

No. 03-_____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

S_____ H_____,
Defendant-Appellant.

On appeal from the United States District Court
for the Western District of Wisconsin
Case No. 03-CR-6
Honorable John C. Shabaz, United States District Judge, Presiding.

APPELLANT'S REPLY BRIEF

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ISSUES PRESENTED

1. Does *United States v. Booker*, 5__ U.S. ____, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005), require that Mr. H_____ be resentenced because the trial court improperly based his sentence on facts that were not either proven to a jury beyond a reasonable doubt or admitted by him?
2. Is Mr. H_____ -sentence unreasonable because the district court failed to consider the disparity between sentences for crack and powder cocaine and did not adequately consider the government's recommendation and facts when departing, by only one level, for Mr. H_____ -substantial assistance?

INTRODUCTION

On January 3, 2003, Mr. H_____ sold 17.23 grams of crack cocaine to an undercover officer, with the assistance of his co-defendant, Jovan Alexander. (PT¹ 17-23; PSR 7.) As a result, he was charged with distribution of over five grams of cocaine base. (CR 7; App. 2; 21 U.S.C. 841(a) &(b)(1)(B), 2.)

On May 2, 2003, Mr. H_____ pled guilty, pursuant to a plea agreement. (CR 17-18, PT 2-24, App. 3-6.) He admitted the above facts and drug quantity when he pled guilty. (PT 17-23.)

In her presentence report, the probation officer recited several instances of relevant conduct, in addition to the conduct underlying Mr. H_____ conviction. This conduct involved approximately 3.63 kilograms of crack cocaine. (PSR 9-10.) Therefore, the probation officer recommended that Mr. H_____ base offense level be 38, based on over one and a half kilograms of crack cocaine. (PSR 14.) The probation officer also recommended that Mr. H_____ receive a three-level adjustment for acceptance of responsibility. (PSR 15.) She also found that Mr. H_____ was in criminal history category six, based on both his criminal history

¹ CR is used as an abbreviation for the district court clerk's record of Mr. H_____ case. PT is used as an abbreviation for the reporter's transcript of Mr. H_____ Rule 11 or plea hearing. ST is used as an abbreviation for the reporter's transcript of the sentencing hearing. PSR is used as an abbreviation for the probation officer's presentence report. AOB is used as an abbreviation for appellant's opening brief. App. is used as an abbreviation for the appendix to Mr. H_____ opening brief. RB is used as an abbreviation for respondent's brief.

score and being a career offender. (PSR 15-18.) Mr. H_____ prior record includes four convictions for controlled substance offenses. (PSR 15-18.)

On July 23, 2003, the court held a sentencing hearing for Mr. H_____. The court adopted the Guidelines calculations in the presentence report. (ST 3-4, App. 14-15.)

The government then argued for a downward departure, pursuant to U.S.S.G. § 5K1.1. It asked the court to either depart by three levels and sentence Mr. H_____ at the high end of the resulting guideline range or depart by two levels and impose a sentence at the low end of the resulting range. The government noted that Mr. H_____ cooperated with investigators as soon as he was arrested. However, he was not yet represented by counsel when he gave his first statement and that information was used against him at sentencing. The government also stated that Mr. H_____ had always been truthful. Mr. H_____ cooperation allowed the government to obtain an additional conviction, after a trial, and the pleas of other people. (ST 5-6, App. 16-17, RB 7-8.) Mr. H_____ argued that his cooperation was extraordinary because he gave a detailed statement as soon as he was arrested, instead of waiting to see how it would help him. In addition, Mr. H_____ gave subsequent statements and even testified in another defendant's trial. Counsel also noted that Mr. H_____ family was

threatened as a result of his cooperation. (ST 6-8, App. 17-19; RB 7.) The court granted the government's motion for a downward departure, but only departed by one level. (ST 9, App. 20.) It found that, while Mr. H_____ assistance was substantial, it was not extraordinary. The court focused on the fact Mr. H_____ had given evidence against a confederate who was less culpable than he was. The court observed that such cooperation ~ happens all the time.TM(ST 9, App. 20.)

Both parties then asked the court for a sentence at the low end of the guideline range. The prosecutor noted that Mr. H_____ chose to go forward with his testimony even after he heard that his girlfriend was threatened. (ST 12, App. 22.) However, the court sentenced Mr. H_____ to a term of 327 months imprisonment, which was the high end of the range. The court also sentenced him to a term of eight years of supervised release, following his incarceration. (CR 34; ST 13-14; App. 7-12, 23-24.) The court stated that it would have imposed the upper end of the original range if it had not departed. (ST 13, App. 23.)

The district court erred when sentencing Mr. H_____ by treating the Sentencing Guidelines as mandatory and basing his sentence on facts which were not found by a jury beyond a reasonable doubt or admitted by Mr. H_____ in court. *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005). The government concedes that this was error. It also concedes that the

limited remand procedure of *United States v. Paladino*, 401 F.3d 471, 483-484 (7th Cir. 2005), may apply to this case. However, the government argues that this Court should affirm Mr. H_____’s sentence, without a remand, because it is clear that he would not receive a lesser sentence on remand. The government is incorrect. It is not clear that the district court would impose the same sentence now that it can consider mitigating factors that it was not allowed to consider before. In addition, Mr. H_____ argues that this Court should go further and order a full remand of his case to the district court for resentencing.

Furthermore, if this Court does not remand Mr. H_____’s case for resentencing based on the primary *Booker* error, it should still reverse his sentence because it is unreasonable. For example, a sentence which fails to take the effect of the disparity in sentences between crack and powder cocaine into account and modify it is irrational and does not comply with the statutory purposes of sentencing. In addition, the limited extent of the district court’s downward departure is unreasonable. The court did not give substantial weight to the government’s evaluation of Mr. H_____’s substantial assistance and recommendation for a greater departure. The government does not dispute the district court’s failure to do those things. However, it argues that the sentence was still proper based on pre-*Booker* authority. The government’s argument is

wrong under a post-*Booker* sentencing scheme.

ARGUMENT

- I. **Mr. H_____’ sentence must be reversed, in light of *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because his sentence was increased on the basis of facts that were not proven to a jury beyond a reasonable doubt or admitted by him.**

The government concedes that the district court violated Mr. H_____–Fifth and Sixth Amendment rights by basing his sentence on facts that were not proven to the jury beyond a reasonable doubt or admitted by him. *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005). The government also concedes that the error is plain. (RB 22-25.)

However, the government argues that the error did not affect Mr. H_____ – substantial rights or affect the fairness, integrity, or public reputation of judicial proceedings. It argues that the record shows that Mr. H_____ would receive the same or a greater sentence on remand. (RB 25-28.) The government is wrong. The record is not clear on those points. In fact, there is a reasonable probability that Mr. H_____ would receive a more favorable sentence on remand.

The government argues that the fact the court did not depart further on the basis of Mr. H_____ –substantial assistance shows that it would not impose a lower sentence on the basis of any other factors. (RB 26.) However, as Mr. H_____ argues in his opening brief and below, the court erred by failing to depart further on the basis of Mr. H_____ –substantial assistance. (AOB 25-26, *Infra*. p.

17.) In addition, courts are not allowed to consider factors that are not related to a defendant's substantial assistance when deciding the extent of a departure under U.S.S.G. § 5K1.1. *United States v. Thomas I*, 930 F.2d 526, 529 (7th Cir. 1991). Therefore, the extent of the court's departure does not indicate how it would have viewed other factors that it could not consider before *Booker*.

In fact, this Court recently rejected an argument that is almost identical to the one the government makes in this case. It stated that:

The government argues in its supplemental brief that any error in [Appellant's] sentence was harmless because it did not affect the district court's choice of sentence. First, the government argues that the district court's decision to depart downward the equivalent of just three offense levels based on [Appellant's] substantial assistance signals the court's unwillingness to exercise the discretion already available to it by further lowering [Appellant's] sentence. This argument has some facial appeal, but it ignores the fact that a sentencing judge, prior to *Booker*, had the guidelines and the appellate standard of review in mind when fashioning a departure. A departure decision, even if "discretionary," was nevertheless informed by the guidelines and thus sheds little light on what a sentencing judge would have done knowing that the guidelines were advisory.

Moreover, although the size of the departure was within the court's discretion, see U.S.S.G. § 5K1.1, the government cites no examples of past cases in which this argument has been accepted as [a] basis for concluding that a guidelines misapplication was harmless. Ultimately, this court would have to speculate that the district court's error in thinking itself bound by the guidelines did not affect the sentence.

United States v. Schlifer, 4__ F.3d ___, 2005 U.S. App. LEXIS 5613, *12-*13 (7th Cir.

April 7, 2005).

Furthermore, the fact the court sentenced Mr. H_____ at the high end of the Guidelines range is not enough to

rule out the possibility that the judge might have imposed a lesser sentence had he known that the Guidelines did not bind him. The judge picked a sentence at the top of the range believing that his discretion was confined to the range specified by the Guidelines; had he realized that his discretion was broader than that, and had he thought that the Guidelines range as a whole was too high, then he conceivably might have sentenced [Mr. H_____] to a lesser term.

United States v. Della Rose, 4__ F.3d ___, 2005 U.S. App. LEXIS 5696, *44 (7th Cir.

April 8, 2005).

As Mr. H_____ noted in his opening brief, the district court could now consider the effect of the disparity between guideline ranges for crack and powder cocaine. (AOB 17-18.)

In addition, the Court could consider the fact the Sentencing Commission has noted that ~[c]ommentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods, which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers.TMU.S.S.C., *Fifteen Years of Guidelines Sentencing* (2004) p. 134 (citations omitted). That information could affect the

court's evaluation of Mr. H_____ record of four prior convictions for controlled substance offenses.

Furthermore, Mr. H_____ incarceration is not likely to protect the community. After Mr. H_____ was sentenced, the Sentencing Commission found that:

Unlike repeat violent offenders, whose incapacitation may protect the public from additional crimes by the offender, criminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.

Ibid. Arguably, Mr. H_____ was not a low-level drug seller since he had people working for him. However, he was engaging in retail sales. He was at most a mid-level dealer. Therefore, the Commission's findings apply to his situation. Just as there is always someone who is willing to start selling drugs, there is always a lower level dealer that is willing to step in and fill a vacuum that is created by an arrest at a higher level.

If the district court had been allowed to fully consider all of the above and, perhaps, other mitigating factors it may have found that a shorter sentence was sufficient, but not greater than necessaryTM to achieve the purposes of sentencing. (18 U.S.C. 3553(a).)

As a result, the district court's error affected Mr. H_____—substantial rights by depriving him of his right to be sentenced under a Constitutional sentencing scheme.

Sentencing Mr. H_____ under an unconstitutional system also affected the fairness, integrity, or public reputation of judicial proceedings. This Court has found that if the district court says, on limited remand, that it would impose a lower sentence then this satisfies the fourth, as well as the third, prong of plain error review. *United States v. Paladino*, 401 F.3d at 483-484. *See also United States v. Williams*, 399 F.3d 450, 461 (2nd Cir. 2005).

In addition, reports of disparity in sentencing

undermine public confidence in the federal courts, particularly among minority groups. Public confidence also is threatened by data showing that the gap in average sentences between African-American and other offender groups grew wider in the years following implementation of the guidelines and mandatory minimum penalty statutes enacted shortly after passage of the Sentencing Reform Act. ... Today's sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation.

U.S.S.C., *Fifteen Years of Guidelines Sentencing* at p. 135.

Therefore, this Court should at least order a limited remand, pursuant to *Paladino*. However, as Mr. H_____ argued in his opening brief, this Court should go further and fully remand his case to the district court for resentencing. (AOB 19-20.)

II. The district court's sentence was unreasonable because it failed to consider the sentence disparity between crack and powder cocaine and did not give adequate consideration to Mr. H_____ ' substantial assistance.

A. Standard of Review

The government claims that review of a sentence for reasonableness, under *Booker*, is only for plain error unless the defendant actually said below that the sentence was unreasonable. (RB 14.) However, the government is wrong. Mr. H_____ argued for a lower sentence. (ST 6-8, 11; App. 17-19, 21.) That included the implicit argument that a higher sentence than he requested was unreasonable. Therefore, his argument for a lower sentence was sufficient to preserve the issue of reasonableness for appellate review. As Mr. H_____ stated in his opening brief, the most appropriate standard of review appears to be for abuse of discretion. (AOB 22-23.)

In addition, it should make little difference if the reasonableness of Mr. H_____ -sentence is reviewed under the plain error standard. An unreasonable sentence is plainly erroneous under *Booker*. *United States v. Booker*, 125 S.Ct. at

765. It would also affect Mr. H_____’s substantial right to be sentenced to a term within the realm of reasonableness. Letting an unreasonable sentence stand would: be unfair; affect the integrity of federal sentencing; and bring the federal courts into disrepute, as well.

B. Argument

The government argues that the disparity between sentences for crack and powder cocaine is not a fact which can make a sentence unreasonable. However, it relies on several pre-*Booker* decisions in support of its argument. (RB 15-17.) Those decisions are irrelevant to the advisory guidelines system that now exists after *Booker*. Mr. H_____ is not arguing that the disparity is unconstitutional. He is also not raising an argument over the interpretation of the Guidelines.

The fact a sentence follows the Guidelines does not necessarily mean that it is reasonable. *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019, 1023 (D.Neb. 2005). *Booker* did not hold or imply that all Guidelines sentences should be found reasonable. If that is what the Court meant, it would have said that any error in treating the Guidelines as mandatory was harmless so long as the actual sentence complied with the Guidelines.

The Guidelines are not entitled to any more or less weight than the other factors in 18 U.S.C. § 3553(a). An approach which gives the Guidelines presumptive or heavy weight continues to treat the Guidelines as mandatory

with narrow exceptions for departures. Therefore, such an approach violates the portion of *Booker* which held that the Guidelines were unconstitutional because they were mandatory. *United States v. Ranum*, 353 F.Supp.2d 984, 985-986; *United States v. Myers*, 353 F.Supp.2d 1026, 1028-1029 (S.D. Iowa 2005); *United States v. Huerta-Rodriguez*, 355 F.Supp.2d at 1023, 1025; *United States v. Biheiri*, 356 F.Supp.2d 589, 593-595 (E.D. Vir. 2005); *United States v. West*, 3__ F.Supp.2d ___, 2005 U.S. Dist. LEXIS 1123, *5-*7 (S.D.N.Y. Jan. 27, 2005); *United States v. Jaber*, 3__ F.Supp.2d ___, 2005 U.S. Dist. LEXIS 4028, *17-*33 (D.Mass. Mar. 16, 2005) (extensively explaining the problems with such an approach); *Simon v. United States*, 3__ F.Supp.2d ___, 2005 U.S. Dist. LEXIS 4551, *11-*13 (E.D. NY Mar. 17, 2005). *Contra: United States v. Wilson*, 350 F.Supp.2d 910, 913-925 (D. Utah 2005); *United States v. Wilson II*, 355 F.Supp.2d 1269 (D. Utah 2005); *United States v. Wanning*, 354 F.Supp.2d 1056, 1059-1063 (D. Neb. 2005); *United States v. Peach*, 356 F.Supp.2d 1018, 1020-1022 (D. N.D. 2005).

As noted above, the Sentencing Commission has now determined that the disparity between sentences for crack and powder cocaine is not warranted. U.S.S.C., *Fifteen Years of Guidelines Sentencing* xvi,132 (2004). The Commission also noted that eliminating or reducing the disparity would dramatically improve the fairness of the federal sentencing system.TM*Id.* at 132. Therefore, a sentence

which does not take the unfairness of this disparity into account: overstates the seriousness of the crime; provides more than just punishment for the offense; and fails to promote respect for the law in violation of 18 U.S.C. § 3553(a)(2)(A). As a result, such a sentence is unreasonable.

Indeed, Judge Adelman recently came to this conclusion when sentencing another defendant who was convicted of possession with intent to distribute over 50 grams of crack cocaine. *United States v. Smith*, 359 F.Supp.2d 771, 2005 U.S. Dist. LEXIS 4177, *16-*29 (E.D. Wis. 2005).

The government argues that Judge Adelman did not have the authority to deviate from the Guidelines ratio in *Smith*. (RB 17.) However, the government ignores the fact the Guidelines are no longer mandatory. That means courts can now deviate from them when appropriate.

The government also criticizes Mr. H_____’s use of Judge Adelman’s opinion because he is just one district judge. (RB 17.) However, the government ignores the fact the Sentencing Commission has accepted the argument that the present ratio of disparity between sentences for crack and powder cocaine is not warranted. U.S.S.C., *Fifteen Years of Guidelines Sentencing* xvi,132 (2004). In addition, two of the three other courts that have considered the issue have now agreed with Judge Adelman’s view. *United States v. Harris*, 3__ F.Supp.2d, 2005

U.S. Dist. LEXIS 3958, *8-*9 (D. D.C. Mar. 7, 2005) (noting that *Booker's* directive to consider pertinent Sentencing Commission policy statements also requires consideration of Commission reports); *Simon v. United States*, 2005 U.S. Dist. LEXIS 4551, *24-*33 (declining to adopt specific ratio, but reducing sentence due to the disparity).

Only one of the four courts that has published an opinion deciding the issue refused to alter a sentence due to the acknowledged disparity between sentences for crack and powder cocaine. *United States v. Tabor*, 3__ F.Supp.2d ____, 2005 U.S. Dist. LEXIS 6649, *11-*27 (D. Neb. April 18, 2005). In *Tabor*, the court acknowledged the problems with sentences for crack cocaine. However, it chose not to determine an appropriate sentence because it found that judges lack the institutional capacity and competence to do so. In addition, the court did not even consider the Sentencing Commission's 2004 report on ~ Fifteen Years of Guidelines Sentencing.TM*Ibid.* In choosing to apply presumptive weight to the Guidelines, the *Tabor* court even went so far as express its dislike for the parsimony provision of 18 U.S.C. § 3553(a), which requires that sentences not be greater than necessary, by calling it meaningless. Judge Kopf also said that he is ~ likely to throw upTM if he hears the phrase one more time. *Id.* at *25 fn. 14. Such mocking of the statute is the judicial equivalent of thumbing one's nose at

Congress and the Supreme Court while purporting to follow the law. It also suggests that the real reason for choosing to presumptively follow the Guidelines may simply be hostility toward the application of the remaining 3553(a) factors in each case. Therefore, this Court should follow the better reasoned opinions of the majority of courts which have concluded that continuing to apply the 100 to 1 ratio between sentences for crack and powder cocaine is improper.

The district court's failure to account for the problems with this disparity caused it to impose an unreasonable sentence on Mr. H_____.

Blind adherence to rules that have been proven ineffective, meaningless, and unjust serves no purpose. Not only does such adherence unjustly deprive an individual defendant of his or her liberty, it also deprives the federal courts of their inherent justice. Our current crack cocaine sentencing scheme is unjust. The Sentencing Commission has so acknowledged and now it is time for the federal courts to do the same.

United States v. Gaines, 122 F.3d 324, 336 (6th Cir. 1997) (Jones, J. dissenting).

In addition, as Mr. H_____ showed in his opening brief, the limited extent of the district court's downward departure is unreasonable. (AOB 25-26.) The government argues that the district court's miserly departure was reasonable. However, it fails to address the arguments that Mr. H_____ made in his opening brief. (RB 18-19.)

Furthermore:

Rehabilitation is also a goal of punishment. 18 U.S.C. § 3553(a)(2)(D). That goal cannot be served if a defendant can look forward to nothing beyond imprisonment. Hope is the necessary condition of mankind A judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life. Punishment should not be more severe than that necessary to satisfy the goals of punishment.

United States v. Carvajal, 3__ F.Supp.2d ____, 2005 U.S. Dist. LEXIS 3076, *15-*16 (S.D. NY Feb. 22, 2005).

Therefore, Mr. H_____’s sentence is unreasonable even without the consideration of the additional mitigating factors which he might be able to present at a new sentencing hearing. Thus, this Court should reverse his sentence and remand his case for resentencing to a lower term that comes within the broad range of reasonable sentences.

CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. H_____ ' sentence and remand his case to the district court for resentencing.

Respectfully submitted
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