

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

UNITED STATES OF AMERICA,

Plaintiff,

MEMORANDUM and ORDER

04-CR-13-S-01

v.

JACK A. DAY,

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's relevant criminal activity involved a large number of miles tolled back on many vehicles and a huge financial loss to the victims. His conduct took place over the course of several years and included using false claims to sell the vehicles to unsuspecting customers. Defendant misrepresented mileage on 19 vehicles for a total loss of \$39,875.00 from June 2000 to March 2002.

The Court determined defendant's offense level to be 6 and increased it four levels because it determined that the loss was more than \$20,000.00 and less than \$40,000.00. Defendant does not contest the amount of loss. The Court further increased the offense level by two levels because the offense involved a scheme to defraud more than one victim. This offense level was reduced two levels for acceptance of responsibility. Based on this offense level of 10 and defendant's criminal history category of five, the advisory guideline imprisonment range is 21 to 27 months. The Court sentenced defendant to 25 months in prison and ordered defendant to pay restitution in the amount of \$39,875.00, due and payable immediately.

The imposition of the original sentence considered those suggestions presented both then and now by counsel: the seriousness of the offense, adequate deterrence to criminal conduct and protecting the public. Had the guidelines been advisory, this Court would have imposed the same sentence believing it to be

reasonable considering the defendant's criminal conduct, and 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 defendant's character and history. Defendant contends that the Court should consider his military service, his age (73), his history of alcoholism and his medical condition. The Court does consider these factors and they are counterbalanced by his repeatedly taking advantage of trusting and unsuspecting people in his own community and his excessive fraudulent activities which continued over a significant period of time. Considering all these factors, a sentence near the top 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 the defendant's original sentence had the sentencing guidelines been merely advisory.

Defendant states that restitution is the primary concern in this matter. The Court notes that defendant does not contest the amount of loss and restitution is mandatory. Based on defendant's limited resources nominal payments toward restitution would be ordered should this issue come before the Court again.

Entered this 7th day of September, 2005.

BY THE COURT:

____s/_____
JOHN C. SHABAZ
District Judge