

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

MEMORANDUM and ORDER

03-CR-159-S-01

v.

MARTIN J. APPLEBEE,

Defendant.

Presently pending before the Court in the above entitled matter is a limited remand from the United States Court of Appeals for the Seventh Circuit to determine whether this Court would impose defendant's original sentence had the sentencing guidelines been merely advisory. In U.S. v. Paladino, 401 F. 3d 471, 484 (7th Cir. 2005), the Court advised as follows:

Upon reaching its decision (with or without a hearing) whether to resentence, the District Court should either place on the record a decision not to resentence with an appropriate explanation," *United States v. Crosby, supra*, 397 F. 3d at 1920, or inform this Court of its desire to resentence the defendant.

The Court has considered the views of counsel, the advisory sentencing guidelines, the purposes of sentencing and the reasons for its original sentence, determining that it would impose the same sentence.

As justification for its original sentence the Court considered the following facts:

Defendant was apprehended while in the process of manufacturing methamphetamine which caused the release into the environment of a hazardous substance. Defendant had been manufacturing methamphetamine since 2001. This offense involved the marijuana equivalency of 636 kilograms. Defendant's manufacturing of methamphetamine was primarily intended for his personal use, but it was made available to others as well.

Defendant's offense level was determined to be 28 with a two level increase to 30 for the unlawful discharge, emission or release into the environment of a hazardous or toxic substance. It was then reduced three levels to 27 for defendant's acceptance of responsibility. Based on this offense level of 27 and defendant's criminal history category of four, the advisory guideline imprisonment range is 100-125 months. The Court sentenced defendant to 115 months.

Defendant's counsel now argues that according to Booker the Court erred in determining defendant's offense level by using relevant conduct that was not proven beyond a reasonable doubt. He is incorrect. In McReynolds v. U.S., 397 F. 3d 479, 481 (7th Cir. 2005), the United States Court of Appeals for the Seventh Circuit stated as follows:

The remedial portion of *Booker* held that decisions about sentencing factors will continue to be made by judges, on the preponderance of the evidence, an approach that comports with the sixth amendment so long as the guideline system has some flexibility.

As a practical matter, then, petitioner's sentences would be determined in the same way if they were sentenced today; the only change would be the degree of flexibility judges would enjoy in applying the guideline system.

In defendant's case the Court includes his relevant conduct which is found by a preponderance of the evidence to determine his offense level. As long as the Court uses the guidelines as advisory this approach comports with the Sixth Amendment. That is the reason the Court of Appeals is providing this Court the opportunity to determine whether it would have imposed the same sentence had the guidelines been advisory.

The imposition of the original sentence considered those suggestions presented both then and now by counsel: the seriousness of the offenses, adequate deterrence to criminal conduct, protecting the public and defendant's addiction to methamphetamine. Had the guidelines been advisory, this Court would have imposed the same sentence believing it to be reasonable considering the defendant's criminal conduct, sufficient to hold defendant accountable and to protect the community from further criminality on his part.

Pursuant to 18 U.S.C. §3553 the Court may consider the character and history of the defendant. The Court considers the letter written by defendant's wife which suggests that he would benefit from treatment rather than incarceration. This is

counterbalanced by defendant's past criminal conduct and his recidivism.

Considering all these factors, a sentence near the middle of the advisory guidelines is reasonable and necessary for the statutory purposes of sentencing.

For the reasons stated this Court advises the United States Court of Appeals for the Seventh Circuit that it would impose defendant's original sentence had the sentencing guidelines been merely advisory.

Entered this 20th day of May, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge