

400 F.3d 1115

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United States Court of Appeals,
Eighth Circuit.
UNITED STATES of America, Appellee,
v.
Kevin Edward LEA, Appellant.
No. 04-3427.
Submitted: March 7, 2005.
Filed: March 24, 2005.

Background: Defendant pleaded guilty in the United States District Court for the Western District of Missouri, Nanette K. Laughrey, J., conspiring to manufacture methamphetamine, and was sentenced to 110 months' imprisonment. Defendant appealed his sentence.

Holding: The Court of Appeals held that defendant was entitled to be resentenced under an advisory, rather than mandatory, sentencing guidelines scheme.

Vacated and remanded.

West Headnotes

[1] [KeyCite Notes](#) 

[110](#) Criminal Law

[110XXIV](#) Review

[110XXIV\(U\)](#) Determination and Disposition of Cause

[110k1181.5](#) Remand in General; Vacation

[110k1181.5\(3\)](#) Remand for Determination or Reconsideration of Particular Matters

[110k1181.5\(8\)](#) k. Sentence. [Most Cited Cases](#)

Defendant who properly preserved his challenge to constitutionality of sentencing guidelines was entitled to remand for resentencing under an advisory, rather than mandatory, guidelines scheme, even though his guidelines sentence was based on facts to which he stipulated in his plea agreement. [U.S.S.G. § 1B1.1](#) et seq., 18 U.S.C.A.

[2] [KeyCite Notes](#) 

[110](#) Criminal Law

[110XV](#) Pleas

[110k272](#) Plea of Guilty

[110k273.4](#) Waiver of Defenses and Objections

[110k273.4\(1\)](#) k. In General. [Most Cited Cases](#)

Defendant did not waive his right to challenge constitutionality of the sentencing guidelines by entering into plea agreement that expressly allowed him to dispute at his sentencing hearing any issue not "specifically listed" in paragraph that acknowledged that certain guidelines provisions would be applicable to his case, but did not specifically address the issue of mandatory or advisory application of the guidelines. [U.S.S.G. § 1B1.1](#) et seq., 18 U.S.C.A.

[3] [KeyCite Notes](#) 

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110K1177 k. Sentence and Judgment and Proceedings After Judgment. [Most Cited Cases](#)

Error in sentencing of defendant to 110 months' imprisonment for conspiring to manufacture methamphetamine under sentencing guidelines district court believed to be mandatory rather than advisory was not harmless, where court sentenced defendant at the low end of his guidelines range, and had it not felt bound by the guidelines, could have imposed a sentence as low as 60 months.

[U.S.S.G. § 1B1.1](#) et seq., 18 U.S.C.A.

*1115 [Christopher A. Slusher](#), Jefferson City, MO, for appellant.

C. Douglas Shull, Asst. U.S. Atty., Jefferson City, MO, for appellee.

Before MELLOY, [McMILLIAN](#), and [GRUENDER](#), Circuit Judges.

PER CURIAM.

Kevin Edward Lea appeals the sentence the district court imposed after he pleaded guilty to a drug charge. We vacate Lea's sentence and remand for resentencing in light of [United States v. Booker, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 \(2005\)](#).



[1] Lea pleaded guilty to conspiring to manufacture methamphetamine, in violation of [21 U.S.C. §§ 841\(a\)\(1\)](#) and [846](#). He entered into a written plea agreement in which he stipulated to specific offense conduct and acknowledged that these admissions would be used to calculate his *1116 sentence under the federal Sentencing Guidelines. Before sentencing, however, he objected to being sentenced under the Guidelines, arguing they were unconstitutional based on the Supreme Court's then-recent decision in [Blakely v. Washington, --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 \(2004\)](#). The district court rejected Lea's constitutional challenge and imposed a Guidelines sentence of 110 months imprisonment and 4 years supervised release. On appeal, Lea renews his constitutional challenge to the Guidelines.

In [Booker](#), the Supreme Court held that the mandatory aspect of the federal Sentencing Guidelines was unconstitutional and modified Sentencing Reform Act provisions to make the Guidelines advisory. See [125 S.Ct. at 756-57](#). We disagree with the government's position on appeal that because Lea's Guidelines sentence was based on facts he admitted or to which he stipulated, he cannot challenge his sentence. [Booker](#) specifically rejected the invitation to leave the Guidelines as binding in cases that do not involve judicial factfinding. See [id. at 768](#). Because Lea properly preserved his challenge to the constitutionality of the Guidelines, we conclude he is entitled to be sentenced under an advisory, rather than mandatory, Guidelines scheme.



[2] We also reject the government's argument that Lea expressly waived, in the plea agreement, his right to make this constitutional challenge on appeal. Paragraph 15 of the plea agreement expressly allowed Lea to dispute at his sentencing hearing any issue not "specifically listed" in Paragraph 14. Paragraph 12 gave Lea the right to appeal any sentencing issues not "specifically addressed" in Paragraph 14. Lea's acknowledgment in Paragraph 14 that certain Guidelines provisions would be applicable to his case did not specifically address the issue of mandatory or advisory application of the Guidelines. Therefore, the language of the plea agreement cannot be construed to foreclose Lea's ability to make this constitutional challenge.



[3] Finally, we cannot conclude, on the record before us, that it was harmless error for the district court to sentence Lea under a Guidelines scheme the court believed to be mandatory. See [Booker, 125 S.Ct. at 769](#) (in cases not involving Sixth Amendment violation, whether resentencing is warranted may depend on application of harmless-error doctrine). We note that the district court sentenced Lea at the low end of his Guidelines range, and had it not felt bound by the Guidelines, could have imposed a sentence as low as 60 months. Cf. [Williams v. United States, 503 U.S. 193, 202-03, 112 S.Ct. 1112, 117 L.Ed.2d 341 \(1992\)](#) (when district court misapplies Guidelines, remand

is required unless reviewing court determines, on basis of whole record, that error is harmless, i.e., error did not affect district court's selection of sentence imposed); [United States v. Hensley, 36 F.3d 39, 42 \(8th Cir.1994\)](#) (where record did not show conclusively whether district court considered Guidelines policy statements in imposing sentence, remand was proper because "we cannot be certain the error was harmless").

Accordingly, we reverse as to Lea's sentence and remand to the district court so that Lea may be resentenced in accordance with [Booker](#).

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