

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 13-117 (SRN)

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	GOVERNMENT'S SENTENCING
)	MEMORANDUM
V.)	
)	
DANA WILLIAM ASHEY,)	
)	
Defendant.)	

The United States of America, by and through its attorneys, John R. Marti, Acting United States Attorney for the District of Minnesota, and Andrew R. Winter, Assistant United States Attorney, submits this memorandum in connection with the sentencing of defendant Dana Ashey.

BACKGROUND

Ashey has pled guilty to one count of False Information and Hoaxes, in violation of Title 18, United States Code, Section 1038(a)(1). The conduct involved Ashey placing a series of phone calls on April 12, 2013, which relayed the false information that bombs were to detonate at the Mall of America and the Minneapolis/St. Paul International Airport. In his call to the airport, he stated "I have a bomb in the women's bathroom, the men's bathroom. You find it by three or it goes off." PSR, ¶ 7. In his call to the MOA, Ashey said, "I'm gonna blow up the building. If there is any survivors, they will be killed. Good-bye." PSR, ¶ 9. While making both of these bomb threats, the defendant mimicked a Middle-Eastern accent. Upon receiving these telephonic threats, law enforcement responded immediately. The following description of the investigation is gleaned from the police reports generated in this investigation.

MSP International Airport Police Department Response

At 2:40 AM on April 12th, three APD officers immediately fanned out and began visually checking all restrooms on the unsecured side of the security checkpoints at Terminal 1 of the Minneapolis/St. Paul International Airport. After this was completed, two officers checked the restrooms on the secured side of the checkpoints. According to the police reports, 4 officers from the Transportation Security Administration (TSA) assisted in checking restrooms on 4 of the main concourses at Terminal 1. At 3:20 AM, a K-9 officer arrived at Terminal 1 and began searching the baggage claim areas. At 3:45 AM, a second K-9 officer arrived and began searching Terminal 2. The searches continued with the K-9 officers until 6:00 AM.

By 8:15 AM, the Minneapolis Airport Commissions Telecommunications Specialist had located a phone number for CenturyLink to conduct a search through their telephone switches. By 9:15 AM, law enforcement had compared the audio files from the airport threat to the MOA threat and had discerned that that caller was one in the same. By noon, CenturyLink provided the phone number used to place the threats to the airport. Law enforcement then worked back from the subscriber information obtained to identify Dennis Ashey, the defendant's father.

Mall of America (MOA) Response

At 2:42 AM on April 12, the MOA received the defendant's threat to detonate a bomb in a restroom of the MOA. The number used by the defendant was blocked. By 2:50 AM, all MOA staff were instructed to stay out of the restrooms and a systematic check of each restroom on MOA property was begun by security personnel. Senior Management Staff were notified of this situation and they, in turn, activated the MOA standing Emergency Action Plan. The search of the restrooms continued until 4:30 AM. During this time, a K-9 officer, patrol and other security personnel also began a sweep of the "Nickelodeon Universe," located within the MOA. As a

result of the efforts of the Airport Police in identifying a possible suspect, MOA security were provided a photograph of the defendant for possible identification. At 3:30 PM, MOA security located the defendant in the north food court at the mall.

The PSR calculated a total offense level of 13. PSR, ¶ 29. At criminal history category IV, Ashley's guideline range would be 24 to 30 months imprisonment. The Government concurs with this guidelines analysis and seeks a sentence within this range.

A. Specific Offense Characteristic

The PSR found a 4-level increase under guideline section 2A6.1 applicable to the facts in this case. See PSR, ¶ 21. This specific offense characteristic contemplates an increase where there was "a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense." See U.S.S.G. §2A6.1(b)(4)(B). The PSR correctly noted that the law enforcement agencies involved spent \$6,752 in responding to Ashley's criminal conduct. PSR, ¶ 13. The defendant does not dispute the underlying facts of the offense nor does he challenge the accuracy of the expenditures documented by law enforcement.

The nearly \$7000 amount involved in this case was indeed significant and justifies a 4-level increase under §2A6.1(b)(4)(B). Multiple agencies spent this money and time responding to hoax calls placed to arguably two of the most sensitive public spaces in the State of Minnesota. Nine officers from the Airport Police Department were required to respond to the defendant's actions costing the department over \$3000. Two FBI agents were utilized for nearly \$1000 in costs. The Mall of America Security Department and Bloomington Police employed 12 patrol officers, an intelligence analyst, a K-9 handler, and a behavior detection officer and others for a total of \$2,630 in expenses. All of this to respond to the threats of immediate explosions which could reasonably have involved mass casualties. What this case does *not* present is one in which

a single threat is made against an ordinary and less-sensitive place of public use which would naturally require a smaller law enforcement response. For example, a bomb threat against a bus station, regional airport or strip mall would, by nature, not require the response as seen in this case. In other words, not all hoax cases will require nearly \$7000 to respond to and secure ***both*** an extraordinarily large shopping mall and an international airport.

Absent a bright line in the guidelines or case law as to what is “substantial,” a sentencing judge is allowed to examine the unique facts and circumstances of the particular case. Setting Ashley’s case apart from the ordinary – and thus making the application of the 4-level increase appropriate – is the fact that his hoax calls were directed at two separate but both highly sensitive places of public use which demanded an immediate and significant law enforcement response. This will not always be the case in a hoax prosecution because not all hoax cases involve facilities that are as large or as sensitive as the two threatened here by the defendant.

B. Upward Variance

If this Court does not apply the 4-level enhancement at issue, the government maintains that a term of imprisonment between 24 and 30 months is indeed the reasonable and appropriate sentence and can be achieved by an upward variance from the advisory guidelines range.

The Court must determine what constitutes a reasonable sentence as guided by the factors of Title 18, United States Code, Section 3553(a). As a first step, the Court must determine the applicable Sentencing Guidelines. Although the Guidelines are advisory, the Court must “remain cognizant of them throughout the sentencing process.” Gall v. United States, 552 U.S. 38, 50 n.6 (2007). Indeed, a court may “rest [its] decision upon the Commission’s own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case’ if the court finds that the case before it is typical.” United States v. Robinson,

516 F.3d 716, 718 (8th Cir. 2008) (quoting Rita v. United States, 551 U.S. 338, 357 (2007)). In addition to considering the Guidelines, Section 3553(a) requires the Court to analyze a number of factors, including the nature and circumstances of the offense, the history and circumstances of the defendant, the need for the sentence to reflect the seriousness of the offense, the need for deterrence, the need to protect the public from further crimes of the defendant, and the need to avoid unwarranted disparities. 18 U.S.C. § 3553(a).

1. Need to Protect the Public from Further Crimes of the Defendant

The need to protect the public from further crimes of the defendant is evident from his recent record in the criminal justice system. Since the age of 18, he has been prolific in terms of serious criminal conduct and the responses from the state courts have done little to stem the tide of serious criminal behavior. Both the leniency shown by the state courts in Ashe's prior felony offenses and the pattern of his similar misconduct are bases upon which this Court can rest a decision to vary upward from the guidelines. See United States v. Gonzalez, 573 F.3d at 606-07 and United States v. Shillingstad, 632 F.3d 1031, 1037 (8th Cir. 2011) respectively. In 2009 in Somerset County Superior Court, ME, Ashe was given a suspended sentence for a felony conviction involving a stolen vehicle. See PSR ¶ 36. Similarly, a judge in Kennebec County Superior Court in Augusta, ME saw fit to sentence Ashe to probation and a suspended prison sentence in 2010 for two felony convictions once again involving a vehicle. See PSR ¶ 38. The defendant even threatened a female victim in 2009 (see PSR ¶ 35) and received little punishment for this conduct. Further, while serving a sentence in Connecticut for using a motor vehicle without the owner's permission in 2010, Ashe assaulted an employee of the correctional facility and for this conduct, he was simply moved into punitive segregation for 15 days. See PSR ¶ 37.

2. The Characteristics of the Defendant

The defendant has struggled with mental and chemical health issues over the years and is open to psychiatric and substance abuse treatment as part of his sentence. A sentence of 24 to 30 months will aid in assuring that Ashey addresses – if he chooses - this component of his repeated and serious criminal behavior.

3. Seriousness of the Offense

There can be no understating the seriousness of the offense conduct involved in the case at bar. The defendant's actions were designed to strike fear into the minds of those charged with the safety of large numbers of vulnerable citizens. Ashey knew that a bomb threat delivered in a Middle Eastern accent to both an international airport and one of the largest shopping malls in the world would trigger an immediate and significant response. But for remarkably efficient and professional efforts by law enforcement and security personnel, the incident was efficiently brought to a close. For that, however, Ashey deserves no credit.

Particularly disturbing of the defendant's crime is the notion that while responding to his fake crisis, those resources were unavailable to respond to a real one. The defendant's conduct here had the perverbial effect of letting the air out of the tires of the squad cars responsible for reacting to actual emergencies. While someone in real need of help suffers, the law enforcement resources are rendered useless.

4. Need for Deterrence

A sentence between 24 and 30 months is required in order to provide adequate deterrence to other individuals who would contemplate such a crime. It is too simple an act to pick up a cell phone and place a hoax call, the likes of which engage multiple agencies and dozens of officers. A prison sentence that is stern but fair can help deter others from committing like crimes which ultimately allows for law enforcement and security personnel to respond to *real* emergencies.

CONCLUSION

The nature and circumstances of the offense, the need for the sentence to reflect the seriousness of the offense, and the need to afford adequate deterrence to such crimes are not adequately accounted for by a sentence of 10-15 months. Rather, a sentence of 24-30 months appropriately balances the nature and circumstances of the offense, Ashey's criminal history, and his characteristics. Such a sentence would serve the needs of sentencing to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offenses, afford adequate deterrence, protect the public from further crimes of Defendant, and avoid unwarranted sentencing disparities among defendants.

For the foregoing reasons, the Government respectfully requests a sentence between 24 and 30 months.

Dated: November 8, 2013

Respectfully Submitted,

JOHN R. MARTI
Acting United States Attorney

s/ Andrew R. Winter

BY: ANDREW R. WINTER
Assistant U.S. Attorney