

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
: :
v. : :
: :
EMMANUEL CROPPER : NO. 04-412

MEMORANDUM

Dalzell, J.

November 2, 2004

In this prosecution, the Government alleges that defendant Emanuel Cropper, allegedly a convicted felon in the Pennsylvania state courts, illegally possessed a .45 caliber semi-automatic pistol as well as twenty-six Remington cartridges in double violation of 18 U.S.C. § 922(g)(1). To these garden variety Operation Ceasefire charges, there is appended a "Notice of Additional Factors" that sets forth four sentencing enhancements under the United States Sentencing Guidelines.¹

1. To be specific, the Notice provides:

THE GRAND JURY FURTHER CHARGES THAT:

1. In committing the offense charged in Count One of this indictment, defendant EMMANUEL CROPPER:

a. Possessed the firearm with an altered or obliterated serial number, as described in U.S.S.G. Section 2K2.1(b)(4).

2. In committing the offenses charged in Counts One and Two of this indictment, defendant EMMANUEL CROPPER:

a. Committed the offenses charged while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status as described in U.S.S.G. Section 4A1.1(d).

b. Committed the offenses charged less than two years after release from imprisonment on a sentence or while in imprisonment or escape status on a sentence as described in U.S.S.G. Section 4A1.1(e).

c. Used or possessed the firearm or ammunition in connection with another felony offense, as described in U.S.S.G. Section 2K2.1(b)(5).

(continued...)

The Notice is the product, of course, of the Supreme Court's June 24, 2004 decision in Blakely v. Washington, 124 S.Ct. 2531 (2004). Although the Government takes the position that Blakely does not apply to the United States Sentencing Guidelines, it nevertheless has added notices of additional factors, similar to the one at issue here, in many Indictments that have been returned or superseded since June 24, 2004.

In response to our Order that the parties submit their views as to the propriety of submitting these four factors to the jury, either in the Government's case-in-chief or in a bifurcated trial, the defendant has expressed vigorous opposition to submitting any of the factors to the jury at the trial that will begin on November 8, 2004. As might be expected, the Government defends the propriety of its Notice and recommends submission of three factors in its case-in-chief.

We are especially puzzled at the Government's position in view of what it said to the Supreme Court of the United States in United States v. Booker and United States v. Fanfan, Nos. 04-104 and 04-105, which were argued on October 4, 2004. In the Government's merits brief in those two cases, it stated to the Supreme Court that:

In theory, courts could fill the resulting gap by instituting a court-designed system of jury findings on sentence-enhancing facts

1. (...continued)

In its Trial Memorandum, the Government announced it "is not seeking enhancement 2.c." Gov't Trial Mem. at 5.

under the beyond-a-reasonable-doubt standard, to be supplemented by judicial findings on facts that reduce the sentence under the preponderance standard. But that system would require a court not merely to sever an unconstitutional provision, but to "amend the act," Hill v. Wallace, 259 U.S. at 71, a course that the Court has previously declined to undertake.

Br. for the U.S. at 60.

The Government then discussed the Court's decision in United States v. Jackson, 390 U.S. 570, 576-79 (1968). Jackson involved part of the Federal Kidnapping Act that authorized a sentence of death only upon the recommendation of a jury, which the Court held unconstitutionally burdened the defendant's right to trial and seek a jury. As the Acting Solicitor General described it:

The government proposed that the statute could be rescued from constitutional infirmity by reading it to authorize "by implication" the "convening [of a] special jury * * * for the sole purpose of deciding whether [the defendant] should be put to death" in a case in which the defendant had pleaded guilty or waived jury trial. Id. at 576-577.

Br. for the U.S. at 60-61. The Court in Jackson rejected the Government's proposal and explained that "it would hardly be the province of the courts to fashion [such] a remedy" Jackson, supra at 579, and that "[i]t is one thing to fill a minor gap in a statute" but "quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

Thus, the Acting Solicitor General concluded in Booker and Fanfan by stating, pertinent to the question before us:

Replacing the statutory gap in the Guidelines system with a novel system of jury trials for sentence-enhancing facts would be fraught with the same grave difficulties as in Jackson. Indeed, it would require judicial legislation on a far greater scale than the approach rejected in Jackson, because the Guidelines apply in every federal criminal prosecution.

Br. of the U.S. at 61.

Although we have elsewhere predicted that the Supreme Court will apply Blakely to the Guidelines, see United States v. Leach, 325 F.Supp.2d 557 (E.D. Pa. 2004), we did not predict the consequences of such a holding beyond Guideline-based enhancements. A review of the transcript of the October 4, 2004 oral argument in Booker and Fanfan reveals that the consequences beyond what we held in Leach are very much up in the air. Until the Supreme Court decides Booker and Fanfan, however, it seems to us not extravagant to take the Government at the word expressed by the Acting Solicitor General in Booker and Fanfan rather than at the word of the local prosecutor here.²

We also do not accept the Government's soothing assurance that there will be "no prejudice to the defendant" because it can seamlessly weave the enhancements into its case-in-chief. The Government contends, for example, that since the

2. Of course, if the Court answers the severability question by making the Guidelines, well, guidelines in the ordinary English meaning of that word, then this procedural problem will be mooted.

prior felony "is an element of the charged offenses", Gov't Trial Mem. at 5, and the certified conviction of October 17, 2000 "indicates, on its face, that the defendant's sentence shall 'be followed by 5 years reporting probation'", id. at 6, it will be a simple matter for the jury to conclude that the defendant was on probation "at the time of the offense" because "the prison records resulting from that same felony conviction will show that the defendant was incarcerated for the aforementioned felony offense until December 22, 2000." Id.

Of course, there will be "no prejudice to the defendant" from this evidence except to show the jury that, in addition to possessing a weapon and ammunition, the defendant is also a probation violator, and thus is doubly culpable. Indeed, the application of sentencing enhancements in the Government's case-in-chief in this workaday case demonstrates why the Government's argument in Booker and Fanfan, quoted above, makes quite a bit of sense.

We therefore decline to submit the sentencing factors to the jury.

/s/ Stewart Dalzell, J.

