

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :                   CRIMINAL ACTION  
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BRYANT SHEARD                                :                   NO. 01-338-1

**M E M O R A N D U M**

Ludwig, J.

May 30, 2002

On July 3, 2001, defendant Bryant Sheard pleaded guilty to a four-count information charging possession with intent to deliver PCP and crack cocaine, 21 U.S.C. § 841(a)(1), possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c), and possession of counterfeit currency, 18 U.S.C. § 472. On April 18, 2002, defendant, represented by counsel, was sentenced to 126 months of custody, eight years of supervised release, and a \$2,000 fine. His *pro se* appeal followed.

At sentencing, the guidelines calculation was fixed as follows: base offense level 32, given a 1,386 kg. marijuana equivalence.<sup>1</sup> After a §4B1.1 career offender enhancement of 5 levels, combined with a 3-level downward adjustment for acceptance of responsibility and timely providing information,<sup>2</sup> the total offense level was 34. With a criminal history category of VI, as required by the § 4B1.1 career offender guideline, the guidelines range was 262 to 327 months for counts one, two, and four. In addition, the gun possession count mandated a 60-month consecutive sentence, 18 U.S.C. § 924(c)(1)(A). At

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<sup>1</sup>U.S.S.G. § 2D1.1(c)(4).

<sup>2</sup>§§ 3E1.1(a) - 3E1.1(b).

sentencing, the parties disputed only the applicability of § 4A1.3, with the government opposing a downward departure under that provision.

#### I. Downward departure under § 4A1.3

“If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range.” § 4A1.3. Downward departures have been upheld under § 4A1.3 based on various combinations of the precise character of a defendant’s criminal history and the dramatic impact of the career offender provision on his or her sentence.<sup>3</sup> Defendant’s criminal history comprises robbery, theft, and smalltime

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<sup>3</sup>The sentencing court must make an “individualized” inquiry into factors such as “the amount of drugs involved in . . . prior offenses, his role in those offenses, the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for by placement in CHC VI.” United States v. Mishoe, 241 F.3d 214, 219 (2d Cir. 2001). See, e.g., United States v. Reyes, 8 F.3d 1379, 1381-89 (9<sup>th</sup> Cir. 1993) (departure upheld where criminal history comprised of six minor offenses would have produced sevenfold increase in guidelines penalty); United States v. Bowser, 941 F.2d 1019, 1024 (10<sup>th</sup> Cir. 1991) (departure upheld where criminal history would have tripled sentence and was comprised of an aggravated robbery/kidnapping charge and an aggravated robbery charge committed within two months of each other when defendant was only twenty); United States v. Lawrence, 916 F.2d 553, 554-55 (9<sup>th</sup> Cir. 1990) (departure upheld where criminal history of two possession with intent to deliver convictions would have quadrupled guidelines penalty range and psychiatrist testified that defendant was not violent or antisocial and had low likelihood of recidivism). Cf. United States v. Richardson, No. CR.A. 00-251, 2001 WL 210291, at \*10-12 (E.D.Pa. Feb. 28, 2001) (declining to depart downward because two strong-arm robbery convictions were “troubling” and defendant “is one who doesn’t seem to learn his lesson”).

drug dealing,<sup>4</sup> with little violent behavior<sup>5</sup> and sentences not exceeding eleven and a half to twenty-three months. While some incremental increase in punishment is appropriate given defendant's status as a career offender, a doubling of defendant's guidelines range overstates both the seriousness of his past criminal conduct and the apparent likelihood<sup>6</sup> that he will commit other crimes. As allowed by United States v. Shoupe, 35 F.3d 835, 839 (3d Cir. 1994),<sup>7</sup> the downward departure was effectuated by reducing the career offender offense level enhancement – from 5 levels to 2 levels, resulting in a range of 188-235 months for counts one, two, and four.

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<sup>4</sup>Defendant's adult criminal history (all state sentences): (1) 1988, one year of probation for retail theft, receiving stolen property, and criminal conspiracy; (2) 1989, time served to twenty-three months for robbery; (3) 1991, three years of probation for theft by unlawful taking; (4) 1992, nine months to twenty-three months for possession with intent to deliver cocaine; and (5) 1999, eleven and a half to twenty-three months for possession with intent to deliver 15 grams of cocaine.

<sup>5</sup>The 1989 robbery involved plaintiff pulling two gold earrings from complainant's right ear.

<sup>6</sup>A downward departure under § 4A1.3 can be justified in part by a "large disparity" between prior sentences and that called for under the career offender guideline. United States v. Mishoe, 241 F.3d 214, 220 (2d Cir. 2001) (such a disparity "might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance . . ."). It is also noted that, at sentencing, defendant presented five character letters from family and a friend, as well as character testimony from his sister, suggesting that he will have significant support after his release.

<sup>7</sup>Where "a defendant's offense level has been augmented by the career offender provision, a sentencing court may depart downward in both the criminal history and offense level categories under § 4A1.3." United States v. Shoupe, 35 F.3d 835, 839 (3d Cir. 1994). The departure here was carried out as a reduction in offense level, rather than criminal history category, because, before applying the career offender provision, the drug quantity of 1,386 kg. marijuana equivalence was towards the bottom of the base offense level 32 range of 1,000 to 3,000 kg., § 2D1.1(c)(4), while defendant's 12 criminal history points put him at the top of the range for criminal history category V. See explanation, Sent hg. tr., 4/18/02 at 16-17.

## II. Downward departure under § 5K1.1

The government moved for a downward departure under § 5K1.1 and recommended a “significant departure” of “approximately half of the guideline sentence . . . calculated by the probation office” (322-387 months) or “seven or eight [offense] level[s].” Sent. hg. tr. 4/18/02 at 7-9. The government’s estimate of the value of defendant’s cooperation was credited. *Id.* at 17-18; see § 5K1.1(a). Accordingly, starting with the post-§ 4A1.3 reduced range of 188-235 months plus 60 months consecutive for count three, defendant was sentenced to 96 months on counts one, two, and four, together with 30 months, consecutively, on count three, or 126 months in all.

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Edmund V. Ludwig, J.