

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

<p>UNITED STATES OF AMERICA</p> <p style="text-align:center">v.</p> <p>HAKIM KING</p>	<p>CRIMINAL ACTION</p> <p>NO. 12-345-2</p>
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Baylson, J.

December 19, 2014

MEMORANDUM OF REASONS FOR SENTENCING PROCEDURES

Following a conviction by a jury of defendant/appellant Hakim King on two counts of interference with interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a), and two counts of using a firearm in connection with a crime of violence under 18 U.S.C. § 924(c)(1), defendant has appealed the judgment of sentence. New counsel has been appointed for him. An appeal is pending.

The government has “confessed error” as to what the government views as two separate defects in the procedures concerning sentencing. First, the government agrees with defendant that the Court erred in proceeding to sentence without a full Presentence Report, which would have included information about the defendant’s personal background, family, and upbringing, etc. Second, the government agrees with defendant that the sentencing hearing was not “meaningful” because the Court did not sufficiently explore defendant’s claims of mental illness and did not thoroughly explain the sentence in terms of the sentencing factors under 18 U.S.C. § 3553(a).

The Court is filing this Memorandum to provide the Court of Appeals with a full picture of the reasons for the Court's actions, which the defendant and government assert were improper.¹

Initially, a brief review of the facts will put the sentence and the procedure the Court used in a better perspective. On two separate occasions, on February 9, 2012, and then on February 12, 2012, defendant Hakim King participated in committing violent armed robberies of convenience stores, one in Radnor Township and the other in Lower Merion Township, in Montgomery County, PA. In the first robbery on February 9, 2012, a firearm was discharged, and a WAWA employee suffered a left eye wound. In a second robbery on February 12, 2012, the firearm was brandished, but not discharged.

As to both cases, civilian employees of the convenience stores testified at trial that they were assaulted and put in fear of their lives.

Defendant, after being arrested, admitted his commission of these crimes and signed an incriminating statement, which was read at trial. As the sentencing proceeding shows, the law provided for a mandatory minimum consecutive sentence on the two firearm violations totaling 420 months. The robbery counts required a consecutive sentence, for which the Court calculated a guideline offense level of 24, and a Criminal History level of III, resulting in a guideline range of 63 – 78 months.

The Court did postpone the sentencing for approximately 30 days so that the Probation Office could review defendant's criminal history. The Presentence Report

¹ Defendant raises an additional argument that the sentence imposed was "unreasonable," but the government disagrees with this argument. The Court notes that it had no knowledge of defendant's arguments on appeal until the government provided the Court with a courtesy copy of its brief. The undersigned has previously recommended to Professor Catherine Struve, reporter for the Appellate Rules Advisory Committee, that the federal rules should adopt a version similar to Rule 1925 of the Pennsylvania Rules of Appellate Procedure, which would require counsel to serve on the trial judge a short statement of the arguments being made on appeal, so that, as in this case, the trial court would have the opportunity to spell out the reasons for specific actions in a supplemental memorandum or opinion, as the Court does now.

showed a number of convictions, but at the sentencing hearing defendant contested the propriety of two of these convictions, which the Court then said it would disregard and thus reduced his Criminal History Category from V to III.

I. Presentence Report Issue

The Court gave the reasons for dispensing with a full Presentence Report as follows:

I just want to tell you for the record that I directed that this report be prepared on an expedited basis. And in view of the consecutive mandatory sentences involved in this case and the nature of the crime I didn't see any reason for you to be interviewed or for any family background or anything of that nature.

You're facing a mandatory sentence for the gun charges of 420 months, is that right, Mr. Arteaga?

MR. ARTEAGA: It's a total of 35 years mandatory minimum.

THE COURT: Yes. That's mandatory that I have to impose. And I didn't see any reason for the Probation Department to interview you or your family or get any background information, plus whatever Guideline sentence – whatever sentence I'm going to impose on the robbery counts. Yes, sir?

THE DEFENDANT: So just because I got a mandatory minimum denies me my right of a – of a PSR?

THE COURT: Well, you don't have a right to a PSR at all. The rules of court and the statute allow the Judge to waive a PSR if the Judge doesn't think it's going to be helpful in this case and I don't think it's going to be helpful in this case.

The PSR which I have has a summary of the offenses, has a summary of your criminal history and I don't see how any personal matters involving you or your family background is going to be helpful, that's the reason.

Tr. of Sentencing Hr'g 5-6 (ECF 129).

The government apparently takes the position that a Presentence Report should be required in any case in which the trial judge is not bound by a mandatory minimum, or if the crime is “heinous.” Initially, the Court notes that the text of Federal Rule of Criminal Procedure 32(c)(1)(A)(ii), which allows a court to dispense with a Presentence Report, does not contain any such restrictions. Further, the Third Circuit has not issued any decisions or guidelines for district judges which restrict district judges as to those circumstances in which a Presentence Report need not be prepared.

In this case, defendant’s crimes were indeed “heinous.”² In a civil society, the law abiding public, who frequent convenience stores, should not be subject to future dangers from this defendant, who invaded two convenience stores and put the lives of the employees and their customers at great danger. No matter how unfortunate defendant’s upbringing may have been, or no matter how much his family or other factors may have contributed to his criminality, defendant committed two very serious violent crimes within a short timeframe. An Act of Congress required lengthy mandatory prison sentences for the firearm offenses alone. The Court did not believe that a Presentence Report, delving into defendant’s personal life and his family life, would alter these facts. The Court concluded that defendant was “dangerous” and considerations of public safety, as well as the congressionally imposed mandatory minimums, demonstrated that a long period of incarceration was necessary.

If the Court of Appeals determines to remand this matter, and requires that a full Presentence Report be prepared, of course that will be done as expeditiously as possible. A new hearing will be scheduled and all credible facts will be considered, including

² The Presentence Report, paragraph 21, details the victim impact aspect of defendant’s crime, from the viewpoint of one of the robbery victims, and supports this conclusion that the crime was “heinous.”

whatever the Presentence Report and the defendant present. However, the Court notes, in that event, the Probation Officer who prepared the Presentence Report and who defended the Criminal History calculation will then have the opportunity to bring to the sentencing hearing documentary support for her belief that this defendant had the additional convictions set forth in paragraphs 52, 53, 54, and 55 of the Presentence Report. After giving defendant a chance to dispute those convictions, if the Court determines that defendant in fact had those additional convictions, he will be subject to sentencing under Criminal History Category V, and his guideline range will become 92 - 115 months.

The Court has located several appellate decisions not cited by defendant or the government, which have held district judges acted within their discretion in dispensing with Presentence Reports for adequate reasons.

A. United States v. Cantu, 786 F.2d 712 (5th Cir. 1986) (per curiam)

In a short per curiam opinion denying rehearing in a case regarding false income tax filings, the Fifth Circuit rejected petitioners' arguments about the need for a presentence report in their case. The court wrote:

The petitioners also contend that the sentencing hearing was reduced to a "meaningless formality" because the district court did not order the preparation of a presentencing report under Federal Rule of Criminal Procedure 32(c)(1). We reject this argument because under Fed.R.Crim.P. 32(c)(1), a district court may dispense with a presentence report if it finds that such a report is unnecessary. In the instant case, the district court so held when it found that it had all the necessary information "at hand." In addition, the district court granted the petitioners the opportunity to address the court regarding sentencing. We find no error in the sentencing hearing.

Id. at 713 n.1. The Fifth Circuit did not discuss the specific evidence that the district court had "at hand" during the sentencing and the opinion does not reveal

the degree to which the district court discussed the various sentencing factors from 18 U.S.C. § 3553(a).

B. United States v. Latner, 702 F.2d 947 (11th Cir. 1983)

In an armed robbery case, the defendant challenged “the imposing of a sentence without a presentence report as an abuse of discretion on the part of the trial judge.” Id. at 949. After the jury returned a guilty verdict

the appellant was asked if he would waive a presentence report to which the reply was no and a request for a presentence investigation. The court then noted that Fed.R.Crim.P. 32(c)(1) provides an alternative to a presentence report and proceeded to question the defendant about his family and personal history. The trial judge asked Latner numerous questions about his educational, military, financial and family background. He also allowed Latner and his attorney time to review a two and one-half page rap sheet. Latner was also given two opportunities to make an additional statement. The court then explained that it had gone down the form used by the probation office and thus had sufficient evidence before it to make a meaningful decision. With this finding, Latner was sentenced to twenty-five years in prison, fined ten thousand dollars and was ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

Id. The Eleventh Circuit concluded that

After observing the defendant throughout the trial, reviewing the records before him and questioning the defendant extensively, the trial judge had sufficient information to make a fair determination. If there had been any information that Latner thought the court should have considered prior to sentencing but which it did not have, he could have brought it to the court’s attention under Fed.R.Crim.P. 35. Latner did not do this, nor has he shown this court that he was prejudiced by the manner in which the trial judge gathered the presentence information. We are unable to find there was any abuse of discretion on the part of the trial judge in choosing an alternative procedure.

Id. at 949-50.

C. United States v. Chiantese, 582 F.2d 974 (5th Cir. 1978)

In an extortion case, the Fifth Circuit concluded that there was no abuse of discretion when the district court failed to order a presentence report, although the

sentencing occurred prior to the 1975 changes to the Federal Rules of Criminal Procedure. The court wrote:

The final ground asserted by the defendants is that the trial judge abused his discretion in declining to order a presentence report. The court did afford the defendants and their counsel the opportunity to say anything on the defendant's behalf "that would be of assistance to the Court . . . in determining (the) sentence the Court is going to impose." Record, vol. 4, at 610. Although the defendants themselves did not accept the invitation, counsel for both of them did point out that both defendants were first-time offenders, that no actual harm had come to Parnass or his family, and that no money had actually changed hands. Chiantese's attorney noted also that his client had not initiated the extortion attempt. Under these circumstances, the failure to order a report prior to sentencing was not an abuse of discretion.¹⁷

Footnote 17: Fed.R.Crim.P. 32(c)(1), as it read at the time of sentencing below, did not require the court to state its reasons for not having an investigation. An amendment to the rule, effective December 1, 1975 (three months after Chiantese and Cerrella were sentenced), imposed such a requirement. Nevertheless, the court did state that, given the evidence before him, he did not see the need for a presentence report. "A lifelong career as a choir boy and do-gooder in church and civic organizations would not really take the sting at all out of the evidence that has been presented in the courtroom." Record, vol. 4, at 615.

Id. at 981.

II. Adequacy of Sentencing Hearing

The second argument which defendant made, and with which the government agrees, is that the sentencing hearing was not "meaningful" as required by prior decisions of the Third Circuit. Neither defendant nor the government quarrels with the portion of the sentence reflecting the mandatory minimum, but they assert that the Court did not fully consider the sentencing factors in § 3553(a).

The crimes for which defendant was convicted are among the most serious. Many judges consider safeguarding the public as the highest priority in sentencing for violent crimes.

In this case, defendant faced a statutory mandatory minimum of 420 months, plus a guideline sentence range of 63 – 78 months, which, under law, had to be consecutive to the mandatory minimums on the firearm statutes. There is no dispute that the appropriate guideline range was 63 – 78 months, once the Criminal History category was reduced.

This defendant was already 27 years old, but this was not his first violent crime. He was on probation after having been sentenced to 11-1/2 to 23 months in state court for a violent assault on a female friend. (¶ 57, Presentence Report)

As the government notes, at the sentencing hearing, defendant stated that he had been in mental hospitals:

I have a very extensive record of mental instability and have been diagnosed by many doctors with severe mental issues. I've also been admitted into mental -- mental institutions on numerous occasions over the years and at one point I spent two years in a mental asylum.

Tr. of Sentencing Hr'g 16-17 (ECF 129).

Under all the circumstances, assuming that defendant was being truthful about his mental history, the Court did not see any need to secure additional information because defendant was a dangerous individual and his incapacitation was necessary to protect the public. The Court did not necessarily dispute defendant's statements but did not think they warranted a departure or variance.³

Although the Court could have extended the sentencing hearing with additional verbiage, the Court did not think that it abused the discretion which the Third Circuit has held a trial judge has in sentencing a defendant, particularly for a violent crime, where a

³ Policy statement 5H1.3 discusses mental health issues, but under § 5K2(a)(4), these are not relevant unless present to “an exceptional degree.” Defendant's counsel did not request a downward departure for his mental history. The record does not show why not. On this direct appeal, defendant's new counsel is bound by the record of the trial court, consistent with Third Circuit precedent. Any claim of incompetent counsel must be made by a § 2255 petition. If as and when such a petition is filed, the Court will give defendant a fair hearing.

mandatory minimum itself requires a lengthy sentence, and any additional sentence must be consecutive to the mandatory minimum. The government specifically requested a guideline sentence. The Court did not see any reason to do otherwise.

Public safety was the paramount driving force of a within-guideline prison sentence in addition to the mandatory minimum. The Court of Appeals has frequently noted that there are three parts to a sentencing proceeding. First, the calculation of the appropriate guideline range; second, a ruling on any motions, *i.e.*, for a downward departure or for a variance, that may have been presented; and third, consideration of the § 3553(a) factors.

In this case, the guideline range of 63 – 78 months was beneficial to defendant because the Court disregarded the disputed convictions. There were no specific motions for a downward departure or variance although defense counsel impliedly requested a variance when he contended that the mandatory minimum alone would be sufficient punishment. Tr. of Sentencing Hr'g 15 (ECF 129).

Turning to the § 3553(a) factors, the Court covered each of the factors substantively, albeit without lengthy explanation. The Court mentioned:

- (a) the seriousness of the crime;
- (b) the need for punishment;
- (c) public safety;
- (d) deterrence; and
- (e) that defendant needed a lengthy period in a correctional institution to correct his antisocial behavior represented by these convictions. Tr. of Sentencing Hr'g 20-22 (ECF 129).

The arguments of defendant and the government put form over substance and incorrectly assert that prior decisions of the Third Circuit require, in every case, lengthy explanations by the trial judge.

This was at least the second time that defendant had violated the terms of probation or parole, according to his Presentence Report at paragraph 50, plus his having been on probation at the time of these offenses. The Court did not count similar comments in paragraphs 52 and 54 because of defendant's denials. All in all, the evidence showed defendant was a violent individual who was unable to behave in a lawful manner.

The docket will show that there was a pretrial hearing on April 3, 2014 (ECF 126), in which there was a discussion in open Court, prompted by defendant's motion to dismiss his attorney (ECF 92), and then a sealed portion where the Court had a colloquy with defendant and his attorney only, and excused the prosecutor, Mr. Arteaga, from the Courtroom.

Now that an appeal has been taken, I do not think it would be proper for me to unseal the record that took place with just the defendant and his former attorney, and this Court may lack jurisdiction to do so. The Court of Appeals may consider unsealing this transcript and providing access to counsel.

If the case is remanded, the Probation Officer will be instructed to interview defendant, with his counsel present, to get the exact details about his mental history and his stay in a mental asylum, which will be subject to verification.

The Court notes, in passing, after many decades as both a prosecutor and criminal defense attorney, and particularly in the last 12 years as a trial judge, that there has been

an increasing reference by defendants to alleged abuse which they suffered as children and also to mental problems, almost the “plat du jour of the allocution menu.” These claims are difficult to substantiate or contradict. Of course, if an individual has actually suffered abuse, and actually has a mental illness, that would be relevant in most cases, but not necessarily in all cases, and not in this case.

In this case, it was not necessary or appropriate to give sympathy or leniency to this defendant because of any mental illness he may have had when he had a serious criminal record and also had the wherewithal to plan, conspire, and invade two convenience stores, with an armed co-conspirator, for purposes of robbery. If it had only been one occasion, then the mandatory minimum would have been much less, and defendant might have a legitimate claim for some leniency for having acted precipitously, and only once. However, with two separate robberies, it is legitimately inferable that defendant, having succeeded with the first robbery, decided to commit a second robbery, and, had he not been caught after the second robbery, as a result of good police work and the cooperation of his co-defendant, it is reasonably inferable that he may have tried a third robbery. The Judges of this Court have had an increasing number of cases with these business-robberies that are punishable in federal court when the government can prove interference with interstate commerce. These cases are adopted by federal prosecutors because of the sentencing guidelines and also because of the mandatory minimums which apply when a firearm is used. It is not infrequent that defendants in these cases have committed multiple robberies and receive very substantial sentences. This crime scourge requires stiff sentences not only to protect the public, but also to act as a deterrent to others.

This Court believes it acted within its discretion and treated this defendant as an individual. His crime and his criminal record warranted a sentence that reflects a lengthy mandatory minimum and a guideline sentence. Nonetheless, if a remand is required, the Court will ensure that the Probation Office conducts the necessary investigation, give defense counsel an opportunity to present or confront whatever facts are found, as presented at a renewed sentencing hearing, and consider all the credible facts presented in a new sentencing hearing.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.