No. 05-3708

In the

United States Court of Appeals

For the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JAMES M. FUNK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION
The Honorable James G. Carr, United States District Judge.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

INTRODUCTION

This is a government appeal of the defendant's sentence, now before the en banc court on remand from the Supreme Court for further consideration in light of Gall v. United States, 128 S. Ct. 586 (2007). The government files this supplemental brief in response to the en banc court's order of December 16, 2008.

JURISDICTIONAL STATEMENT

This is a government appeal of the defendant's sentence. The district court (Carr, J.) had jurisdiction over the case under 18 U.S.C. § 3231. The judgment of the district court was imposed on April 25, 2005, and entered on the court's docket on May 2, 2005. (R. 309, Judgment; Apx. 61-67). The government's notice of appeal, filed on May 17, 2005, was timely under Fed. R. App. P. 4(b)(1)(B). (R. 311, Notice of Appeal; Apx. 68). The jurisdiction of this Court is invoked under 18 U.S.C. § 3742(b).

STATEMENT OF THE ISSUE

Whether the district court failed to provide an adequate explanation for the below-Guidelines sentence it imposed.

STATEMENT OF THE CASE

On January 18, 2002, defendant James Funk and seven others were charged in a one-count indictment with conspiracy to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (R. 10, Indictment; Apx. 42). The indictment charged Funk and the other defendants with conspiring from 1998 onward to obtain over 15 kilograms of cocaine and over 2,000 pounds of marijuana from Texas and Illinois, which they then distributed in the Marion, Ohio area. (R. 10, Indictment ¶¶ 1-2; Apx. 42-43).

After the other defendants pleaded guilty, a jury trial commenced against Funk on January 14, 2003. (R. 188, Minute Entry; Apx. 29). On January 17, 2003, the jury found Funk guilty. (R. 196, Minute Entry; Apx. 30).

The presentence report (PSR) found Funk responsible for at least 600 pounds of marijuana and 15 ounces of cocaine. (PSR ¶ 11; Apx. 150-152). Under Sentencing Guidelines § 2D1.1(c)(7), this quantity of drugs converted for guidelines purposes to a minimum of 289.62 kilograms of marijuana and a base offense level of 26. (PSR ¶¶ 11, 17; Apx. 152, 153). Had that base offense level applied, Funk's Criminal History category (VI) would have produced a guidelines range of 120-150 months' imprisonment. See Guidelines Ch. 5, Pt. A (Sentencing Table). However, Funk qualified as a career offender under Sentencing Guidelines § 4B1.1, which provides for a higher guideline range for a defendant who commits either a crime of violence or a controlled substance offense, and has at least two prior felony convictions for either a crime of violence or a controlled substance offense. Funk had two prior convictions for crimes of violence, a 1984 aggravated burglary conviction and a 1996 aggravated assault conviction (based on Funk's attempt to attack two law enforcement officers and a police dog with a metal pole), and one prior controlled substance offense, a 1990 marijuana trafficking conviction. (PSR ¶¶ 28-30, 35-36, 43-45; Apx. 154-157). Under

In its statement of reasons attached to the judgment, the court found that "the career enhancement was excessive and unreasonable," and reiterated that Funk's "extremely serious offense" did not involve firearms or drugs other than marijuana, and that the 150-month sentence would satisfy the purposes of sentencing. (R. 309, Judgment; Apx. 170).

The United States appealed, and this Court vacated Funk's sentence. United States v. Funk, 477 F.3d 421 (6th Cir. 2007). Funk sought a writ of certiorari, which the Supreme Court granted, vacating this Court's judgment and remanding for reconsideration in light of Gall v. United States, 128 S. Ct. 586 (2007). See Funk v. United States, 128 S. Ct. 861 (2008).

After receiving supplemental briefs, this Court again held that Funk's sentence was unreasonable. 534 F.3d 522, 530 (6th Cir. 2008). Citing the Supreme Court's statement in Kimbrough v. United States, 128 S. Ct. 558, 575 (2007), that "closer review" may be appropriate when a district court varies based solely on its disagreement with the Guidelines' application in a typical case, the majority found that "[b]ased on the district court's reasoning, ... this appears to be the type of 'mine-run case'" which would be subject to "closer review." 534 F.3d at 527-528. Under that "more skeptical" standard, the majority held, the justification stated by the district court did not support the substantial variance

from the advisory Guidelines range. Id. at 529-530.[2]

STATEMENT OF THE FACTS

The pertinent facts are summarized in greater detail in this Court's prior unpublished order in United States v. Funk, 124 Fed. Appx. 987 (6th Cir. 2005), and vacated panel opinion in United States v. Funk, 477 F.3d 421, 423 (6th Cir. 2007), but are briefly stated below.

In 1994, Funk delivered 35 pounds of marijuana to Chester Blanton on behalf of Anthony Smith, who was smuggling drugs to Ohio from Florida and Texas. (Blanton TR 70, 72; Apx. 72, 75). From that point until 1998, Funk and Blanton received monthly loads of 40 to 80 pounds of marijuana from a supplier in Florida. (Blanton TR 75-79, Cosgrove TR 246-247; Apx. 78-82, 107-108). Funk also conducted a "half dozen" 20 to 30 pound marijuana transactions with his lifelong friend Kevin Thacker between 1998 and 2000. (Thacker TR 169-170; Apx. 100-101).

Other witnesses testified that Funk distributed cocaine and marijuana in Marion County throughout the conspiracy period. (Valdez TR 211-213; Apx.

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[2]Chief Judge Boggs dissented. 534 F.3d at 530-531. In his view, the district court's explanation of the below-Guidelines sentence, although "somewhat cursory," was properly read as based on "the facts of this case," rather than on a general disagreement with the career offender guideline. Id. at 531.

538 n. 3 (6th Cir. 2008) (holding that if district court "simply disagreed with the guidelines," Court would affirm variance imposed under "closer" review). In Kimbrough v. United States, 128 S. Ct. 558, 574-575 (2007), the Supreme Court identified "discrete institutional strengths" of the Sentencing Commission and sentencing courts and observed that in light of the sentencing judge's "'greater familiarity with ... the individual case and the individual defendant before him..., a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'" (quoting Rita v. United States, 127 S. Ct. 2456, 2465, 2469 (2007)). "On the other hand," the Court stated, "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." 128 S. Ct. at 575, quoting Rita, 127 S. Ct. at 2465.

The Court in Kimbrough found "no occasion" to further explicate this "closer review" standard because the crack cocaine guideline at issue in that case had been extrapolated from statutory mandatory minimum sentences rather than formulated through the Commission's normal practices, and the Commission itself had concluded that the guideline produced sentences greater than necessary to

achieve the purposes of sentencing. 128 S. Ct. at 575. While Justice Scalia expressed reservations about the content and application of this "closer review" standard, no other members of the Court joined his opinion. Id. at 576-577 (Scalia, J., concurring). Even if this Court views the Supreme Court's discussion of the "closer review" standard to be dicta, that "dicta is of persuasive precedential value." Wright v. Morris, 111 F.3d 414, 419 (6th Cir. 1997) (internal quotation omitted), and should be adopted.

A "closer review" standard is also consistent with Gall v. United States, 128 S. Ct. 586 (2007). Gall holds that appellate courts must review all sentences – whether inside or outside the Guidelines – "under a deferential abuse-of-discretion standard." Id. at 591. Nonetheless, appellate courts may presume that sentences imposed within the advisory Guidelines range in "mine-run" cases are reasonable. Rita, 127 S. Ct. at 2467.

By contrast, when a court reviews a sentence outside the advisory Guidelines range, it may not presume that the sentence is unreasonable, but may "take the degree of variance into account and consider the extent of a deviation from the Guidelines" in conducting its abuse of discretion review. Gall, 128 S. Ct. at 595. As a result, a district court judge "must explain his conclusion" that a sentence outside the range recommended by a sentencing guideline that is "the

product of careful study based on extensive empirical evidence" is justified. Id. at 594. Ordinarily, that explanation will be based on facts specific to a particular case. Kimbrough, 128 S. Ct. at 575; see, e.g., Gall, 128 S. Ct. at 599-602 (upholding below-range sentence based primarily on individual defendant's extraordinary self-motivated rehabilitation); United States v. Vonner, 516 F.3d 382, 392 (6th Cir.) (en banc) ("Booker breathes life into the authority of district court judges to engage in individualized sentencing"), cert. denied, 129 S. Ct. 68 (2008). When a district court rejects a Guideline sentence based not on the facts of a particular case but on disagreement with a Guideline itself, it is not making "an individualized assessment based on the facts presented," a fact critical to the Court's decision in Gall. 128 S. Ct. at 597. As such, the lower court's rationale is appropriately subjected to "closer" scrutiny than are reasons based on case-specific facts. See United States v. Cavera, ___ F.3d ___, 2008 WL 5102341, *9 (2d Cir. Dec. 4, 2008) (en banc) ("varying from the Guidelines in a 'mine-run' case may invite closer appellate review").

Funk has argued (En Banc Pet. 12-15) that "closer" review is not appropriate because the career offender guideline, like the cocaine guidelines at issue in Kimbrough, originated from a congressional directive, in this case 28 U.S.C. § 994(h), which requires that the Commission assure that the guidelines for

recidivist defendants convicted of crimes of violence and controlled substance offenses are near the maximum authorized terms. But Kimbrough did not hold that the Commission's policy judgments are suspect whenever they are consistent with a direction from Congress; rather, the Supreme Court concluded that there was no congressional direction for the Commission to follow in formulating the Guidelines for crack cocaine offenses. The Court rejected the government's argument that the Guidelines reflected a congressional policy determination that sentences for crack and powder offenses must comport with the 100:1 quantity ratio in 21 U.S.C. § 841(b), 128 S. Ct. at 571-573, holding that the statute "mandates only maximum and minimum sentences" and "says nothing about the appropriate sentences within these brackets." Id. at 571. In fact, the Court explicitly contrasted the drug statute with 28 U.S.C. § 994(h), which "specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." 128 S. Ct. at 571.

II. Under the Appropriate Standard of Review, the District Court Did Not Adequately Explain and Justify the Sentence Imposed

In this case, the district court did not adequately explain its conclusion that the career offender enhancement is "excessive and unreasonable." The government agrees with Funk that sentencing courts are not precluded from entering a below-range sentence based on policy disagreements with the career

offender guideline. See United States v. Liddell, 543 F.3d 877, 885 (7th Cir. 2008); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008); United States v. Sanchez, 517 F.3d 651, 663-665 (2d Cir. 2008). While Congress directed the Sentencing Commission to set guideline ranges at or near the statutory maximum, it has never directed that sentencing courts must impose sentences at or near the maximum for serious recidivist offenders. Thus, as with other guidelines, district courts may vary from the range recommended by the career offender guideline based on policy disagreements with the guideline, so long as they adequately explain why "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations." Rita, 127 S. Ct. at 2465; see also Kimbrough, 128 S. Ct. at 570; United States v. White, ___ F.3d ___, 2008 WL 5396246, *5 (6th Cir. Dec. 24, 2008) (en banc) ("a district judge may disagree with the application of the Guidelines to a particular defendant because the Guideline range is too high or too low to accomplish the purposes set forth in § 3553(a)").

Because of this fact, the government disagrees with the prior panel's conclusion that 28 U.S.C. § 994(h) represents a "clear direction by Congress ... that offenders such as Funk be sentenced as [career offenders]," and that disagreement with the policy of the career offender guideline is an "improper" basis for a variance. 534 F.3d at 530. Nonetheless, when a district court chooses

to reject the advice given through a guideline, it must justify that decision. See Vonner, 516 F.3d at 387 ("'[w]here the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so"), quoting Rita, 127 S. Ct. at 2468. In Kimbrough itself, the Supreme Court upheld the district court's decision to reject the crack cocaine guideline only because the lower court "properly homed in on the particular circumstances of [the defendant's] case and accorded weight to the Sentencing Commission's consistent and emphatic position" criticizing its own guideline. 128 S. Ct. at 576.

Unlike the district judge in Kimbrough, the court here did not adequately explain its conclusion that the career offender enhancement was "excessive and unreasonable." The Sentencing Commission has raised questions about specific applications of the career offender enhancement, but it has not deemed the enhancement generally unwarranted. See U.S. Sent. Comm'n, Fifteen Years of Guideline Sentencing [Fifteen Year Report] 133-134 (2004) (questioning application of career offender enhancement to "offenders qualifying only because of prior drug offenses"); see generally U.S. Sent. Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 10-16 (2004) (discussing relative recidivism rates for categories of offenses and offenders). The Commission's stated concern that the career offender

enhancement may overstate the risk of recidivism for defendants who qualify as career offenders based solely on prior drug offenses has no application to Funk, who has two prior violent felony convictions. PSR ¶¶ 28-30, 43-45; Apx. 154, 156-157. See Fifteen Year Report at 134 (52% of career offenders with prior violent felonies recidivate within two years; incapacitation of "repeat violent offenders" may "protect the public from additional crimes by the offender"). While the Commission has shown concern that the guideline may sweep in low-level, non-violent drug sellers, see United States v. Pruitt, 502 F.3d 1154, 1168 (10th Cir. 2007) (McConnell, J., concurring), vacated, 128 S. Ct. 1869, and reinstated, 2008 WL 4218798 (2008), Funk was selling massive amounts of drugs and has a violent past, including burglary and an attack on law enforcement officers.

The district court failed to provide any reasoned basis for disagreeing with the policy reflected in the guidelines and recent Commission reports to impose lengthy sentences on violent repeat offenders who continue to commit crimes. In an advisory guidelines system with reasonableness review, a court's explanation for its sentence is vital to permit meaningful appellate review. See Gall, 128 S. Ct. at 597 (district court must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing");

United States v. Jones, 531 F.3d 163, 172 (2d Cir. 2008) (when sentence varies significantly from guideline range, district court must "identif[y] a significant justification"). Such an explanation "is especially important when the district court has significantly departed from the Guidelines range." United States v. Henry, 545 F.3d 367, 385 (6th Cir. 2008); see also United States v. Davis, 537 F.3d 611, 615-616 (6th Cir.) (finding inappropriate district court's reliance on lapse of time between crimes and sentencing in imposing one day sentence), cert. denied, ___ S. Ct. ___, 2008 WL 4898439 (2008).

The career offender guideline reflects Congress's considered judgment about the need for severe punishment of career offenders, and Congress's judgment must be assumed to be compatible with the application of the Section 3553(a) factors in a "mine-run" case. Accordingly, a sentencing court that reaches a judgment contrary to the general view reflected in a guideline must, under abuse of discretion review, provide a reasonable explanation. See, e.g., United States v. Martin, 520 F.3d 87, 93 (1st Cir. 2008) (career offender enhancement rejection upheld where decision rested on defendant's family support, "personal qualities," and a desire to avoid disparity with coconspirators' sentences); United States v. Smart, 518 F.3d 800, 809-810 (10th Cir. 2008) (affirming below-range sentence based on defendant's "relatively minor role in the offense" and need to avoid

sentencing disparity with co-defendant).

The court here did not provide such an explanation. The district court's written statement of reasons offers no indication that it based its departure on an individualized assessment. Instead, it simply states that it "found that the career enhancement was excessive and unreasonable" based largely on a boilerplate recitation of generic Section 3553(a) factors such as "just punishment" and "adequate public deterrence and safety," and an erroneous factual finding that the defendant and his cohorts did not distribute cocaine. (Judgment; Apx. 170). Such a justification cannot be upheld on the "closer" review Kimbrough mandates.

Funk has suggested that additional comments the district court made at sentencing (Apx. 126-128) are enough for this Court to uphold his sentence as reasonable, but the government respectfully disagrees. The court's comments once again are little more than boilerplate recitations of some of the § 3553(a) factors. When rejecting a considered guideline, a district court must do more than regurgitate 18 U.S.C. § 3553(a), as the court here did, to survive reasonableness review. Compare Henry, 545 F.3d at 386-387 (vacating sentence where court recited § 3553(a) factors but "failed to explain how [they] specifically applied to Henry's non-Guidelines sentence or articulate why the sentence constituted an adequate punishment"). Indeed, this Court has found equally brief discussions of

§ 3553(a) factors insufficient where a district court has imposed a within-range sentence applying the career offender enhancement. See United States v. Stephens, 549 F.3d 459, 466-467 (6th Cir. 2008). Where a court is rejecting the wisdom of the range established by the Sentencing Commission, it surely must do at least as much. It is possible that the district court could justify a 150 month sentence, but it has not done so on this record, and the case should therefore be remanded for reconsideration of the sentence.

CONCLUSION

The judgment of the district court should be reversed, and the case should be remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that I caused two true and correct copies of the foregoing Supplemental Brief for the United States to be served by first class mail, postage prepaid, on:

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I FURTHER CERTIFY that I caused twenty-five (25) true and correct copies of the foregoing Supplemental Brief for the United States to be sent, via Federal Express, for overnight delivery, to the Clerk of the Court.

Dated: January 15, 2009

David Hollar

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