

No. 10-2087

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	<u>ORDER</u>
)	
CEDARRIUS FROST,)	
)	
Defendant-Appellant.)	

Before: BOGGS and GILMAN, Circuit Judges; HOOD, District Judge.*

Defendant Cedarius Frost appeals his conviction of conspiracy to distribute controlled substances and distribution of cocaine base. The government moves to dismiss the appeal based on an appellate-waiver provision in his plea agreement. Frost opposes the motion.

“Plea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law.” *United States v. Wells*, 211 F.3d 988, 995 (6th Cir. 2000) (quoting *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991)). Plea agreements “are to be enforced according to their terms.” *United States v. Moncivais*, 492 F.3d 652, 662 (6th Cir. 2007). An appeal waiver within a plea agreement is valid if it is made knowingly and voluntarily. *United States v. Gibney*, 519 F.3d 301, 305-06 (6th Cir. 2008); *United States v. Coker*, 514 F.3d 562, 573 (6th Cir. 2008). Thus, if the plea was voluntary and the colloquy proper under Federal Rule of Criminal Procedure 11, the waiver provision will be enforced. See *United States v. Sharp*, 442 F.3d 946, 949-52 (6th Cir. 2006).

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

At the sentencing hearing on August 20, 2010, Frost argued that the Fair Sentencing Act of 2010 (“FSA”), which was signed into law on August 3, 2010, should be applied. The district court disagreed. However, over the objections of the government, the district court stated that Frost could appeal the question of whether the FSA could be applied retroactively to his case.

Statements by a district judge at sentencing with respect to a defendant’s right to appeal do not control over the unambiguous language of a plea agreement. *United States v. Swanberg*, 370 F.3d 622, 626 (6th Cir. 2004); *United States v. Fleming*, 239 F.3d 761, 764-65 (6th Cir. 2001). Once a plea agreement is accepted, the district court lacks the authority to modify that agreement to resurrect a defendant’s right to appeal. *Fleming*, 239 F.3d at 764. “[A]ny pronouncement from the bench that seeks unilaterally to amend a plea agreement exceeds the court’s authority under the Criminal Rules and is without effect.” *Id.* at 765. A valid appeal waiver will be enforced “despite the district court’s incorrect statement to the contrary at [the] sentencing hearing.” *Swanberg*, 370 F.3d at 626. The district court’s statements at sentencing did not resurrect Frost’s right to appeal.

Frost concedes that his plea was voluntary; he does not argue that it was not knowing. The record before the court demonstrates that Frost’s plea was knowing and voluntary and that the sentence imposed falls within the terms of the appeal waiver.

Frost argues that his ten-year sentence is an illegal sentence, invalidating the appeal waiver or, as a matter of public policy, the waiver should not be enforced by the court. His arguments rest on the questionable premise that the FSA is applicable to his case and that its enactment can invalidate an otherwise valid appeal waiver. In concluding that the FSA should not be applied retroactively, we have held that the court “must apply the penalty provision in place at the time [the defendant] committed the crime in question.” *United States v. Carradine*, 621 F.3d 575, 580 (6th

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Cir. 2010). Frost's criminal conduct occurred prior to the enactment of the FSA; thus the FSA does not apply to his sentencing.

The government is entitled to enforcement of the valid appeal waiver, and its motion to dismiss is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Clerk