No. 05-1562 cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES,

Plaintiff-Appellant

v.

JAMES A. RATTOBALLI,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES

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l. Error In Failure To Impose Imprisonment

The district court recognized that Rattoballi committed "substantial crimes" (A-180) for which the Guidelines would normally call for 27 to 33 months' imprisonment. A-174-175. Nonetheless, in a non-Guidelines sentence, it imposed no imprisonment, because of what it apparently considered unique factors in this case justifying such leniency. A-181-183. The district court erred, because some of the factors it relied on are impermissible and because others, though permissible, suffered yet other infirmities. Defendant's brief fails to justify the sentence, and indeed makes no serious attempt to defend most of the improper factors on which the district court relied.

a. While a judge post-Booker[1] may impose a non-Guidelines sentence, it is unreasonable to rest such a sentence in whole or in part on impermissible factors. United States v. Godding, 405 F.3d 125 (2d Cir. 2005) (per curiam). In Godding, the Guidelines called for imprisonment of 24 to 30 months for the defendant's bank embezzlement, but the court imposed a non-Guidelines sentence of no imprisonment, relying in part on the bank's failure to detect and prevent the embezzlement. In remanding the case for resentencing, this Court ruled that the bank's inadequacy in this regard was an impermissible sentencing factor under

[1] United States v. Booker, 125 S. Ct. 738 (2005).

post-Booker "reasonableness" review. Id. at 126-127.

In this case, as in Godding, the district court rested its leniency on impermissible factors.

First, the court justified its sentence on the ground that the defendant stood convicted of the crimes charged, and conviction itself was "not without meaning as far as punishment." A-181. While conviction alone may be sufficient punishment for minor offenses that result in Guidelines sentencing ranges that begin with zero months of imprisonment, it cannot justify leniency for one who, as the district court conceded, has committed "substantial crimes" (A-180), because it is not unique to Rattoballi or his circumstances. Rather, it is true of every defendant to be sentenced, for without a conviction, there cannot be a sentence.

Second, the court relied on the fact that the defendant pled guilty and thus "did not force the government to go to trial." A-181. By definition, a defendant's guilty plea means that the government is not forced to try him; this reasoning therefore applies to every defendant who pleads guilty, and cannot justify leniency specially for Rattoballi.

Third, the court relied on the pendency of these proceedings "hanging over [Rattoballi] for a period of three years." A-181. This too was impermissible. Proceedings of this sort involving multiple defendants, some pleading guilty and

some insisting on a trial, are common and often protracted. Once again, there is nothing here to set Rattoballi apart from vast numbers of other similarly situated criminals. Moreover, as the district court recognized, part of the reason why the proceedings hung over him for so long is that, contrary to the terms of his plea bargain, he failed fully to cooperate with the government and he obstructed the investigation by lying to prosecutors about the full extent of his involvement and the involvement of others. A-160, 165, 167, 181.[2]

Finally, the court excused Rattoballi from serving a prison sentence to "assist" him in earning money so that he could pay restitution. A-183 ("Maybe he can sell a home or something, but mainly it will assist greatly in the restitution picture if [he] continues to earn money"). Restitution cannot be a substitute for prison for a convicted felon, 18 U.S.C. 3663A(a)(1); United States v. Rivera, 994 F.2d 942, 955-56 (1st Cir. 1993) (Breyer, J.),[3] particularly where, as here,

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[2] Defendant makes no attempt to defend the court's reasoning on these three impermissible factors and instead claims that the sentence is supported by his admitted lack of criminal history and evidence of his good character. Deft. Br. 25. The court did not rest the sentence on these factors.

[3] The defendant's effort to dismiss this part of Judge Breyer's rationale in Rivera is unpersuasive. Thus, while Rivera was a pre-Booker Guidelines departure case (Deft. Br. 23), it remains relevant here because it speaks to the 3553(a) factors that are relevant in all sentencing cases. Moreover, 18 U.S.C. 3663A(a)(1), which requires an order of restitution "in addition to . . . any other penalty authorized by law" (emphasis added), also applies in all sentencing contexts. And

Rattoballi himself has conceded to some "modest wealth," A-66, and has various means of paying restitution from his assets, his business, or his prison wages. See U.S. Br. 31-32 (government's opening brief).

b. By itself, the district court's erroneous reliance on these factors requires a new sentencing free from consideration of impermissible concerns. Godding, supra. The district court further erred, however, in determining that the defendant should not be incarcerated based on a consideration that the defendant did not advance and that the United States did not have an opportunity to address. Rattoballi never made the claim that incarceration "would absolutely end [his] business" (A-182); the record evidence does not support it; and the United States did not have an adequate chance to explore the issue at the sentencing hearing. U.S. Br. 28-31. When as here a court chooses a sentence radically below that recommended by the Guidelines, it must conduct its decisionmaking with particular care. Otherwise, the continuing importance of the Guidelines emphasized by Booker, 125 S. Ct. at 767, and United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005), will be wrongly diminished. Indeed, 18 U.S.C.

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while Rattoballi cites dicta from United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005) (Deft. Br. 27), in that non-Guidelines case, which did not involve restitution, the court did impose a term of imprisonment, because imprisonment was required to "promote respect for the law." Id. at 991.

3553(c)(2) imposes on courts the additional requirement of a "specific" written explanation for sentences that are "outside the [Guidelines] range." See also Godding, 405 F.3d at 127 (expressing concern "that the brevity of the term of imprisonment imposed . . . does not reflect the magnitude of the theft," and emphasizing that the sentence must "reflect the seriousness of the offense" and other section 3553(a) factors). Since there will have to be a new sentencing hearing in any event, see pp. 1-4, supra, at that hearing the government should be allowed a fair opportunity to develop and present contrary evidence on this issue.

Similarly, because the district court abdicated its duty of reasoned decision-making when it failed to impose any prison term on the premise that Rattoballi was less culpable than Mitchell Mosallem, a co-conspirator who received a 70-month prison sentence (A-164, 182), the issue should be remanded for reconsideration. Neither the government nor the probation office had recommended that Rattoballi be treated as sternly as Mosallem. And even Rattoballi himself says that he should be treated similarly to another co-conspirator with a "similar record[]" and "found guilty of similar conduct," who was sentenced to 15 months in prison by another judge. Deft. Br. 35.[4]

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[4] In fact, the defendant sentenced to 15 months was far less culpable in the fraud than Rattoballi. See A-163. Moreover, the defendant who received a sentence of probation from Judge Griesa (see Deft. Br. 35) was an 82 year-old man

2. Error In Failure To Impose A Fine

The district court's finding that Rattoballi had the "inability to pay" a fine (A-192) is clearly erroneous. Defendant conceded to the trial court that he "had accumulated some modest wealth" and was fully capable of paying a "modest fine," in addition to paying "restitution for which Mr. Rattoballi is responsible." A- 66. In fact, defendant admitted to assets well over $l million, A-66, and the court found that Rattoballi had substantial assets to pay $155,000 in restitution. A-183. Nevertheless, the court did not impose even the minimum Guidelines fine of $20,000. See U.S. Br. 38-39.

The defendant's efforts to defend the mistaken finding with a reason the court itself never mentioned (the court's supposed desire not to hamper Rattoballi's ability to pay restitution, Deft. Br. 21), is unsound. It is plainly the court's obligation under 18 U.S.C. 3553(c) to state its reasons for the sentence, and a clearly erroneous reason cannot be saved by post-hoc rationalization of defendant's counsel. Moreover, defendant's explanation cannot be squared with the facts in the record, which show that Rattoballi can pay both restitution and a fine. A-66.

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whose heroin-addicted son required the defendant's personal attention and support to keep from relapsing. A-163-64.

CONCLUSION

The sentence should be vacated and the case remanded for resentencing.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

l. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1502 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of October 2005 I served two copies of the accompanying Reply Brief for the United States, by overnight express mail on:

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