UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cause No. 2:04-CR-30 PS
	)	
HENRY NELLUM	)	

SENTENCING MEMORANDUM

On February 2, 2005, the Court sentenced defendant Henry Nellum to 108 months in prison, followed by four years of supervised release for distribution of five grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1). In the wake of *United States v. Booker*, 125 S. Ct. 738 (2005), the Court had to carefully consider both the guidelines and the more general factors set forth in 18 U.S.C. § 3553(a). In this memorandum, the Court first explains how it views *Booker* and will then apply the principles of *Booker* to the facts of this case.

I. Sentencing Post-Booker

The *Booker* decision has two parts to it. In the first part, the Court held that the Federal Sentencing Guidelines, promulgated pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*, violated a defendant's right to a jury trial under the Sixth Amendment. This was so because the Guidelines required a judge to find facts that can increase a defendant's sentence beyond what could be imposed solely based on the jury's verdict. As a remedy, in the second part, a different majority of the Court (what I'll refer to as the remedial majority) severed two parts of the Act, 18 U.S.C. § 3553(b)(1), which made the guidelines mandatory, and 18 U.S.C. §3742(e), which mandated a *de novo* standard of review. With these modifications, the Court noted that "the Federal Sentencing Act . . . makes the Guidelines effectively advisory." *Booker*, 125 S. Ct. at 757.

This holding raises the question of how much weight this Court should give to the now advisory Guidelines, on the one hand, and the more general factors set forth in 18 U.S.C. § 3553(a), on the other. Those factors are: (1) the sentencing range established for the applicable category of offense committed by the applicable category of defendant, § 3553(a)(4); (2) the pertinent Sentencing Commission policy statements, § 3553(a)(5); (3) the need to avoid unwarranted sentencing disparities, § 3553(a)(6); (4) the need to provide restitution to victims, § 3553(a)(7); (5) the nature and circumstances of the offense and the history and characteristics of the defendant, § 3553(a)(1); (6) the kinds of sentences available, § 3553(a)(3); and (7) the need for judges 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, § 3553(a)(2).

Booker therefore requires a sentencing court to do two things: "The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Booker*, 125 S. Ct. at 767. At the same time, *Booker* requires district judges to take account of the factors set forth in § 3553(a). What complicates this task is that many of the § 3553(a) factors – such as the history and characteristics of the defendant, *see* § 3553(a)(1) – are factors that the guidelines "either reject or ignore." *United States v. Ranum*, __F. Supp. 2d___, No. 04-CR-31, 2005 WL 161223, at *1 (E.D. Wis. Jan. 19, 2005).

In the present case, after carefully considering all of the evidence presented and thoroughly reviewing the presentence report (PSR), I computed the applicable sentencing guideline range. After calculating the guidelines, I then applied all of the relevant § 3553(a)

factors. For the reasons stated below, the sentence arrived at by the Court of 108 months, while less than the term called for by the guidelines, is sufficient to satisfy the purposes of sentencing.

II. Application of Principles

Nellum pled guilty to Count I of a five count indictment which charged him with distribution of 5 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1). The facts are straight-forward. On January 12, 2004, the Gang Response Investigative Team ("GRIT") took part in a physical surveillance at the Mobile gas station located at 4901 East Melton Road, Gary, Indiana. During the course of this surveillance and at the direction of GRIT Investigators, a cooperating witness ("CW") pulled up and parked on the west side of the gas station. Shortly thereafter, Nellum pulled up and parked on the east side of the gas station. Nellum then moved his car next to the CW's vehicle. The CW then exited his vehicle and entered Nellum's car where he proceeded to sell 27.4 grams of cocaine base to the CW for $900. Similar controlled buys were made on January 20, 2004, February 10, 2004, and February 18, 2004. During each of these subsequent three buys, Nellum sold approximately 27 grams of cocaine base to the CW.

On February 18, 2004, GRIT Investigators executed a federal search warrant at Nellum's residence located at 4600 East 10th Avenue, Gary, Indiana. During the execution of the search, substantial evidence of crack distribution was found. A total of 95 grams of cocaine base were recovered. In addition, other evidence of distribution – baggies, baking soda, scales and two guns – were recovered in the search. By the same token, it was also clear from the evidence that the defendant, the sole resident of the house, was regularly using crack cocaine. (*See* PSR ¶¶ 80-83.) The house was an utter mess, and found in the house were things such as a "push rod",

crack pipe and "chore boy" – all things that Detective Garza testified led him to clearly conclude that the resident was regularly using crack.

A. The Guidelines Computations

Thus, the total weight of all the crack cocaine from the count of conviction (count I) was 27 grams. (PSR ¶ 16.) However, after applying the principles of relevant conduct, because the various acts of distribution were done "in the same course of conduct", *see* U.S.S.G. § 1B1.3(a)(2), the defendant was ultimately held responsible for approximately 204 grams. (PSR ¶ 27.)

At the sentencing hearing, the Court first resolved any objections to the guidelines as calculated by the probation officer who prepared the presentence report. The principle dispute was whether Nellum possessed a firearm during the offense of conviction. Because one of the guns found in the search was in close proximity to some of the drugs, the Court applied the gun enhancement. *See e.g. United States v. Starks*, 309 F.3d 1017, 1027 (7th Cir. 2002). Even though the guns were not possessed by the defendant during the offense of conviction (remember the distribution that he pled guilty to occurred away from the home), the Court applied the relevant conduct guideline and found that the guns were possessed by the defendant "in preparation for" the offense of conviction. U.S.S.G. § 1B1.3(a)(1)(A). *See e.g. United States v. Wetwattana*, 94 F.3d 280, 283 (7th Cir. 1996).

Therefore, in determining Nellum's guideline range, the Court found that the base offense level was 34, U.S.S.G. § 2D1.1, plus 2 for possession of a dangerous weapon, § 2D1.1(b)(1), minus 3 for acceptance of responsibility, § 3E1.1(a) and (b), and the criminal history category was III, creating an imprisonment range of 168-210 months. The government

argued for a sentence consistent with that range. The defendant argued under *Booker* for a sentence of five years (the mandatory minimum). The court rejected both recommendations and imposed a sentence of 108 months. In crafting the sentence, all of the factors set forth in §3553(a) were considered, including the advisory guidelines.

B. Consideration of the 3553(a) Factors

First the Court considered the need for the sentence to reflect the seriousness of the offense and the need to deter Nellum and others from committing further crime. *See* § 3553(a)(2). The factors in this category weighed heavily in mitigating the defendant's sentence. Perhaps most important, the defendant is fifty-seven years old. If the Court were to give him a guideline sentence he would be over the age of seventy at the time of his release. The sentence of 108 months protects the public, provides just punishment and adequate deterrence. *See* § 3553(a)(2). If all goes as expected, with a sentence of 108 months, Nellum will be released from prison when he is roughly 65 years old.

The likelihood of recidivism by a 65 year old is very low. In fact, according to a United States Sentencing Commission Report released in May, 2004, "Recidivism rates decline consistently as age increases. Generally, the younger the offender, the more likely the offender recidivates." *See* U.S.S.C., Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, at 12, http://www.ussc.gov/publicat/Recidivism-General.pdf. As the report states, "Among all offenders under age 21, the recidivism rate is 35.5%, while offenders over age 50 have a recidivism rate of 9.5%." *Id.* According to the Commission Report, for criminal history category III offenders, like defendant Nellum, the recidivism rates were as follows:

Age at Sentence	Category III Percent Recidivating
Under age 21	54.7%
Ages 21-25	42.7%
Ages 26-30	33.6%
Ages 31-35	32.7%
Ages 36-40	29.4%
Ages 41-50	24.5%
Ages over 50	19.8%

Id. at 28. The positive correlation between age and recidivsm is impossible to deny. Indeed, as shown above, the Sentencing Commission in its report did not even bother to separately report statistics on recidivism rates of inmates who are, for example, age 55 at the time of sentence (or age 57 like Nellum). One can only reasonably assume that the trend of decreasing recidivism continues downward after the age of 50.[1] Under the guidelines, the age of the offender is not ordinarily relevant in determining the sentence. *See* § 5H1.1. But under § 3553(a)(2)(C), age of the offender is plainly relevant to the issue of "protect[ing] the public from further crimes of the defendant." *See also Booker*, 125 S. Ct. at 765.

In addition, this Court considered the history and characteristics of the defendant. Nellum has a good relationship with his children and was a good father when he was clean and not using crack. (*See* PSR ¶ 76.) Nellum's daughter was present in the courtroom in support of her father during sentencing. Under the guidelines, family ties are not ordinarily relevant to determining the sentence. U.S.S.G. § 5H1.6. But under § 3553(a), the history and

[1] The Court attempted to find statistics on recidivism rates of males, like Nellum, who are released from prison at the age of 65. While such studies may exist, the Court could not readily locate them.

characteristics of the defendant, including his family ties, are pertinent to crafting an appropriate sentence.

In addition, the evidence at the sentencing hearing demonstrated that from 1973 until 1991, when the defendant was not using drugs, he had no brushes with the law. By contrast, when he started using crack in 1991, everything in his life fell apart, and he found himself committing crimes to maintain his habit. *See* § 3553(a)(2). Crack addiction is clearly the root cause of Nellum's criminal history. Indeed, four of his criminal history points – enough alone to put him in criminal history category III under the guidelines – are from two misdemeanor convictions for possession of crack for personal use. (*See* PSR ¶¶ 46-50.) Thus, there is no question that the evidence from the sentencing hearing established beyond a doubt that Nellum is a serious crack addict who supported his habit by selling drugs. Under the guidelines, drug addiction is not ordinarily relevant to sentencing. *See* U.S.S.G. §5H1.4. But under § 3553(a)(2)(D), the defendant's need for correctional treatment is relevant. *See also Booker*, 125 S. Ct. at 765.

In addition, Nellum has serious medical problems. Nellum suffers from high blood pressure, a blocked prostate, and actually suffered a heart attack in March 2004 while in custody. (*See* PSR ¶¶ 77-78.) As with his drug addiction, under the guidelines, Nellum's serious medical condition would not be relevant to his sentence. *See* U.S.S.G. § 5H1.4. But § 3553(a)(2) and *Booker*, "requires judges to impose sentences that . . . effectively provide the defendant with needed medical care." *Booker*, 125 S. Ct. at 765.

The defendant is also an Army veteran, who was honorably discharged. (*See* PSR ¶ 85.) Under the guidelines, Nellum's military service is not ordinarily relevant in arriving at an

appropriate sentence. *See* U.S.S.G. § 5H1.11. Yet, this Court finds it very relevant that a defendant honorably served his country when considering his history and characteristics. *See* § 3553(a)(1).

The Court also considered the nature of the offense. The offense was very serious. Crack cocaine is an insidious drug. Many communities in Northwest Indiana are overrun with crime due to the presence of crack. Crack addicts, like Nellum, help fuel this crime epidemic in support of their own habits. The seriousness of dealing crack cocaine cannot be underscored enough.

Nellum argued at sentencing that the disparity between the sentencing guidelines for crack versus powder cocaine (the infamous 100 to 1 ratio), *see generally* U.S.S.G. §2D1.1(c), should be considered in crafting an appropriate sentence. Indeed, Nellum pointed this Court to a November 2004 report issued by the United States Sentencing Commission in which it noted that in 2001 it "recommended that the crack cocaine threshold be raised . . . replacing the 100 to 1 ratio with a 20 to 1 ratio." U.S.S.C., Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform, at 132, http://www.ussc.gov/15_year/15year.htm. Congress did not act on that request. In the November 2004 report, the Commission again stated that "Revising the crack cocaine thresholds . . . would dramatically improve the fairness of the federal sentencing guidelines." *Id*. As one court put it, "the Sentencing Commission with its ability to collect sentencing data, monitor crime rates, and conduct statistical analyses, is perfectly situated to evaluate deterrence arguments." *United States v. Wilson*, ___F. Supp. 2d ___, No. 2:03-CR-0082-PGG, 2005 WL 78552, at *8 (D. Utah Jan. 13, 2005). There can be no doubt that this issue is extremely

controversial and one which this Court will no doubt face in future sentencings. However, the Court found that it need not address the 100-to-1 powder to crack cocaine ratio in crafting this sentence. Instead, the Court relied on the myriad of factors it was already required to take into consideration in arriving at Nellum's sentence.

While recognizing the seriousness of the crime Nellum was convicted of, it is worth pointing out that under the guidelines, the weight of the narcotics is the driving force behind the sentence. The government is well aware that for every controlled buy that is made, the quantity of drugs is increased, and so is the sentence. There is a randomness to this in the following sense: Nellum's guideline range would have been significantly decreased if he was arrested after the first buy on January 12, 2004, and not after the fourth buy. Under the guidelines, this fortuity increased Nellum's guidelines range from 87 - 108 months (if 27 grams of crack were involved), to 168 - 210 months. Indeed, on the other hand, if the officers wanted to, they probably could have made additional controlled buys from Nellum and the total weight of the drugs attributable to him would have been even higher and so too his sentence under the guidelines. None of this is meant as a criticism of the agents involved in this or any other drug investigation. To be sure, they are serving the public by ridding the streets of drugs, and every controlled purchase that is made is one less sale to a drug addict on the street. It is nonetheless difficult to ignore the random nature of how the system plays out in reality.[2]

Finally, the Court considered the need to avoid unwarranted sentencing disparities. *See* § 3553(a)(6). To be sure, uniformity in sentencing is important. However, under the

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[2] Under the guidelines, arguments relating to sentencing entrapment were usually non-starters. *See e.g. United States v. Estrada,* 256 F.3d 466 (7th Cir. 2001). To be clear about it, this case did not involve any entrapment.

circumstances of this particular case, for the reasons stated above, the sentence called for by the guidelines, 168-210 months, was greater than necessary to satisfy the purposes of sentencing set forth in § 3553(a). In other words, while this sentence may be disparate from the sentence given to other defendants who are "found guilty of similar conduct", given the particular circumstances of this case – Nellum's age, the likelihood of recidivism, his status as a veteran, his strong family ties, his medical condition, and his serious drug dependency – the Court does not view that disparity as being "unwarranted." 18 U.S.C. § 3553(a)(6).

For all of these reasons, and for the reasons stated on the record at the sentencing hearing, a sentence of 108 months is just and meets the statutory purposes of sentencing set forth in 18 U.S.C. § 3553(a).

ENTERED: February 3, 2005

s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT