In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2345

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

QUINTEZ L. TURNER,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.
No. 2:18-cr-20057-CSB-EIL-1 — **Colin S. Bruce**, *Judge*.

ARGUED SEPTEMBER 7, 2022 — DECIDED DECEMBER 22, 2022

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. Quintez Turner pleaded guilty to three firearm and drug charges after police discovered a pistol, a rifle, marijuana, and heroin in his apartment. On appeal, Turner claims the district court should have suppressed the drugs and firearms as evidence because the officers lacked probable cause for the search. He also challenges his sentence,

arguing that the district court improperly relied on two prior state convictions to enhance his statutory maximum sentence.

Because Turner entered an unconditional plea in open court, he waived any objection to the district court's suppression ruling. We thus decline to review the merits of Turner's suppression challenge. As for his sentence, we agree the district court erred in enhancing Turner's maximum penalty and remand for resentencing.

I. Background

Ramiro Aguas owned an apartment complex in Champaign, Illinois. In late October 2018, Aguas received a tenant complaint about a strong marijuana odor and suspicious drug activity at Apartment 103. He called the police department to complain. Aguas told an investigator that, on three occasions between October 2018 and November 2018, he had smelled marijuana when passing by Apartment 103 on his way to show the empty unit directly above it, Apartment 203. Once inside the empty unit, Aguas continued to detect a strong marijuana odor. He further reported that he had knocked on Apartment 103's door twice during the same period. Both times, a man, later identified as Quintez Turner, opened the door. On each occasion, Aguas smelled marijuana coming from the apartment. Police Investigator Matthew Quinley and Aguas swore to these facts in an affidavit. That affidavit did not mention that Quinley had visited the complex and identified a marijuana odor when inside Apartment 203 but not when passing by Apartment 103.

Based solely on the affidavit, Quinley obtained two search warrants for Apartment 103 from a state court judge. The first authorized a canine sniff outside the apartment. The second

authorized a search of the apartment conditioned on a positive canine alert. When outside the apartment door, a police dog alerted to the presence of drugs. The officers then entered the apartment and found a pistol, a rifle, marijuana, heroin, and a scale with heroin residue. A grand jury charged Turner with possession of a firearm as a convicted felon, 18 U.S.C. § 922(g)(1) (Count 1), possession of heroin with intent to distribute, 21 U.S.C. §§ 841(a)(1), (b)(1)(C) (Count 2), and possession of a firearm in furtherance of a drug trafficking offense, 18 U.S.C. § 924(c)(1)(A) (Count 3).

Before trial, Turner moved to suppress the evidence seized at his apartment because the officers lacked probable cause for the search in violation of the Fourth Amendment. He filed no other substantive motions. After a hearing at which both Quinley and Aguas testified, the district court denied Turner's suppression motion. It found Aguas a credible informant and concluded that the officers had probable cause for both the canine sniff and the apartment search.

After the motion was denied, Turner filed a pro se letter with the district court expressing a desire to plead guilty. The letter stated in relevant part: "I'm … ready to plea guilty … I just want to plea to an open sentence to reserve all my appeals." Turner also said he did not want to accept the government's plea agreement, and he reiterated: "I just want to plea to an open sentence and reserve all my rights to appeal." The letter did not mention his motion to suppress.

A magistrate judge held a change of plea hearing in February 2021. Turner's counsel, appearing via phone, confirmed Turner wanted "an open plea." The government expressed concern about defense counsel's phone appearance, stating that "the nature of the open plea is … for the purpose of

preserving any number of appellate issues; and this just becomes one more." The hearing continued with Turner's consent, and the magistrate judge conducted a thorough plea colloquy under Federal Rule of Criminal Procedure 11(b), ensuring Turner knowingly and voluntarily entered his plea. During the colloquy, the magistrate judge told Turner that, "by entering a plea," he preserved his "right under federal law to appeal both [his] sentence and conviction." At no point did Turner say he wished to appeal the district court's suppression ruling. Turner then pleaded guilty to all three counts in open court. On the magistrate judge's recommendation, the district court accepted Turner's guilty pleas on each of the three charged offenses.

Before sentencing, the government filed an information stating its intent to use Turner's two prior Illinois felony convictions to enhance his sentence for Count 2, the heroin charge. *See* 21 U.S.C. § 851. The government identified Turner's 2001 conviction for unlawful possession with intent to deliver cocaine, 720 ILL. COMP. STAT. 570/401(c)(2), and his 2015 conviction for unlawful delivery of a controlled substance, 720 ILL. COMP. STAT. 570/401(d). A prior felony drug offense raises the statutory maximum penalty for the heroin charge from twenty to thirty years in prison. 21 U.S.C. § 841(b)(1)(C). Given Turner's prior convictions, the district court applied the sentencing enhancement without objection.

In the revised presentence investigation report, Turner was designated a "career offender" under the Sentencing Guidelines because his Illinois convictions qualified as prior "controlled substance offense[s]." U.S.S.G. § 4B1.1(a). The career-offender designation resulted in a criminal history category of VI. U.S.S.G. § 4B1.1(b). And since Turner faced a

thirty-year maximum penalty due to the sentencing enhancement, his offense level was 34. U.S.S.G. § 4B1.1(b). Turner was credited with acceptance of responsibility for a final offense level of 31. U.S.S.G. § 3E1.1. This resulted in a preliminary Guidelines range of 248 to 295 months' imprisonment, which included a mandatory consecutive 60-month sentence for the Count 3 firearm charge. Because Turner faced multiple counts of conviction, including one under 18 U.S.C. § 924(c), Turner's final Guidelines range was 262 to 327 months' imprisonment. U.S.S.G. § 4B1.1(c).

At the sentencing hearing, the district court adopted the revised presentence report. The court stated that Turner faced "up to 30 years' imprisonment" for the Count 2 heroin charge. For that count, the government recommended 267 months' imprisonment. The district court then sentenced Turner to 120 months' imprisonment on Count 1, 234 months' imprisonment on Count 2 to run concurrently with Count 1, and 60 months' imprisonment on Count 3, consecutive to the first two counts, for a total of 294 months in prison.

II. Conditional Plea

On appeal, Turner seeks to challenge the district court's denial of his motion to suppress. "But there is an immediate and obvious barrier to his appeal." *United States v. Adigun*, 703 F.3d 1014, 1018 (7th Cir. 2012). A defendant who enters an unconditional guilty plea "waives all nonjurisdictional defects arising before his plea, including Fourth Amendment claims." *United States v. Combs*, 657 F.3d 565, 568 (7th Cir. 2011).

Federal Rule of Criminal Procedure 11(a)(2) provides an exception to this waiver under certain circumstances: "With the consent of the court and the government, a defendant may

enter a conditional plea of guilty …, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea." FED. R. CRIM. P. 11(a)(2). A district court may accept a conditional plea only if the appellate court's decision on the preserved issues would "completely dispose of the case." *United States v. Yasak*, 884 F.2d 996, 999 (7th Cir. 1989). When a defendant fails to comply with these requirements, "we lack jurisdiction" to hear the defendant's pre-plea claims. *Combs*, 657 F.3d at 569. "[A]ll non-jurisdictional issues not specifically reserved in the conditional plea agreement remain waived." *United States v. Phillips*, 645 F.3d 859, 862 (7th Cir. 2011).

Turner claims that he entered a conditional guilty plea preserving the right to appeal the district court's suppression ruling. He argues that his pro se letter—in which he wrote that he wished to "reserve all [his] appeals"—satisfies Rule 11(a)(2)'s writing requirement. Turner further contends that the government and the district court implicitly consented to a conditional plea because they continued with the change of plea hearing with knowledge of his letter. For Turner, this satisfies the "intent and purpose" of Rule 11(a)(2). *Yasak*, 884 F.2d at 1000.

The conditional plea requirements under Rule 11(a)(2) are not satisfied here, formally or functionally. Turner pleaded guilty to all three charges in open court without a plea agreement. Although Turner's pro se letter provides written evidence of his desire to preserve his appellate rights, the record does not show the reservation of a specific pretrial motion, or consent by the government or the district court. We discuss each requirement in turn.

A. Writing

A defendant seeking to enter a conditional guilty plea must reserve the right to appeal a specified pretrial motion "in writing." FED. R. CRIM. P. 11(a)(2). The writing requirement "ensure[s] that careful attention will be paid to any conditional plea" by providing a clear statement of the plea's conditions as well as the government's assent to those conditions. *Yasak*, 884 F.2d at 999. The rule's writing requirement is not itself jurisdictional. *United States v. Markling*, 7 F.3d 1309, 1313 (7th Cir. 1993). Rather, it is more in the nature of a right which the government may expressly waive. *Yasak*, 884 F.2d at 999.

In *Yasak*, we upheld a conditional plea under Rule 11(a)(2) despite the lack of a written plea agreement. 884 F.2d at 1000. The defendant's plea hearing transcript "plainly" showed that the government agreed to a conditional plea, the district court accepted the plea, and the court's prior ruling on a motion to dismiss "was the specific (and dispositive) issue for appeal." *Id.* On appeal, the government affirmed its agreement to the conditional plea. *Id.* Given the circumstances, the plea transcript provided "a writing of sorts" that sufficed to "constitute the writing required by Rule 11." *Id.*

We later held in *Markling* that a plea proposal letter from the government qualified as a writing because it "outlin[ed] the terms of [the defendant's] proposed plea." 7 F.3d at 1313. According to the letter, both the defendant and the government agreed to a conditional plea in which the defendant reserved his right to appeal the court's denial of a motion to suppress. *Id.* As in *Yasak*, the government agreed on appeal that it had consented to the defendant's conditional plea in the district court. *Id.*

Turner's pro se letter and the change of plea hearing transcript are written documents preserved in the record. The government has acknowledged as much, conceding that the letter and the hearing transcript "might" satisfy the writing requirement under Rule 11(a)(2). Even if the plea hearing transcript is "a writing of sorts" for the purpose of the rule, *Yasak*, 884 F.2d at 1000, the circumstances in Turner's case do not match those of *Yasak* or *Markling*. As we discuss next, neither the letter nor the plea hearing transcript provides evidence of the specific issue Turner sought to preserve for appeal, the government's consent, or the district court's consent.

B. Specified Pretrial Motion

Rule 11(a)(2) requires that a conditional plea identify the "specified pretrial motion" subject to appeal. FED. R. CRIM. P. 11(a)(2). "[T]o preserve an issue for appeal, a conditional plea must precisely identify which pretrial issues the defendant wishes to preserve for review." *United States v. Desotell*, 929 F.3d 821, 826 (7th Cir. 2019) (quoting *United States v. Kingcade*, 562 F.3d 794, 797 (7th Cir. 2009)). Turner's pro se letter and the change of plea hearing transcript do not denote which pretrial rulings Turner sought to preserve. Acknowledging this, Turner asks the court to infer that he satisfied the specificity requirement because he filed only one substantive pretrial motion, his motion to suppress. Therefore, the plea must have been conditioned on appeal of that motion.

Rule 11(a)(2) contains no exception to its specificity requirement in cases with only one pretrial motion. This court held that the defendant in *Adigun* failed to abide by this rule, reasoning that the "[d]efense counsel [had] stat[ed] that Adigun was entering an 'open plea'" and there was "no indication

in the record of any issues preserved for appeal." 703 F.3d at 1019. Turner's counsel had ample opportunity at the plea hearing to specify that Turner wanted to preserve his right to appeal the motion to suppress—but did not. As in *Adigun*, Turner's defense counsel confirmed that Turner wanted "an open plea." And at the start of the hearing, the magistrate judge asked Turner's counsel whether the parties had a plea agreement in place. Turner's counsel responded, "it is an open plea." The record fails to identify the district court's suppression ruling as the specific issue reserved for appeal.

This court's ruling in *United States v. Sarraj*, 665 F.3d 916 (7th Cir. 2012), does not aid Turner. In *Sarraj*, the defendant entered a written conditional plea, which specified the reservation of two pretrial motions for appeal. 655 F.3d at 919. This court concluded that the defendant had flexibility as to which *arguments* he emphasized when litigating the merits of those pretrial motions on appeal. *Id.* at 920. Despite what Turner suggests, we did not hold that defendants have flexibility in specifying which *issues* are preserved.

C. Government Consent

Under Rule 11(a)(2), the government must consent to a conditional plea agreement. The rule "requires 'unequivocal government acquiescence.'" *Adigun*, 703 F.3d at 1019 (quoting *Yasak*, 884 F.2d at 999). When "there is no evidence of any prosecutors' agreement to a conditional plea," the defendant has failed to comply with this requirement. *Id.* Even without a written plea agreement in *Yasak* and *Markling*, the defendants provided evidence of the government's approval. In *Yasak*, "[t]he plea hearing transcript plainly show[ed] that both parties," one being the government, "agreed to the conditional plea." 884 F.2d at 1000. In *Markling*, the proposal

letter stated: "The Government consents to entry of this conditional plea." 7 F.3d at 1313. And in both *Yasak* and *Markling*, the government agreed on appeal that it had assented to a conditional plea. 884 F.2d at 999; 7 F.3d at 1313.

Turner can point to no statement—in either his pro se letter or the change of plea hearing transcript—where the government provides "unequivocal" consent to a conditional plea. Turner underscores a single statement at the plea hearing, where the government observed that an open plea is done "for the purpose of preserving any number of appellate issues … ." This remark is far from sufficient to establish government consent. The government's recognition of the purpose of an open plea is not an express agreement to a conditional plea, let alone one that specifically identifies Turner's right to appeal his motion to suppress.

He also argues that the government failed to object to his pro se letter when discussing it at the change of plea hearing, demonstrating its consent to the letter's contents. In the pro se letter, Turner referred to his appellate rights in general terms. He wrote that he wanted an "open sentence" and sought to "reserve all [his] rights to appeal." Unlike Turner claims, the letter did not contain the "conditions of his plea." The government did not have notice of its need to object to the letter's conditions because it contained none. The government's lack of objection at the plea hearing falls short of establishing "unequivocal government acquiescence."

D. District Court Consent

As with the government, Rule 11(a)(2) requires the district court to give "explicit" consent to a conditional plea. *Combs*, 657 F.3d at 569. And "district courts must decline to accept

conditional pleas unless the appellate court's decision will effectively dispose of the case." *Id*. Because the district court had his pro se letter at the time of the change of plea hearing, Turner argues that the district court understood the conditional nature of his plea. For support, Turner highlights one statement from the district court at the plea hearing. There, the magistrate judge advised Turner that "by entering a plea, an open plea," he was "preserving [his] right under federal law to appeal both [his] sentence and conviction."

The magistrate judge's statement does not constitute explicit consent to a conditional plea. The change of plea hearing transcript in *Yasak* "plainly show[ed]" that the district court "understood its ruling on Yasak's motion to dismiss was the specific (and dispositive) issue for appeal." *Yasak*, 884 F.2d at 1000. And in *Markling*, the district court had received a detailed plea agreement that mentioned Markling's motion to suppress. 7 F.3d at 1313. Here, the plea hearing transcript does not show that the district court understood its suppression ruling was a specific and dispositive issue reserved for appeal. Thus, that court could not have accepted Turner's conditional plea. And Turner's letter identified no specific motion. We cannot imply, let alone find "explicit," the district court's consent to a conditional plea based on either the plea hearing transcript or Turner's letter.

* * *

We conclude that Turner did not enter a valid conditional guilty plea. His pro se letter and the change of plea hearing transcript do not identify a specific and dispositive pretrial motion reserved for appeal. Nor do they show acceptance of a conditional plea by the government or the district court.

Turner's failure to comply with Rule 11(a)(2) precludes our review of the district court's suppression ruling.

III. Sentence

Turner also challenges his sentence. He argues the district court improperly enhanced the maximum penalty on Count 2, the heroin charge, by relying on two prior state convictions. Turner forfeited this objection by failing to raise it in the district court, so we review for plain error. *United States v. Ruth*, 966 F.3d 642, 645 (7th Cir. 2020) (citing FED. R. CRIM. P. 52(b)).

A. Predicate Felony Drug Offenses

Turner pleaded guilty to all three charges against him, including possession of heroin with intent to distribute. 21 U.S.C. § 841(a)(1), (b)(1)(C). The statutory maximum penalty for the heroin conviction increases from twenty to thirty years in prison if a defendant has a "prior conviction for a felony drug offense." 21 U.S.C. § 841(b)(1)(C). A "felony drug offense" refers to an offense "that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). Based on Turner's 2001 and 2015 Illinois felony convictions under 720 ILL. COMP. STAT. 570/401(c)(2) and 720 ILL. COMP. STAT. 570/401(d), the district court enhanced Turner's maximum sentence.

Our decision in *Ruth* squarely prohibits considering a conviction under § 401(c)(2) as a felony drug offense under 21 U.S.C. § 841(b)(1)(C). 966 F.3d at 650. Under the familiar categorical approach, prior state convictions qualify as felony drug offenses "[i]f, and only if, the elements of the state law mirror or are narrower than the federal statute." *Id.* at 646

(quoting *United States v. De La Torre*, 940 F.3d 938, 948 (7th Cir. 2019)). We concluded in *Ruth* that Illinois defines cocaine in a matter "categorically broader than the federal definition." *Id.* at 647. The Illinois definition includes cocaine's "positional" isomers whereas the federal definition does not. *Id.* (comparing 720 ILL. COMP. STAT. 570/206(b)(4) with 21 U.S.C. § 812, Schedule II(a)(4)). Thus, a conviction under that Illinois statute "is not a predicate 'felony drug offense' that triggers" the sentencing enhancement. *Id.* at 650. Under *Ruth*, the district court plainly erred in using Turner's conviction under § 401(c)(2) to enhance his maximum sentence.

The district court also viewed Turner's 2015 conviction for the manufacture or delivery of a controlled substance under 720 ILL. COMP. STAT. 570/401(d) as a prior felony drug offense. We have not yet considered whether the conduct prohibited by § 401(d) is categorically broader than its federal counterpart. The Illinois provision makes it unlawful to manufacture or deliver "any other amount of a controlled or counterfeit substance … classified in Schedules I or II." 720 ILL. COMP. STAT. 570/401(d). Under Illinois law, Schedule II includes the same cocaine provision we examined *Ruth*. 720 ILL. COMP. STAT. 570/206(b)(4). Because § 401(d) references the same, broader Illinois cocaine definition, the government concedes that this court's holding in *Ruth* may also apply to a § 401(d) conviction.

Regardless of the breadth of the state statute, a state conviction may still serve as a predicate felony offense if the Illinois provision is divisible. If so, then the court may apply the modified categorical approach and "consult a limited class of documents" to decide whether a particular alternative element formed the basis of Turner's conviction. *Descamps v.*

United States, 570 U.S. 254, 257 (2013). We previously held that a similar provision which banned the possession of "a controlled substance" was indivisible. *Najera-Rodriguez v. Barr*, 926 F.3d 343, 351 (7th Cir. 2019) (addressing 720 ILL. COMP. STAT 570/402(c)). That provision also referenced the controlled substances listed in the Illinois drug schedules. *Id.* at 347. Based on an analysis of charging and sentencing documents, we concluded that the statute did not require the identification of the controlled substance as an element of the offense. *Id.* at 356.

Because Turner did not object to the use of his 2015 conviction as a predicate felony offense, the district court did not consider the breadth or divisibility of § 401(d). On appeal, the government concedes the potential applicability of *Ruth* to § 401(d), but it does not specifically argue the divisibility of this particular provision. Instead, the government agrees that a remand for resentencing is proper based on the district court's reliance on § 401(c)(2). Given our finding of plain error (discussed below), we agree to remand this case for resentencing.

B. Plain Error

On plain error review, the district court's application of the sentencing enhancement must have affected Turner's substantial rights. *Id.* (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). We exercise our discretion to correct such an error when it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. In *Ruth*, the district court's application of an improper sentencing enhancement affected the defendant's substantial rights because it increased his Guidelines range. 966 F.3d at 650.

Because Turner faced a thirty-year maximum sentence as a career offender, his offense level was 34; without the sentencing enhancement his offense level would have been 32. U.S.S.G. § 4B1.1(b)(2) & (3). Given the three-point decrease for acceptance of responsibility, Turner's final offense level would have been 29, not 31. With a criminal history category of VI, this would have resulted in an alternative preliminary Guidelines range of 215 to 248 months in prison, instead of 248 to 295 months.

But the error here did not affect Turner's final Guidelines range. U.S.S.G. § 4B1.1(c) recommends specific Guidelines ranges for career offenders convicted under 18 U.S.C. § 924(c). Due to his multiple convictions, including one under 18 U.S.C. § 924(c), Turner's final Guidelines range totaled 262 to 327 months' imprisonment. With or without the application of the sentencing enhancement, it turns out that Turner faces the same final Guidelines range under U.S.S.G. § 4B1.1(c).

Given that the application of the sentencing enhancement would not have changed Turner's final Guidelines range, we consider whether the increased statutory maximum resulted in plain error. "[T]he answer to that inquiry turns on prejudice." *United States v. Currie*, 739 F.3d 960, 964 (7th Cir. 2014). No prejudice exists "if it was clear that the sentencing judge would have imposed the same sentence absent the error." *Id.* at 965.

At the sentencing hearing, the district judge incorrectly stated that the statutory maximum for Count 2, the heroin charge, was "up to 30 years' imprisonment." The government recommended 267 months' imprisonment for that same count, a sentence above the correct statutory maximum of twenty years, or 240 months. In arriving at Turner's final

sentence, the district court stated it was "not going to max out the guidelines" but rather wanted "to go slightly above the minimum." The district court ultimately sentenced Turner to 234 months in prison on Count 2.

The district court arrived at the correct Guidelines range and gave Turner a sentence below the correct statutory maximum. But the sentencing enhancement could have had a prejudicial effect. Based on the sentencing hearing transcript, it is not clear the district court "would have imposed the same sentence absent the error." *Currie*, 739 F.3d at 965. Like the Guidelines range, "[s]tatutory minima and maxima have an obvious anchoring effect on the judge's determination of a reasonable sentence" by "demarcat[ing] the range within which the judge may impose a sentence." *Id.* at 966. A statutory maximum is "necessarily one of the circumstances that the judge had to consider in ascertaining a reasonable sentence," as the district court did here. *Id.* Although the district court stated it did not want to "max out the guidelines," it made no statement about whether it would have imposed the same sentence for Count 2 regardless of the heightened statutory maximum. Because "it is difficult to say whether the court would have arrived at the same sentence" without the enhancement, we remand for resentencing. *Id.*

For the reasons stated above, we AFFIRM Turner's conviction, and we REMAND to the district court for resentencing.

HAMILTON, *Circuit Judge*, concurring. I join the court's opinion. On the problem of waiving appellate rights, the opinion shows that Turner and his lawyer failed to satisfy the requirements of Federal Rule of Criminal Procedure 11(a)(2) for a conditional appeal that would have preserved Turner's right to appeal the denial of his motion to suppress. The transcript of the plea hearing shows that the magistrate judge who took the plea, the prosecutor, and defense counsel were all aware that Turner wanted to preserve his right to appeal at least something. Denial of the motion to suppress was the most obvious candidate. The transcript also indicates, however, that neither defense counsel, the prosecutor, nor the magistrate judge recognized how Rule 11(a)(2) might apply to Turner's "open plea" to defeat his attempt to appeal that denial.

Turner's motion to suppress raised a substantial issue, especially in light of law enforcement's unsuccessful effort to corroborate the accusations of the landlord, who wanted to get Turner out of the apartment due to nonpayment of rent. In a similar case about Rule 11(a)(2), our colleagues in the Fourth Circuit reversed the denial of relief under 28 U.S.C. § 2255 because the defendant had received ineffective assistance of counsel as to whether he could plead guilty under an open plea and still appeal the denial of his motion to suppress evidence. *United States v. Akande*, 956 F.3d 257 (4th Cir. 2020).