

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2622

UNITED STATES OF AMERICA

v.

RAYMOND DAVIS,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D.C. Crim. No. 00-cr-00737
District Judge: The Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit LAR 34.1(a)
June 5, 2002

Before: SCIRICA, BARRY, and WEIS, Circuit Judges

(Opinion Filed: June 6, 2002)

OPINION OF THE COURT

BARRY, Circuit Judge

Raymond Davis pled guilty to possession of crack cocaine with the intent to distribute in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. On appeal, Davis attacks his conviction, arguing that the District Court committed reversible error when it denied his request for discovery to establish that he was the victim of selective prosecution. In the alternative, Davis argues that the District Court erred when it sentenced him because it declined to downward depart from the United States Sentencing Guidelines. We have jurisdiction to review the denial of discovery and the resulting conviction pursuant to 28 U.S.C. 1291. As discussed below, we lack jurisdiction to review the District Court's discretionary refusal to depart.

Because the parties are familiar with the facts, we need not recite them in great detail here. Suffice it to say that on March 2, 2000, police officers in Cumberland County, New Jersey, executed a search warrant at the residence of Davis and his fianc , Carmen Colon. The police found marijuana and crack cocaine in the master bedroom closet, including 245 grams of crack cocaine in a pair of Davis' pants. Davis and Colon were both charged with state drug law violations, but only Davis was charged with federal violations. Davis made several pre-trial motions in the District Court, including a

motion to "require the Government to produce proof regarding [his] referral for federal prosecution." App. at 10. Davis, an African-American, claimed that federal charges were brought against him and not Colon, a woman of Hispanic descent, simply because he was black. The Government maintained that only Davis was charged because the evidence strongly indicated that the crack cocaine found in Davis' pants belonged to him, not to Colon. The District Court denied Davis' motion for pre-trial discovery, finding Davis' claim of selective prosecution unavailing.

On January 25, 2001, Davis knowingly, voluntarily, and unconditionally pled guilty to the possession of crack cocaine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. The District Court subsequently held a sentencing hearing, at which it granted Davis a two-level minor role adjustment pursuant to U.S.S.G. 3B1.2(b). The Court granted an additional two-level "safety valve" adjustment, thereby allowing Davis to avoid a mandatory minimum of 10 years in prison. 18 U.S.C. 3553(f); U.S.S.G. 5C1.2. Although Davis had expressed remorse, enrolled in academic classes, applied for a drug counseling program, and acquired a job in prison, the District Court declined to grant Davis' request for a downward departure based upon his post-offense rehabilitation efforts or other allegedly remarkable factors. Noting that Davis had been arrested eight times and was "clearly a danger to society," the District Court sentenced him to 76 months in prison. App. at 45-46.

A. Selective Prosecution Claim Forfeited

Davis claims that the Government decided to charge him with violations of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 because of his race, thereby violating his constitutional rights under the Equal Protection Clause and Due Process Clause. He argues that his unconditional plea of guilt does not preclude him from attacking the District Court's decision to deny him discovery regarding this selective prosecution claim. Generally, when the accused in a criminal proceeding enters an unconditional plea of guilt, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (citing *Brady v. United States*, 397 U.S. 742, 750 (1970); *McMann v. Richardson*, 397 U.S. 759, 770 (1970); *Parker v. North Carolina*, 397 U.S. 790, 798 (1970)). A defendant does not waive his right to appeal, however, when the record existing at the time of the plea makes it clear that the government did not have the power to constitutionally "hal[e] a defendant into court on a charge." *United States v. Broce*, 488 U.S. 563, 569 (1989) (quoting *Menna v. New York*, 423 U.S. 61, 62 (1975)). In such cases, the defendant may retain a basis for appeal, often referred to as a "jurisdictional defense."

The precise definition of a jurisdictional defense is not entirely clear. The Supreme Court has held that double jeopardy constitutes a jurisdictional defense. *Menna*, 423 U.S. at 62. The Eighth Circuit has held that an "indictment [that] on its face fails to state an offense" also qualifies. *United States v. Fitzhugh*, 78 F.3d 1326, 1330 (8th Cir. 1996) (quoting *O'Leary v. United States*, 856 F.2d 1142, 1143 (8th Cir. 1988)). The Ninth Circuit has stated that a jurisdictional defense exists if the statute under which charges are brought is facially unconstitutional. *United States v. Cortez*, 973 F.2d 764, 767 (9th Cir. 1992) (citing *Menna*, 423 U.S. at 62). The Supreme Court has also held that claims of vindictive prosecution constitute a jurisdictional defense. *Blackledge v. Perry*, 417 U.S. 21, 30 (1974). To date, however, no court has explicitly ruled on whether a selective prosecution claim would constitute a jurisdictional defense.

While it is an interesting legal question, this case does not require us to decide whether an unconditional guilty plea results in the waiver of a selective prosecution claim. The jurisdictional claim exception is limited "to those cases in which the district court could determine that the government lacked the power to bring the indictment at the time of accepting the guilty plea from the face of the indictment or from the record." *Cortez*, 973 F.2d at 767 (emphasis in original) (citing *Broce*, 488 U.S. at 569). When Davis entered his guilty plea, nothing on the face of the indictment or in the record indicated that he was being selectively prosecuted. Accordingly, Davis is barred from attacking his plea on those grounds.

Davis counters that no evidence existed to show selective prosecution at the time he pled guilty because he had been denied pre-trial discovery. While this may be so, it does not change the result here. Davis voluntarily and unconditionally pled guilty after the alleged constitutional violation occurred, thereby waiving his right to appeal that

violation. If he wished to preserve a selective prosecution claim, he should have sought to enter a conditional plea of guilty in accordance with Fed. R. Crim. P. 11(a)(2). *United States v. Suter*, 755 F.2d 523, 527 (7th Cir. 1985). This would have enabled him to have argued to us that there should be a remand for purposes of obtaining the discovery he believed he needed.

B. No Jurisdiction to Review Decision Not to Depart from Sentencing Guidelines

Davis also argues that the District Court erred when it declined to depart from the Sentencing Guidelines. He asserts that he deserved a downward departure based upon his post-offense rehabilitation efforts or a combination of other remarkable factors. Post-offense rehabilitation may constitute a ground for a departure where the defendant's efforts are "exceptional." *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997). Similarly, a combination of other remarkable factors may justify a downward departure, although such cases are "extremely rare." U.S.S.G. 5K2.0, Commentary. In either case, the District Court's decision to grant or not grant a downward departure is discretionary. *United States v. Yeaman*, 248 F.3d 223, 227 (3d Cir. 2001); U.S.S.G. 5K2.0, Commentary.

Generally, "we lack jurisdiction to review a refusal to depart downward when the district court . . . determines that a departure is not warranted." See, e.g., *United States v. Marin-Castaneda*, 134 F.3d 551, 554 (3d Cir. 1998) (internal quotations omitted) (citing *Sally*, 116 F.3d at 78). A limited exception exists when the sentencing court "believes it lacks the authority" to depart downward. 134 F.3d at 554. Here, however, it is abundantly clear that the District Court knew it had the authority to depart and simply chose not to do so. App. at 43-44. Thus, while Davis may not agree with the District Court's decision, we lack the jurisdiction to review it.

For the foregoing reasons, we will affirm Davis' conviction and will not disturb the sentence imposed by the District Court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

/s/ Maryanne Trump Barry

Circuit Judge