

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: April 19, 2013 Decided: July 16, 2013)

Docket No. 12-1268

- - - - -X

UNITED STATES OF AMERICA,

Appellee,

- v. -

Michael Cook, Sean Herrmann, AKA Vinny, Scott Power, Marcel Malachowski, AKA Sealed Defendant 4, AKA Memo, Selena Hopper, AKA Sealed Defendant 2, AKA Sealed Defendant 5, Lee Tarbell, AKA Sealed Defendant 6, AKA Sleeman, June Jacobs, AKA Sealed Defendant 7, AKA Punk, John Jacobs, AKA Sealed Defendant 8, AKA Wadd, Bryan Cole, AKA Sealed Defendant 9, AKA Buckwheat, Jacquis Harris, AKA Sealed Defendant 7, AKA Sealed Defendant 10, Owen Peters, AKA Sealed Defendant 11, AKA Weezy, Brandon Benedict, AKA Sealed Defendant 12, David Herrmann, AKA Sealed Defendant 13, Adam Fender, AKA Sealed Defendant 14, AKA The Electrician, Jonas Cavallo, AKA Sealed Defendant 15, AKA The Carpenter, Armande Millhouse, AKA Sealed Defendant 16, AKA Beatlejuice, AKA Milly, Jeffrey Baroni, AKA Sealed Defendant 18, Jason Tackus, AKA Sealed Defendant 19, Joshua Brown, AKA Sealed Defendant 20, Sean Canty, AKA Sealed Defendant 21, Aaron Freyder, AKA Sealed Defendant 22, Dominick Stone, AKA Sealed Defendant 23,

Defendants,

ANDREW NOURSE, AKA Sealed Defendant 17, AKA The Jeweler,

Defendant-Appellant.

- - - - -X

1 Before: JACOBS, Chief Judge, POOLER and WESLEY,
2 Circuit Judges.
3

4 Andrew Nourse appeals from his sentence of 60 months'
5 imprisonment for conspiracy to distribute and possess with
6 the intent to distribute more than a 100 kilograms of
7 marijuana, entered in the United States District Court for
8 the Northern District of New York (Kahn, J.). He challenges
9 a ruling on criminal history; but to press that argument,
10 Nourse must overcome an appeal waiver. Although the
11 district court expressed the terms of the waiver
12 imperfectly, the objection was unpreserved. We hold that
13 plain error is the standard of review for an unpreserved
14 challenge to an appeal waiver, and that Nourse has not
15 sustained his burden. Affirmed.

16 BRENDA K. SANNES (Terrence M.
17 Kelly, on the brief) for Richard
18 S. Hartunian, United States
19 Attorney for the Northern
20 District of New York, Syracuse,
21 NY, for Appellee.
22

23 DEVIN MCLAUGHLIN, Langrock
24 Sperry & Wool, LLP, Middlebury,
25 VT, for Defendant-Appellant.
26

27 DENNIS JACOBS, Chief Judge:
28

29 Andrew Nourse appeals from his 60-month sentence,
30 entered in the United States District Court for the Northern

1 District of New York (Kahn, J.), for conspiracy to
2 distribute and possess with the intent to distribute more
3 than a 100 kilograms of marijuana. He challenges a ruling
4 on criminal history; but to press that argument, Nourse must
5 overcome an appeal waiver. Although the district court
6 expressed the terms of the waiver imperfectly, the objection
7 was unpreserved. We hold that plain error is the standard
8 of review for an unpreserved challenge to an appeal waiver,
9 and that Nourse has not sustained his burden. Affirmed.

10
11 **I**

12 Andrew Nourse was a driver for an Albany drug
13 distribution ring that operated in 2008-09. After his
14 arrest in 2011, Nourse entered a plea agreement consenting
15 to the charge of conspiracy to distribute and possess with
16 the intent to distribute more than 100 kilograms of
17 marijuana. He stipulated that he was “accountable for at
18 least 100 kilograms but less than 400 kilograms” of
19 marijuana. Plea Agreement at 7, ECF No. 389.

20 Nourse’s plea agreement recites that he consulted with
21 counsel, “fully underst[ood] the extent of his rights to
22 appeal” and “waive[d] any and all rights, including those

1 conferred by 18 U.S.C. § 3742 and/or 28 U.S.C. § 2255, to
2 appeal or collaterally attack his conviction and *any*
3 *sentence of imprisonment of 60 months or less*" Plea
4 Agreement at 12 (emphasis added).

5 During the change of plea colloquy, the district court
6 reviewed Nourse's plea agreement with him, touching as
7 follows on the appeal waiver:

8 THE COURT: Is there a waiver of any appeal
9 rights in the plea agreement?

10 MR. KELLY: Yes, your Honor. The defendant
11 waives his right to appeal and to collaterally attack
12 his conviction. He preserves the right to appeal the
13 reasonableness of the sentence in excess of 60 months.

14 THE COURT: Is that correct, Mr. Kindlon?

15 MR. KINDLON: Yes, your Honor, it is.

16 THE COURT: Do you understand that too, Mr. Nourse?

17 THE DEFENDANT: I do.
18

19 Change of Plea Hr'g Tr. at 14-15, ECF No. 550.
20

21 The presentence investigation report ("PSR") assigned
22 Nourse three criminal history points based on three
23 proceedings in Massachusetts state court, each of which was
24 "continued without a finding." Presentence Report
25 ("PSR") ¶¶ 31-33, ECF No. 432. A continuance without a
26 finding is a mechanism in the Massachusetts courts that
27 permits charges to be dismissed on a date certain if the
28 defendant complies with negotiated terms or probation. See

1 Mass. Gen. Laws ch. 278, § 18.¹

2 In the first proceeding, Nourse was charged with
3 operating a motor vehicle under the influence of liquor,
4 operating an unregistered motor vehicle, and marked lane
5 violations in the district court in Hingham. PSR ¶ 31. In
6 the second, he was charged with possession of marijuana in
7 Boston. Id. ¶ 32. In the third, he was charged with
8 operating a motor vehicle with a suspended license,
9 operating an unregistered vehicle, and possession of
10 marijuana, in Framingham. Id. ¶ 33. Each case was
11 "continued without a finding," apparently in exchange for a
12 probationary agreement.

¹ "A defendant who is before the Boston municipal court or a district court or a district court sitting in a juvenile session or a juvenile court on a criminal offense within the court's final jurisdiction shall plead not guilty or guilty, or with the consent of the court, nolo contendere. Such plea of guilty shall be submitted by the defendant and acted upon by the court; provided, however, that a defendant with whom the commonwealth cannot reach agreement for a recommended disposition shall be allowed to tender a plea of guilty together with a request for a specific disposition. Such request may include any disposition or dispositional terms within the court's jurisdiction, including, unless otherwise prohibited by law, a dispositional request that a guilty finding not be entered, but rather the case be continued without a finding to a specific date thereupon to be dismissed, such continuance conditioned upon compliance with specific terms and conditions or that the defendant be placed on probation pursuant to the provisions of [chapter 276, § 87]." Mass. Gen. Laws ch. 278, § 18.

1 Nourse argued at the February 2012 sentencing hearing
2 that these prior offenses should not affect his criminal
3 history. The district court rejected the argument,
4 referencing a First Circuit opinion holding that a
5 Massachusetts continuance without a finding could be
6 considered for the purpose of criminal history. Sentencing
7 Hr'g Tr. at 5-6, ECF No. 514. However, the district court
8 also suggested that it was "an interesting issue for appeal,
9 if [Nourse's counsel] is so inclined; I don't think our
10 Second Circuit has ruled on it at all." Id. at 5. The
11 court proceeded to sentence Nourse to 60 months'
12 imprisonment, the statutory mandatory minimum. Id. at 6.
13

14 II

15 Before accepting a guilty plea, Federal Rule of
16 Criminal Procedure 11(b)(1)(N) requires that the court
17 "inform the defendant of, and determine that the defendant
18 understands . . . the terms of any plea-agreement provision
19 waiving the right to appeal or to collaterally attack the
20 sentence." Fed. R. Crim. P. 11(b)(1)(N). The parties
21 dispute the proper standard of review for Nourse's claim
22 that the district court failed to comply with the Rule.

1 A circuit split over how to evaluate Rule 11 errors was
2 resolved in United States v. Vonn, 535 U.S. 55, 58-59
3 (2002). A defendant who has not preserved a Rule 11
4 objection in district court and wishes to amend his guilty
5 plea on appeal must show plain error. Id. After Vonn,
6 other circuits have applied plain error to appeals arising
7 under Rule 11(b)(1)(N) specifically. See United States v.
8 Borrero-Acevedo, 533 F.3d 11, 13 (1st Cir. 2008) (joining
9 “the other circuits to have considered the question and
10 hold[ing] that the plain error standard applies to
11 unpreserved claims of violations of Fed. R. Crim. P.
12 11(b)(1)(N)”) (citing United States v. Murdock, 398 F.3d
13 491, 496 (6th Cir. 2005) and United States v.
14 Arellano-Gallegos, 387 F.3d 794, 797 (9th Cir. 2004)); see
15 also United States v. Sura, 511 F.3d 654, 662 (7th Cir.
16 2007); United States v. Edgar, 348 F.3d 867, 873 (10th Cir.
17 2003). Because we have not expressly stated the standard of
18 review for unpreserved challenges under subsection
19 (b)(1)(N), Nourse suggests that they should be considered
20 under some different standard. We disagree.

21 Nourse argues that this Court has “refrained” from
22 imposing a plain error standard in this context. Instead,

1 he advocates for the test set out in United States v. Ready,
2 which asks whether “the record ‘clearly demonstrates’ that
3 the waiver was both knowing (in the sense that the defendant
4 fully understood the potential consequences of his waiver)
5 and voluntary.” 82 F.3d 551, 557 (2d Cir. 1996) (citation
6 omitted).

7 Ready was decided three years before the 1999 adoption
8 of Rule 11(b)(1)(N), and six years before Vonn. Nourse
9 cites other of our cases in which plain error was not
10 applied as the standard; but they also pre-date one or both
11 of Rule 11(b)(1)(N) and Vonn. See United States v. Tang,
12 214 F.3d 365, 368 (2d Cir. 2000); United States v.
13 Martinez-Rios, 143 F.3d 662, 668 (2d Cir. 1998); United.
14 States v. Chen, 127 F.3d 286, 289-90 (2d Cir. 1997). In any
15 event, Ready’s “knowing and voluntary” test is not at all
16 inconsistent with plain error review: “Rule 11 is *designed*
17 to assist district courts in ensuring that a defendant’s
18 guilty plea is knowing and voluntary.” United States v.
19 Mercado, 349 F.3d 708, 211 (2d Cir. 2003) (emphasis added).

20 We are bound by Vonn, which governs *all* Rule 11
21 appeals, subsection (b)(1)(N) included. The general
22 principle is that “Rule 11 violations that are not objected

1 to at the time of the plea are subject to plain error review
2 under Rule 52(b) of the Federal Rules of Criminal
3 Procedure.” United States v. Youngs, 687 F.3d 56, 59 (2d
4 Cir. 2012) (citing Vonn, 535 U.S. at 62-63). That rule has
5 been applied to subsections other than (b)(1)(N), see, e.g.,
6 United States v. Vaval, 404 F.3d 144, 151 (2d Cir. 2005)
7 (using plain error review in the context of a Rule
8 11(b)(1)(K) appeal), and it applies here as well.

9 Plain error review facilitates (and protects) judicial
10 efficiency. Without it, litigants would have little reason
11 to bring Rule 11 errors to a district court’s attention, a
12 consideration that is equally salient for subsection
13 (b)(1)(N). See Borrero-Acevedo, 533 F.3d at 15-16 (citing
14 Vonn, 535 U.S. at 73). Appellate waivers advance powerful
15 considerations of efficiency and finality; prosecutors make
16 various accommodations in plea deals in exchange for the
17 certainty that they will not have to spend resources
18 litigating appeals down the line.

19 Accordingly, we apply plain error review to Nourse’s
20 unpreserved Rule 11(b)(1)(N) challenge. “Plain error review
21 requires a defendant to demonstrate that (1) there was
22 error, (2) the error was plain, (3) the error prejudicially

1 affected his substantial rights, and (4) the error seriously
2 affected the fairness, integrity or public reputation of
3 judicial proceedings. . . . Additionally, to show that a
4 Rule 11 violation was plain error, the defendant must
5 demonstrate that there is a reasonable probability that, but
6 for the error, he would not have entered the plea.” Youngs,
7 687 F.3d at 59 (internal quotations omitted).

8 9 **III**

10 Nourse challenges the appeal waiver on two grounds:
11 that the judge failed to advise him of the “heart” of the
12 appeal waiver; and that the advice given was undermined by
13 the judge’s observation that the issue of Massachusetts law
14 bearing on criminal history was ambiguous and ripe for an
15 appeal to the Second Circuit. Neither argument is
16 persuasive; Nourse fails to demonstrate that any error
17 existed, or that absent the error he would not have entered
18 the plea.

19 Nourse argues that the judge “never informed [him] that
20 he was waiving the right to appeal a sentence of 60 months
21 or less.” Nourse Br. at 10. Because Nourse did not raise
22 this error in the district court, where it could have been

1 promptly sorted out, his argument is reviewed for plain
2 error. See Vonn, 535 U.S. at 62-63.

3 The court explicitly asked Nourse about the appellate
4 waiver, and Nourse confirmed that he consented to it. The
5 exchange was perfectly lucid and understandable.

6 Nourse argues that the prosecutor's expression of the
7 waiver did "*not* state by necessary implication that [Nourse]
8 could not appeal a sentence of less than 60 months." Nourse
9 Br. at 11. But no negative pregnant suggested that he
10 could. The prosecutor stated that Nourse waived his right
11 to appeal, but preserved his right to appeal a sentence in
12 excess of 60 months. The first point makes sense only if
13 the second is understood as a carve-out; i.e., there is a
14 general waiver except for a sentence that exceeds 60 months.
15 Since, under the circumstances, there was "no realistic
16 possibility that [the defendant] might have misunderstood
17 the nature or source of the waiver," the district court
18 "properly addressed the waiver provision during the plea
19 colloquy." United States v. Morgan, 386 F.3d 376, 379 (2d
20 Cir. 2004).

21 Nourse cites as an analog, United States v. Smith, 618
22 F.3d 657, 664-65 (7th Cir. 2010), in which the district

1 court asked the public defender whether there was a plea
2 waiver and elicited the response, “everything is waived with
3 the exception of the reasonableness of the
4 sentence . . . [a]nd he can’t withdraw his plea.” Id. at
5 565. The judge asked the defendant, “[y]ou understand
6 that?” and the defendant said he did. Id. The Seventh
7 Circuit held that this exchange “did not comport with the
8 requirements of Rule 11(b)(1)(N)” because the judge had not
9 adequately explained to the defendant the “substance of the
10 waiver.” Id. The judge’s inquiries focused on the finality
11 of the plea rather than the appeal waiver itself. Id.

12 There is no such ambiguity here. The relevant exchange
13 among the judge, the prosecutor, Nourse’s counsel, and
14 Nourse himself referenced only the appeal waiver. The most
15 logical understanding of Nourse’s response is that, except
16 for a retained “right to appeal the reasonableness of [a]
17 sentence in excess of 60 months,” he understood that he was
18 waiving altogether “his right to appeal and to collaterally
19 attack his conviction.” Change of Plea Hr’g Tr. at 14.

20 Nourse contends that the appeal waiver was at least
21 impaired when the district court suggested a Second Circuit
22 appeal on the issue of Massachusetts law. However, “an

1 otherwise enforceable waiver of appellate rights is not
2 rendered ineffective by a district judge's post-sentencing
3 advice suggesting, or even stating, that the defendant may
4 appeal." United States v. Fisher, 232 F.3d 301, 304 (2d
5 Cir. 2000). The district court's stray comment occurred at
6 sentencing, not at the plea colloquy, so it does not speak
7 to whether Nourse's appellate waiver was knowing and
8 voluntary. Nourse relies on a proviso in Fisher that "[a]
9 district judge's advice concerning appellate rights might
10 weigh in favor of construing an ambiguous waiver not to be
11 enforceable." Id. at 304 n.2. But for the reasons
12 explained supra, the waiver here was not at all ambiguous.

13 In sum, Nourse made a knowing and voluntary waiver. He
14 therefore has not established a Rule 11(b)(1)(N) error to
15 satisfy the first step of the plain error test.

16 Nourse also fails to establish plain error for a
17 second, alternative reason: he has not shown "a reasonable
18 probability that, but for the error, he would not have
19 entered the plea." Youngs, 687 F.3d at 59. In fact, Nourse
20 admits that he does *not* want to withdraw his plea. Nourse
21 Br. at 14 ("Unlike most Rule 11 challenges, where the
22 defendant is seeking to withdraw his plea, Mr. Nourse is

1 merely seeking the opportunity to be heard on appeal as to
2 the sentence he claims is illegal.").

3 Because Nourse's appeal waiver is binding, we need not
4 reach the merits of his argument under Massachusetts law.

5

6 For the foregoing reasons, we affirm.