

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

UNITED STATES OF AMERICA

v.

CASE NO. 4:12cr48-RH

**MICKEY MURPHY,
Defendant.**

SENTENCING MEMORANDUM

Mickey Murphy is a forty-three year old man with a long criminal history. He had been out of prison less than four months when he committed the instant offense. His offense is that of transporting two kilograms of cocaine. At the time of the offense, he was out of work and anxious to support himself and his mother who suffers from significant health problems. As he stated in one of his telephone conversations that was recorded while he was in jail: “I wanted to go to work, I wanted to make some money, times are tough....” PSR ¶ 11.

While Mr. Murphy acknowledges that his conduct and his criminal history have earned him a lengthy sentence, the sort of sentence recommended by the Sentencing Guidelines would result in what one judge has referred to as an “unwarranted sentencing uniformity, a type of unwarranted disparity,” United States v. Newhouse, ___ F. Supp. 2d ___, 2013 WL 346432, *17 (N.D. Iowa Jan. 30, 2013), and a sentence “greater than necessary” to achieve the goals of sentencing established by Congress. 18 U.S.C. § 3553(a).

Mr. Murphy, as he explained to the probation officer preparing the Presentence Investigation Report, was paid \$2,000 to transport the cocaine that was hidden in a car that did not belong to him. PSR ¶¶8, 17. Without a job or any income, Mr. Murphy was living with his mother who suffers

from Parkinson Disease and other health difficulties. *See* Ex. 1 (letter from Theresa Schimanski). The house they lived in is small, old, and badly in need of a new roof.

Guideline Calculations

Because Mr. Murphy qualifies as a career offender under the United States Sentencing Guidelines, the advisory guideline range is almost twenty-two years to more than twenty-seven years (262 to 327 months). He falls in the harshest range of the career offender provision because of the enhancement filed by the Government pursuant to 21 U.S.C. § 851. Doc. 7. That provision has the effect of increasing the maximum penalty from forty years to life. Were it not for the enhancement and the increased maximum penalty, Mr. Murphy's guideline range under the career offender guideline would be less, 188 to 235 months, about fifteen and a half years to just less than twenty years. If his guideline range was determined on the basis of the drug quantity and his criminal history points, his guideline range would be 100 to 125 months, about eight to ten years. In Mr. Murphy's case, the career offender classification, then, comes close to making his sentence three times longer than it would have been otherwise.

Characteristic Institutional Role of the Sentencing Commission

In a recent decision largely critical of the career offender guideline, United States District Judge Mark W. Bennett wrote that "the Sentencing Commission has at times strayed from the 'characteristic institutional role' described in the SRA [Sentencing Reform Act] and by the Court in Rita, and, when it has, the resulting guidelines are unlikely to properly reflect §3553(a) considerations." *Id.* at *10. Judge Bennett concluded that the career offender guideline represents an instance where that occurred and found that "the career offender guideline results from an imprecisely implemented congressional mandate and is entitled to considerably less deference than

those guidelines where the Sentencing Commission has exercised its institutional expertise and utilized empirical analysis.” *Id.* at *13. Given Mr. Murphy’s criminal history and, perhaps, the quantity of drugs he was transporting, much of Judge Bennett’s criticism of the career offender guideline is inapplicable, and, indeed, Judge Bennett “recognize[d] that some offenders have earned career offender status and should be sentenced within the career offender guideline and, in rare instances, higher.” *Id.* at *10. Nonetheless, some of the shortcomings of the guidelines noted by Judge Bennett apply to Mr. Murphy’s case.

“[T]he Sentencing Commission developed the first set of guidelines through an empirical approach, examining 10,000 presentence reports, and determining average sentences imposed before the guidelines, Rita, 551 U.S. 349.” *Id.* The sentencing scheme, “as directed in 28 U.S.C. § 994” provided that “the Sentencing Commission could revise the guidelines thereafter by studying federal court decisions and seeking advice from prosecutors, law enforcement personnel, defense counsel, civil liberties groups, and experts.” *Id.* The Career Offender guideline was the product, not of that process, but “from Congress’s statutory directive to the Sentencing Commission to set higher guideline ranges for ‘certain felony recidivists.’” *Id.* at *11. (internal authority omitted).

Double Counting

One of the “flaw[s]” of the process is the “double counting” that occurs when, as in Mr. Murphy’s case, the maximum penalty for a drug offense is increased on the basis of an individual’s prior criminal history pursuant to 21 U.S.C. §§ 841, 851, which in turn, results in a higher guideline range for the individual who is classified as a career offender based upon that same criminal history. *Id.* at *12. The maximum penalty for Mr. Murphy’s instant offense has been, for example, increased

from 40 years to life based in part upon his conviction for the cocaine charge listed in paragraph 42.¹ Because the maximum penalty is life, the offense level, under the career offender guideline, is increased from 34 to 37. *See* USSG §4B1.1(b). The increase is, an arbitrary one in that (a) it occurs only in drug cases and not in cases of violent crime and (b) in most districts the United States Attorney will not pursue the §851 enhancement if the defendant enters a guilty plea. With regard to the latter circumstance, it is an increase that is reserved for those who decide to proceed to trial or for those who happen to be prosecuted in districts such as the Northern District of Florida where the United States Attorney has chosen to file the §851 enhancement in every case.²

In his opinion, Judge Bennett includes mention of the Sentencing Commission's effort to "rectify the problem":

The Career Offender guideline is further flawed through the operation of 21 U.S.C. § 851. As in this case, the prosecutor can decide in his or her sole discretion whether to file an information under § 851, which raises the statutory maximum and, in turn, the offense level under the Career Offender table. In 1994, the Sentencing Commission sought to rectify this problem with an amendment that would have excluded any increase in the maximum term under 21 U.S.C. §§ 841 and 851, explaining that the amendment "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." U.S. Sentencing Guidelines Manual App. C, Amend. 506 (1994). The Supreme Court invalidated the amendment because, it said, it was "at odds with § 994(h)'s plain language," in particular,

¹The trafficking in cocaine conviction in paragraph 41 serves the same purpose. While the offense might be subject to challenge on the basis of United States v. Shannon, 631 F.3d 1187 (11th Cir. 2011), the defense has not objected as Mr. Murphy has two other offenses that qualify him as a career offender, the cocaine conviction in paragraph 42 of the PSR and the aggravated battery on a law enforcement conviction in paragraph 43.

²For many years, the United States Attorney has filed the enhancement in every case. A new policy requires the exercise of some discretion when the enhancement results in a mandatory life sentence.

the phrase "maximum term authorized." United States v. LaBonte, 520 U.S. 751, 757, 117 S. Ct. 1673, 137 L. Ed. 2d 1001 (1997).

Id. at *12.

Unwarranted Sentencing Uniformity

In the absence of the Sentencing Commission's institutional expertise and empirical analysis, Judge Bennett went on to criticize the failure of the career offender guideline to distinguish between those such as Mr. Murphy who are couriers or mules and those who lead large scale drug conspiracies:

Application of the Career Offender guideline can result in unwarranted sentencing uniformity, a type of unwarranted disparity. See Paul J. Hofer & Mark H. Allenbaugh, The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 Am. Crim. L. Rev. 19, 83 (2003); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 Am. Crim. L. Rev. 833, 851-71 (1992). This is because the Career Offender guideline does not distinguish between defendants, convicted of the same drug offense, based on either the seriousness of their current offense or their prior convictions. The Career Offender guideline makes no distinction based on the roles of the defendants. As a result, two defendants, one a low-level drug mule, and the other the head of a drug conspiracy employing the defendant drug mule, are treated the same. Both defendants would be placed in criminal history category VI and placed at the same offense level.

Id. at *17.

The resulting potential for unwarranted sentencing uniformity conflicts with the tradition and purposes of sentencing:

The Supreme Court reiterated in *Pepper* that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Pepper*, 131 S. Ct. at 1239-40 (quoting *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996)). The Career Offender guideline runs counter to both this tradition and the goals of sentencing by its serious potential to create unwarranted sentencing disparities through unwarranted sentencing uniformity.

Id. at *18.

Conclusion

The career offender guideline is not the product of characteristic institutional role of the United States Sentencing Commission. The “double counting” that occurs in cases such as Mr. Murphy’s results in an arbitrary increase contingent upon the policy of the prosecutor and happens only in drug cases. Because of that and because the guideline fails to differentiate between those who organize and profit from large scale drug distribution schemes and those such as Mr. Murphy who are the hired help, the advisory guideline range of 262 to 327 months is greater than necessary to achieve the Congressionally established goals of sentencing. Mr. Murphy, therefore, requests that this Court impose a sentence below the advisory range.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery to the Office of Assistant United States Attorney, Eric Mountin, 111 N. Adams Street, 4th Floor, Tallahassee, Florida 32301, this February 6, 2013.

Respectfully submitted,

s/Randolph P. Murrell
RANDOLPH P. MURRELL
Federal Public Defender
Fla. Bar. 220296
227 N. Bronough Street, Ste. 4200
Tallahassee, Florida 32301
(850) 942-8818

