

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-4196

United States of America,

Appellee,

v.

Mario M. Martinez, Sr.,

Appellant.

*
*
*
* Appeal from the United States
* District Court for the
* District of Nebraska.
*
* [UNPUBLISHED]
*

Submitted: January 15, 2007

Filed: January 22, 2007

Before MURPHY, BEAM, and COLLOTON, Circuit Judges.

PER CURIAM.

Mario M. Martinez, Sr., pleaded guilty to conspiring to distribute and possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 846. His written plea agreement contained a provision under which Martinez generally waived his right to appeal his conviction or sentence, reserving his right to seek habeas relief for ineffective assistance of counsel; and a separate specific waiver pursuant to which he agreed to have his sentence determined under the Sentencing Guidelines and to waive all constitutional challenges to their validity. On appeal, counsel moved to withdraw and filed a brief under Anders v. California, 386 U.S. 738 (1967), asserting that Martinez's trial counsel had been ineffective. We denied counsel's motion and ordered supplemental briefing as to whether Martinez had waived his right to appeal

his sentence based on United States v. Booker, 543 U.S. 220 (2005), in light of the district court's¹ plea-hearing comment questioning the validity of the Guidelines waiver; and, if the issue was not waived, whether the court's application of the Guidelines as mandatory warranted relief under Booker.

Upon reviewing the parties' supplemental briefs, we dismiss the appeal based on the broad appeal waiver included in Martinez's plea agreement. See United States v. Andis, 333 F.3d 886, 889-92 (8th Cir. 2003) (en banc) (court should enforce appeal waiver and dismiss appeal where it falls within scope of waiver, both plea agreement and waiver were entered into knowingly and voluntarily, and no miscarriage of justice would result). The plea colloquy reflects that Martinez understood and voluntarily accepted the terms of the plea agreement, including the broad waiver provision. This appeal – including any Booker challenge to the mandatory application of the Guidelines – falls within the scope of the broad waiver, regardless of the separate Guidelines waiver which the district court questioned. See, e.g., United States v. Reeves, 410 F.3d 1031, 1034 (8th Cir.) (right to appeal under Booker is among rights waived by broad appeal waiver even where parties did not anticipate Booker ruling), cert. denied, 126 S. Ct. 469 (2005). Finally, we conclude no injustice would result from enforcing the waiver. To the extent the Anders brief suggests that the plea or the waiver is invalid because of counsel's ineffectiveness, we note that the record is not sufficiently developed on the issue, and any such claim should be pursued under 28 U.S.C. § 2255. See United States v. Hughes, 330 F.3d 1068, 1069 (8th Cir. 2003).

Accordingly, we dismiss the appeal.

¹The Honorable Joseph F. Bataillon, Chief Judge, United States District Court for the District of Nebraska.