has not pointed to any on-point precedent that such

statements during sentencing constitute prosecutorial misconduct, the prosecution's statements were based on facts on the record, and the statements did not affect Battle's substantial rights.

AFFIRMED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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October 05, 2017

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-17257-AA
Case Style: USA v. James Battle
District Court Docket No: 2:15-cr-00524-WKW-WC-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tonya L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion