

Nos. 03-4123 & 04-2358

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BYRON SUTTON,
Defendant-Appellant.

On appeal from the United States District Court
for the Northern District of Illinois (Chicago)
Case No. 03-CR-1131
Honorable Elaine E. Bucklo, United States District Judge, Presiding.

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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ISSUE PRESENTED

Does *United States v. Booker*, 5__ U.S. ____, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005), require Mr. Sutton to 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?

STATEMENT OF THE CASE

The statement of the case is fully set forth in appellant, Byron Sutton's , opening and first supplemental briefs.

On January 26, 2005, this Court ordered the parties to file supplemental briefs addressing the Supreme Court's decision in *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (Jan. 12, 2005), by February 7, 2005.

STATEMENT OF FACTS

Most of the facts are contained in the statement of facts in Mr. Sutton's initial opening brief. The additional relevant facts are set forth below.

Mr. Sutton has a long history of heroin addiction. He was able to stay off of it for several years. However, he relapsed when he became depressed over the loss of a business in 2000. He was using heroin daily until his arrest for the instant offense. Mr. Sutton did become involved in a methadone program in 2001.¹ (PSR² 11.)

¹ There is no further information about this in the presentence report.

² PSR is used as an abbreviation for the probation officer's presentence report. AOB is used as an abbreviation for appellant's opening brief. Supp. AOB is used as an abbreviation for appellant's supplemental opening brief. ARB is used as an abbreviation for appellant's reply brief.

Mr. Sutton had owned two different car wash places from 1993 to 1994 and 1995 to 1997. He also owned two restaurants from 1997 to 2001. (PSR 12.)

The grandmother of one of Mr. Sutton's daughters described him as always kind and helpful. For example, he bought her a used refrigerator when her refrigerator stopped working and she could not afford to buy another one. She also described Mr. Sutton as an involved and supportive father. (Letter from Verlene Eddins attached to Defendant's Position Paper and Commentary on Sentencing Factors and Motion for Downward Departure.)

SUMMARY OF ARGUMENT

Mr. Sutton's Guidelines range and resulting sentence was increased based on facts which were not found by a jury beyond a reasonable doubt or admitted by a defendant. This violated the Fifth and Sixth Amendments. *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 2005 U.S. LEXIS 628, *45-*46 (2005). Mr. Sutton did not object to his sentence on this basis in the district court. However, his sentence is plain error. Mr. Sutton was sentenced under an illegal sentencing scheme which did not allow full consideration of the mitigating factors in his personal history. As a result, the district court did not decide whether, in light of those factors, the sentence it imposed was "sufficient, but not greater than necessary" to achieve the purposes of sentencing in 18 U.S.C. §3553(a). Therefore, this Court should remand Mr. Sutton's case to the district court for resentencing in order for the district court to make that determination after considering all of the relevant factors.

ARGUMENT

Mr. Sutton's sentence must be reversed, in light of *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (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.

Mr. Sutton argued, in his first supplemental brief and his reply brief, that his sentence was unconstitutional under *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004). (Supp. AOB 4-16; ARB 8-14.)

In *United States v. Booker*, 2005 U.S. LEXIS 628, the Supreme Court held that the rule it stated in *Blakely* applies to the Federal Sentencing Guidelines. *United States v. Booker*, 2005 U.S. LEXIS 628, *15-*16. The Court reaffirmed its previous holdings in *Apprendi* and *Blakely* stating that,

"Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

United States v. Booker, 2005 U.S. LEXIS 628, *45-*46.

A separate majority of the Court then held that the solution to this problem was to sever and excise 18 U.S.C. §§3553(b)(1) and 3742(e) from the remainder of the Sentencing Reform Act. *Id.* at *82. This means that sentencing courts are no longer bound by the Guidelines. Instead, "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into

account.” *Id.* at *80. In addition, courts must also consider the purposes of sentencing set forth in 18 U.S.C. §3553(a), including the need “to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.” *Id.* at *72.

A. Standard of Review

Mr. Sutton conceded, in his supplemental opening brief that plain error was the appropriate standard of review. (Supp. AOB 4.) The government now agrees with this. (Gov’t. Supp. Brief 1-2, 4 fn. 3.)

B. Argument

The district court plainly erred when sentencing Mr. Sutton, in light of *Booker*.

1. There was error under *Booker*.

The Supreme Court has now agreed with Mr. Sutton’s argument in his supplemental opening brief that he was sentenced in violation of the Fifth and Sixth Amendments. *United States v. Booker*, 2005 U.S. LEXIS 628, *45-*46. (Supp. AOB 7-12.) As a result, the government has conceded this point. (Gov’t. Supp. Brief 5.)

2. The error was plain.

The government has now conceded that the error is plain or obvious, as well. (Gov't. Supp. Brief 5.) (See also Supp. AOB 12.)

3. The error affected Mr. Sutton's substantial rights.

The government argues that the district court's error did not affect Mr. Sutton's substantial rights. (Gov't. Supp. Brief 5.) However, the government is wrong. This Court has held that a sentence which is based on an incorrect guideline range is an error affecting substantial rights. *Emezuo v. United States*, 357 F.3d 703, 711 (7th Cir. 2004), quoting *United States v. Wallace*, 32 F.3d 1171, 1174-75 (7th Cir. 1994).

The question for purposes of determining whether [Mr. Sutton] was prejudiced is not what the district court would have done had it imposed a sentence in the exercise of its discretion pursuant to §3553(a). [Mr. Sutton] does not argue that the district court erred by failing to regard the guidelines as advisory in sentencing him. Rather, [Mr. Sutton] argues that the district court erred by imposing a sentence that was greater than the maximum authorized by the facts [which he admitted] alone. Therefore, the prejudice inquiry concerns what sentence the court would have imposed had it not committed the error of going beyond the facts found by the jury in imposing a sentence under the mandatory guideline regime then in existence. This case does not present the question of whether a defendant suffers prejudice because a sentencing court fails to treat the guidelines as advisory in determining the sentence.

United States v. Hughes, 3__ F.3d ___, 2005 U.S. App. LEXIS 1189, *15 fn. 6 (4th Cir. Jan. 24, 2005).

If the district court had sentenced Mr. Sutton based on only on the facts which he unequivocally admitted, his Guidelines range would have been 120 to 135 months, rather than the 135 to 168 month range used by the district court. (Supp. AOB 9.) That means that the district court could have sentenced Mr. Sutton to as much as 15 months less imprisonment than it did. As a result, the error affected his substantial rights. *Id.* at *15.

The district court sentenced Mr. Sutton at the low end of the Guidelines range that it found. Since the court did not think it had the authority to reduce the sentence, there is no indication of what it would have done with knowledge of that discretion. However, this Court has held that remand is required, under the plain error standard, when the sentence that the district court selected is within the correct as well as the incorrect Guidelines range, "unless it has reason to believe that the error did not affect the district court's selection of a particular sentence." "Here, the district court chose the lowest possible sentence within the erroneous range." There is "no reason to believe that it would not have selected an even lower sentence if given the opportunity to do so." *Emezuo v. United States*, 357 F.3d at 711, quoting *United States v. Wallace*, 32 F.3d at 1174-75.

Thus, the error in sentencing Mr. Sutton affected his substantial rights.

4. The *Booker* error seriously affects the fairness, integrity, and public reputation of judicial proceedings.

The government also erroneously claims that this last prong of the plain error analysis is not met in this case. (Gov't. Supp. Brief 5-7.) First, the government asserts that Mr. Sutton's sentence was only enhanced based on facts that he admitted. (Gov't. Supp. Brief 5-7.) However, the government ignores the unresolved conflict between the two admissions that Mr. Sutton made; one with a higher figure and one with a lower figure. (See AOB 14-17; Supp. AOB 15; ARB 6-9, 12-13.)

The government then argues that the district court's sentence was reasonable. (Gov't. Supp. Brief 6-7.) That may be true, but it is not the point. "A sentencing error that leads to a violation of the Sixth Amendment by imposing a more severe sentence than is supported by the jury verdict [or the defendant's admission] would diminish the integrity and public reputation of the judicial system [and] also would diminish the fairness of the criminal sentencing system." *United States v. Oliver*, 3__ F.3d ___, 2005 U.S. App. LEXIS 1623, *23 (6th Cir. Feb. 2, 2005) (citation omitted).

The Sixth Circuit distinguished this type of case from the Supreme Court's refusal to find plain error in *United States v. Cotton*, 535 U.S. 625 (2002) because the evidence was "overwhelming and essentially uncontroverted." The Court of

Appeals found that:

Thus, the [Supreme] Court posited that a "real threat" to "fairness, integrity, and public reputation of judicial proceedings" existed if it permitted such cases to be remanded under "plain error" review as defendants "involved in large-scale drug operations" would receive less severe punishments than "the overwhelming and uncontroverted evidence" supported. In this case such concerns are unwarranted as the district court judge may still consider the evidence of flight during re-sentencing. The district court must simply consider this evidence in a manner consistent with *Booker*. There is no concern that Oliver will be granted a windfall if we permit "plain error" review. Given that primary concern of the Supreme Court in *Cotton* is not present here, we conclude that its analysis of the fourth prong of the "plain error" test is distinguishable and inapplicable.

United States v. Oliver, 2005 U.S. App. LEXIS 1623, *23 fn. 3 (citations omitted);

Contra United States v. Bruce, 3__ F.3d ___, 2005 U.S. App. LEXIS 1712, *55-*57 (6th Cir. Feb. 3, 2005) (finding fourth prong not satisfied when Defendant did not contest facts, but only disputed their legal significance).

In addition, *Cotton* only addressed the question of whether failure to include enhancing facts in an indictment was reversible error. It did not address the Sixth Amendment right to a jury finding, absent an admission, or the Fifth Amendment right to a finding beyond a reasonable doubt before a sentence can be enhanced. *United States v. Cotton*, 535 U.S. 625. Therefore, even if this were a case in which the evidence was uncontroverted, *Cotton* would not apply.

Moreover, as noted above, under *Booker*, courts must still consider the Guidelines. However, they must also consider all of the purposes of sentencing set forth in 18 U.S.C. §3553(a). *United States v. Booker*, 2005 U.S. LEXIS 628, *72, *80.

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2."

Section 3553(a)(2) states that such purposes are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Section 3553(a) further directs sentencing courts to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (3) the kinds of sentences available; (6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

United States v. Ranum, 2005 WL 161223, *1 (E.D. Wis. Jan. 19, 2005).

This means that sentencing courts must now consider several factors which they were formerly forbidden to consider.

For example, under §3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, U.S.S.G. §5H1.1, his education and vocational skills, §5H1.2, his mental and emotional condition, §5H1.3, his physical condition including drug or alcohol dependence, §5H1.4, his employment record, §5H1.5, his family ties and responsibilities, §5H1.6, his socio-economic status, §5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, §5H1.12. The guidelines' prohibition of considering these factors cannot be squared with the §3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant. The only aspect of a defendant's history that the guidelines permit courts to consider is criminal history.

Ibid.

"[W]here the guidelines conflict with other factors set forth in §3553(a), courts will have to resolve the conflicts." *Id.* at *2. Thus, factors which mitigate a defendant's culpability for a crime now have much greater importance to the determination of an appropriate sentence.

Therefore, it is not enough for this Court to say that the sentence imposed by the district court is reasonable irrespective of the error.

The fact remains that a sentence has yet to be imposed under a regime in which the guidelines are treated as advisory. To leave standing this sentence simply because it may happen to fall within the range of reasonableness unquestionably impugns the fairness, integrity, or public reputation of judicial proceedings. Indeed, the determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it.

Moreover, declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to [this Court] performing the sentencing function [itself]. This is so because the district court was never called upon to impose a sentence in the exercise of its discretion. That the particular sentence imposed here might be reasonable is not to say that the district court, now vested with broader sentencing discretion, could not have imposed a different sentence that might also have been reasonable. [This Court] simply do[es] not know how the district court would have sentenced [Mr. Sutton] had it been operating under the regime established by *Booker*.

United States v. Hughes, 2005 U.S. App. LEXIS 1189, *17 fn. 8. See also *United States v. Oliver*, 2005 U.S. App. LEXIS 1623, *23 fn. 3 (finding that Court of Appeals would be "usurping the discretionary power granted to the district courts by *Booker* if [it] were to assume that the district court would have given Oliver the same sentence post-*Booker*). If the district court had considered the mitigating factors noted above (*Supra*, pp. 2-3), it may have found that a shorter sentence was "sufficient, but not greater than necessary" to achieve the purposes of sentencing. (18 U.S.C. §3553(a).) In addition, one district court has found that the guidelines ranges for drug sentences are less reliable indicators of fair sentences than guideline ranges for other offenses. *United States v. Huerta-Rodriguez*, ___ F.Supp.2d ___, 2005 U.S. Dist. LEXIS 1398, *11 (D.Neb. Feb. 1, 2005).

The government disagrees with the result in *Hughes*. (Gov't. Supp. Brief 6 fn. 4.) However, in doing so, the government is also disagreeing with the result in *Booker* itself. In *Booker*, the Supreme Court did not perform the reasonableness inquiry in the first instance or order this Court do so. Instead, it simply affirmed this Court's decision and remanded the case to the district court for resentencing. *United States v. Booker*, 2005 U.S. LEXIS 628, *91-*92. Therefore, this Court should do the same thing in this case.

This Court should also refuse to follow the limited remand procedure for a district court to indicate whether it wants to resentence a defendant that was adopted by the Second Circuit in *United States v. Crosby*, 3__ F.3d ___, 2005 U.S. App. LEXIS 1699, *41-*42, *44-*46 (2nd Cir. Feb. 2, 2005). That procedure is also inconsistent with the unlimited remand for resentencing which the Supreme Court ordered in *Booker*. It is even inconsistent with the remand that the Court ordered in *Fanfan*. In *Fanfan*, the Court remanded the case to the district court and gave the parties the opportunity to seek resentencing. It did not leave that decision up to the district court. *United States v. Booker*, 2005 U.S. LEXIS 628, *92.

Therefore, this Court should remand Mr. Sutton's case for resentencing under the now-advisory Guidelines.

CONCLUSION

For the reasons stated above and in his other briefs, this Court should reverse Mr. Sutton's sentence and remand his case to the district court for resentencing.

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