

MAY 17 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE MIGUEL MARTINEZ,

Defendant - Appellant.

No. 12-10054

D.C. No. 5:10-cr-00390-DLJ

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Submitted May 14, 2013**

Before: LEAVY, THOMAS, and MURGUIA, Circuit Judges.

Jose Miguel Martinez appeals from the district court's judgment and challenges his guilty-plea conviction and 120-month sentence for conspiracy to possess with intent to distribute over 50 grams of methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii); and possession with intent to distribute

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

over 50 grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). Pursuant to *Anders v. California*, 386 U.S. 738 (1967), Martinez's counsel has filed a brief stating that there are no grounds for relief, along with a motion to withdraw as counsel of record. Martinez has filed a pro se supplemental brief. The government has filed a motion to dismiss the appeal.

In his written plea agreement, Martinez waived his right to appeal his conviction and sentence. Because the district court did not discuss Martinez's waiver of his right to appeal his conviction during the change of plea hearing, however, we decline to enforce the waiver as to the conviction. *See United States v. Arellano-Gallegos*, 387 F.3d 794, 796-97 (9th Cir. 2004). Our independent review of the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 80 (1988), discloses no arguable grounds for relief as to Martinez's conviction. We accordingly affirm the conviction.

Because the record discloses no arguable issue as to the validity of the sentencing waiver, we grant the government's motion in part and dismiss Martinez's appeal as to his sentence. *See United States v. Watson*, 582 F.3d 974, 986-88 (9th Cir. 2009).

Counsel's motion to withdraw is **GRANTED**.

AFFIRMED in part; DISMISSED in part.