IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT FLEMISTER, TYRAE L. FORD and JACK ERVAN III,

Defendants.

OPINION AND ORDER

99-CR-0106-C

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This criminal case is before the court following a jury trial in which defendants Robert Flemister, Tyrae L. Ford and Jack Ervan III were found guilty of conspiring to distribute cocaine base and possess cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2. The indictment did not charge them with any particular amount of cocaine and the jury was not asked to determine the amount of cocaine for which they should be held accountable for sentencing purposes. After the trial and prior to sentencing, the United States Supreme Court decided Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), holding that the due process clause requires that any factual determination that authorizes an increase in the maximum prison sentence for an offense be made by a jury on the basis of proof beyond a

reasonable doubt. Citing Apprendi, defendants have asked for a determination by the court that they cannot be sentenced to more than 20 years in prison, reasoning that because the government did not charge them with distributing 50 grams or more of cocaine base, they cannot be sentenced to more than the maximum sentence of 20 years provided for distributing less than 50 grams. I conclude that defendants are correct and that, in light of Apprendi, their potential sentences are capped at 20 years.

Congress structured 21 U.S.C. § 841 in two parts. The first, subsection (a), describes certain prohibited criminal acts (manufacturing, distributing, dispensing a controlled substance or possessing a controlled substance with the intent to do any of these things). The second, subsection (b), sets out the penalties prescribed for these acts, which vary depending on the amounts of controlled substances involved, whether the defendant has prior convictions and whether death or serious bodily injury resulted from the use of the substance. Until Apprendi was decided, it was common practice for prosecutors to charge and prove only the acts prohibited under § 841(a). At sentencing, the court would consider the factors in § 841(b), applying a preponderance of the evidence standard in determining the amount of drugs to attribute to the defendant. After Apprendi, prosecutors will have to submit the determination of drug quantities to the jury whenever they believe that the defendant distributed a larger quantity of drugs than the statutory minimum would cover. The question is what to do in

a case like this in which the trial has been held and the government is unable to ask a jury to determine how much cocaine base defendants conspired to distribute or possess with intent to distribute. The government contends that defendants should be sentenced on the basis of 50 grams or more of cocaine base although no jury has ever found that defendants conspired to distribute or possess this amount of cocaine. It maintains that it was a constitutional error to fail to ask the jury to make a determination of the amount of cocaine base involved but that the error is harmless in light of the extensive evidence introduced at trial that defendants dealt in far more than 50 grams. Defendants maintain that Apprendi limits their potential sentences to 20 years, the maximum available when the amount of cocaine base is less than 50 grams, because the jury was never presented with any other charge and never had any occasion to consider the larger amount. They view the government's omission as a structural error to which the doctrine of harmless error has no application.

Whether or not the government's omission is viewed as a structural error, as I think it should be, defendants have the better argument. The failure to charge defendants with possessing 50 grams or more of cocaine is not the kind of error that fits readily into the concept of harmless error discussed in Neder v. United States, 527 U.S. 1 (1999), or Chapman v. California, 386 U.S. 18 (1967). In Neder, a case involving tax offenses, the Court concluded that it was harmless error when a judge failed to submit to the jury the issue of the materiality

of allegedly false statements on the tax returns. In the Court's view, the error was not so intrinsically harmful as to require automatic reversal without regard to its effect on the outcome of the trial. See Neder, 527 U.S. at 7. In other words, the error did not fall into the limited class of fundamental constitutional, or "structural errors," which encompasses cases in which there is a defect "'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" Id. at 8 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). In Chapman, 386 U.S. 18, the question was whether a constitutional error could ever be considered harmless. The Court held that although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," id. at 23, other constitutional errors "in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Id. at 22. The Court concluded that the state's repeated references to defendants' failure to testify fell into the second category but only if the court could "declare a belief that the error was harmless beyond a reasonable doubt." Id. at 24. Since it could not make such a finding, it reversed defendants' convictions.

Defendants have a different sort of case. They are not arguing that the government erred in any respect during the trial, that it omitted any element of the offense it had charged against defendants, that it tendered an improper instruction or commented improperly upon

defendants' failure to testify. Their argument is that the government brought the wrong charge against defendants. This does not strike me as the sort of situation in which harmless error analysis is appropriate. The constitutional safeguards that surround the bringing of a defendant to trial, the right to be tried only by an indictment returned by a grand jury, the right to notice of the charge and the opportunity to defend are not so unimportant and insignificant as to be relegated to the potentially harmless error category. Courts have never allowed prosecutors to amend indictments in the middle of trial to add increased charges, yet this is what the government is seeking in this case, if only because it is forced to do so by the decision in Apprendi.

I recognize that other courts have taken a different approach to the problem, although the published cases concern cases on appeal or on a collateral challenge to a previously imposed sentence. See, e.g., Sustache-Rivera v. United States, No. 99-2128, 2000 WL 1015879 (1st Cir. July 25, 2000) (attempted collateral challenge to increased sentence for carjacking on ground that judge and not jury made finding that "serious bodily injury" was involved; court held that defendant failed to show cause and prejudice for failure to raise issue when filing first post-conviction motion because evidence of serious bodily injury (multiple gunshot wounds to victims, one of whom lost his leg as a result) was so overwhelming); United States v. Sheppard, No. 00-1218, 2000 WL 988127 (8th Cir. July 18, 2000) (court's failure to instruct jury it must

find drug quantity was harmless error in view of fact that court submitted "Special Finding" to jury on which jury found beyond reasonable doubt that conduct involved more than 500 grams of methamphetamine). Cf. United States v. Murphy, No. 4-95-1038DSDFLN, 2000 WL 1140782 (D. Minn. Aug. 7, 2000). In Murphy, the district court vacated the defendant's sentence, which had been imposed under § 841(b)(1)(A), and resentenced him to the much lower statutory maximum in § 841(b)(1)(C) because the government had not charged a specific amount of drugs or proved to the jury that defendant had possessed or distributed 50 grams or more of cocaine. Although defendant brought his challenge on a post-conviction motion, the court read Apprendi as having retroactive application because the rule required observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" Id. at *4 (quoting Teague v. Lane, 489 U.S. 288 (1989)).

Even if a harmless error analysis were appropriate when the government is seeking a higher statutory sentence than it sought in the indictment, it would not be appropriate in this particular case. It is true that there was extensive testimony about amounts of cocaine base that witnesses had seen in the possession of these defendants and their co-defendants. However, the credibility of those witnesses was very much in doubt, as shown by the jury's decision to return not guilty verdicts against three of the men tried with these defendants. To make the finding the government asks would require me to make credibility determinations that

are the province of the jury. Without making those determinations, I cannot say that the government could prove that the evidence was so overwhelming that no reasonable jury could have failed to find more than 50 grams of cocaine base attributable to defendants. Contributing to my reluctance to make this finding is the fact that defendants were not on notice that they should or could put in evidence on drug quantities.

The fact that the critical drug quantity evidence in this case is so bound up with witness credibility distinguishes it from Neder, 527 U.S. 1, where there was no disagreement that the false statements on the tax returns were material, and from Sustache-Rivera, 2000 WL 1015879, where it was beyond dispute that the carjacking victims had been severely injured. In this case, I cannot say as a matter of law that no jury could fail to find beyond a reasonable doubt that defendants were responsible for 50 grams or more of cocaine base.

ORDER

IT IS ORDERED that the potential sentences of defendants Robert Flemister, Tyrae L. Ford and Jack Ervan III are capped under 21 U.S.C. § 841(b)(1)(C) at twenty years.

Entered this 25th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge