U.S. Department of Justice

Antitrust Division

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April 21, 2005

Mr. Thomas K. Kahn, Clerk
U.S. Court of Appeals for the
Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303-6147

Attn: Regina Veals-Gillis

Re: United States v. Triplett, No. 03-14099

Dear Mr. Kahn:

In response to your Memorandum of April 5, 2005, this letter addresses the application of the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005) to this case.

l. Triplett did not raise a Sixth Amendment objection – or any other constitutional or legal objection based on the issues addressed by the Supreme Court in *Booker*, or *Blakely v. Washington*, 124 S. Ct. 2531 (2004) – either in the district court or in this Court on appeal of his conviction and sentence. Nor did Triplett dispute any of the underlying facts on which his sentence rested. Rather, he argued only that the district court had committed legal error in applying the Sentencing Guidelines to facts that he had admitted. *See, e.g.*, Triplett Ct. App. Br. at 7-8 (Summary of Argument).

This Court affirmed Triplett's conviction and sentence in a *per curiam* decision on February 25, 2004. Triplett petitioned for rehearing, but again did not raise any *Booker/Blakely* claim. This Court denied the petition for rehearing on April 26, 2004.

Triplett filed a petition for a writ of certiorari on July 22, 2004, in which he raised as an

issue for the first time "[w]hether or not judicial enhancements pursuant to the United States Sentencing Guidelines constitute a denial of the Sixth Amendment right to trial by jury." Cert. Pet. at i. The petition for certiorari claimed that, because the district court had applied sentence enhancements under the guidelines based on facts not found by the jury beyond a reasonable doubt, there was a violation of *Blakely v. Washington*. Cert. Pet. at 22-23.[1]

2. a. This Court should summarily reinstate its prior decision affirming Triplett's conviction and sentence because Triplett waived any *Booker/Blakely* claim. Triplett never raised a *Booker/Blakely* issue in the district court, and he did not raise it in this Court at any time during his prior appeal. Thus, the claim is untimely. *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005) (*per curiam*) (defendant could not raise a *Booker* claim that had not been raised in his briefs on appeal of the district court decision); *see also United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004), *modified on other grounds*, 400 F.3d 1334 (11th Cir. 2005) (*per curiam*) (refusing supplemental briefing on *Blakely* when claim was not previously raised in appellate briefs); *United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001) (*per curiam*) (*Apprendi*[2] issue, raised for first time in petition for certiorari, was, under this Court's "clear precedent . . . not properly raised . . . in his direct appeal," and was thus "deemed abandoned"); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (*Apprendi* issue abandoned when not raised in initial brief).

Contrary to Triplett's contention, April 15, 2005 Letter Brief ("LB") at 4-5, the Supreme Court's remand of this case "in light of *Booker*" does not require this Court to order a new

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[1] In fact, even in the Supreme Court, Triplett's so-called *Blakely* argument was based primarily on a claim that the district court had erred in finding "lost profits" to be "economic loss," cert. pet. 23-28, rather than a Sixth Amendment claim.

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

sentencing hearing. The Supreme Court expressly said in *Booker* that not "every appeal will lead to a new sentencing hearing," because the Court "expect[ed] reviewing courts to apply ordinary prudential doctrines." 125 S. Ct. at 769. Indeed, in *United States v. Ardley*, 242 F.3d 989 (11th Cir.) (*per curiam*), *cert. denied*, 533 U.S. 962 (2001), this Court held that "[i]n the absence of any requirement to the contrary in either *Apprendi* or in the order remanding this case to us [from the Supreme Court in light of *Apprendi*], we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned." *Ardley*, 242 F.3d at 990. After *Booker* was decided, *Dockery*, following *Ardley*, concluded that, because "[i]n the initial brief in this case, Appellant likewise asserted no such *Apprendi* (or its progeny) challenge to his sentence . . . we reinstate our previous opinion in this case and affirm, once again, Appellant's sentence after our reconsideration in light of *Booker*, pursuant to the Supreme Court's mandate." *Dockery*, 401 F.3d at 1263.

As in *Dockery*, Triplett did not raise a timely *Booker/Blakely* claim, and his sentence should be reinstated.

b. In any event, Triplett is wrong in claiming that his sentence "violated the Sixth Amendment" and *Booker* because "it was not based upon facts admitted by him or found by a jury." LB at 7. In fact, Triplett admitted the facts relied on by the district court in imposing sentence.

Specifically, Triplett testified at trial and at sentencing, and, each time, he essentially admitted all of the facts on which his conviction and sentence were based, including the amount of loss that was used to calculate the offense level using the Fraud Guideline. *See, e.g.*, R121:37, 39 ("I have no quibble with the support of the Court's finding of those figures"), 40-41, 46-47 (objection to fraud is a "legal objection"). For example, he admitted his conduct caused his

employer to pay more for nuclear valves than it would have, but claimed that lost profits do not legally constitute economic harm, and, without such harm, he could not have committed fraud or be liable for restitution. *Id.* at 44, 46-47. He also claimed "abuse of trust" is a specific offense characteristic of fraud and cannot serve as a separate enhancement under U.S.S.G. §3B1.3 (*id.* at 19-21); that conduct of others in the conspiracy did not qualify them as "participants" within the meaning of the U.S.S.G. §3B1.1 (*id.*); that similar schemes to which he admitted had to be part of the "same offense" to qualify for the "relevant conduct" enhancement under U.S.S.G. §1B1.3 (*id.* at 29-37); and that his destruction of documents and comments he admittedly made in tape-recorded conversations with co-conspirators did not constitute "obstruction" under U.S.S.G. §3C1.1 (*id.* at 21-28). *See also* LB at 10 (admitting facts but contesting court's interpretation of the relevant conduct guideline). Triplett does not provide a single record citation to support the claim that his sentence rested on disputed facts or facts "not admitted," and there can be no error in imposing enhancements based on facts admitted by the defendant. *Shelton*, 400 F.3d at 1329; *Duncan*, 400 F.3d at 1304.

c. Even if Triplett had not admitted the facts the district court relied on at sentencing and had raised a *Booker/Blakely* issue "in a timely manner on appeal," this Court's review would be "limited to plain error." *Curtis*, 400 F.3d at 1335; 380 F.3d 1311 n.2; *see also, e.g., United States v. Dowling*, F.3d , 2005 WL 658938 at *4 (11th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1301 (11th Cir. 2005); *United States v. Shelton*, 400 F.3d 1325, 1328 (11th Cir. 2005) (applying plain error test where *Booker/Blakely* claim was not raised in district court, but was raised on appeal of conviction and sentence to this Court).[3] There was no plain

[3] Triplett's claim that *Dockery* failed to follow *Duncan* in applying the plain error test (LB. at 8, n.6), ignores the fact that, in *Duncan*, the defendant had raised a *Blakely* claim in his briefs to this Court, something that both Dockery and Triplett failed to do.

error in this case.

The plain error test gives a court "discretion to correct an error . . . where (1) an error occurred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Duncan*, 400 F.3d at 1301, citing *United States v. Olano*, 507 U.S. 725, 732-36 (1993). The court "may not correct an error the defendant failed to raise . . . unless" all four conditions are met. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005), *rehearing en banc denied*, ___ F.3d ___, 2005 WL 895174 (April 19, 2005). Moreover, even if the sentencing court makes factual findings not supported by the jury's verdict or the defendant's admissions, that, by itself, does not establish plain error. Rather, as this Court explained in *Rodriguez*, 398 F.3d at 1301:

> the constitutional error whose prejudicial measure we take is not the use of extra-verdict enhancements. Their use remains a constitutional part of guidelines sentencing in the post-*Booker* era. The constitutional error is the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge.

See also, *Booker*, 125 S. Ct. at 750 (Stevens, J.); *id.* at 764 (Breyer, J.).

In its post-*Booker* decisions, this Court has held that the district court's application of the guidelines as mandatory, rather than advisory, satisfies the first two prongs of plain error analysis. *Duncan*, 400 F.3d at 1304; *Rodriguez*, 398 F.3d at 1298-99. But that does not end the inquiry.

To satisfy the third prong, the burden is on the defendant to show that the error affected his substantial rights. *E.g.*, *Duncan*, 400 F.3d at 1302, *Rodriguez*, 398 F.3d at 1301. "[W]here the effect of an error on the result in the district court is uncertain or indeterminate – where we would have to speculate – the appellant . . . has not met his burden of showing that his substantial rights have been affected." *Rodriguez*, 398 F.3d at 1301; *accord*, *Duncan*, 400 F.3d

at 1303-04. Triplett must show that there is "a reasonable probability that if the district court had considered the guidelines range it arrived at using extra-verdict enhancements as merely advisory, instead of mandatory, *and had taken into account any otherwise unconsidered § 3553 factors*, the court would have imposed a lesser sentence than it did." *Rodriguez*, 398 F.3d at 1302 (emphasis added); *accord*, *Duncan* 400 F.3d at 1302.

Indeed, in *Booker*, the Supreme Court emphasized that the sentencing court must continue to consult and give due consideration to the Sentencing Guidelines under 18 U.S.C. § 3553(a)(1), and that the remaining factors in section 3553(a) of the Sentencing Reform Act, 18 U.S.C. § 3553(a), also "remain[] in effect" to "guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." 125 S. Ct. at 766. These additional § 3553(a) factors include the need for respect for the law, just punishment, and adequate deterrence (§ 3553(a)(2)); and the need to avoid unwarranted sentence disparities among defendants found guilty of similar conduct (§ 3553(a)(6)). Thus, Triplett must not only show that the court would have sentenced below the guidelines level, but "*[i]n addition, and importantly too*," Triplett must establish "a reasonable probability that some sentence below the guidelines range would be permissible and reasonable in light of *Booker* and the § 3553(a) factors." *Shelton*, 400 F.3d at 1333 (emphasis added). Triplett cannot make either part of this showing.

Triplett has failed to show that his sentence would have been below the guidelines range if the court had considered the guidelines to be advisory. The district court said at sentencing that, "so the family and the friends will understand, the Congress and the President have passed Sentencing Guidelines for judges to follow. In this particular case, it's required that I sentence him to no less than 51 months." R121:57. This statement is not a basis for finding the third prong satisfied. "[T]he third prong takes something more than showing the district court

sentenced within the Guidelines range and felt bound to do so, especially given that the Guidelines range remains an important factor in sentencing." *Shelton*, 400 F.3d at 1332. The court did not express any disagreement with the guideline enhancements it applied,[4] or say that it would have given Triplett a lesser sentence if it had the discretion to do so. To the contrary, the court found numerous grounds for imposing guideline enhancements, and it refused Triplett's request for a downward departure (R121:50). It found that Triplett had obstructed justice by destroying documents and attempting to influence witnesses (R121:23, 25-28); was a leader/organizer (R121:18-19); abused a position of trust (R121:21); and committed similar related acts of fraud – so his offense of conviction was not an isolated instance. R121:35-37.

Although the court sentenced Triplett at the bottom end of the resulting guidelines offense level (R121:60), the court gave no indication when it did so that it considered the sentence unjustly high. Nor did the court express any belief that Triplett was unique or that his circumstances were so exceptional as to warrant special treatment in sentencing under other section 3553(a) factors. The court did not indicate that the sentence was too strict, that it was not merited by defendant's conduct, or that it was "more" than appropriate. *Compare Shelton*, 400 F.3d at 1332-33.[5] To the contrary, the court said that it "set[] the sentence at the bottom of the

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[4] With respect to the obstruction enhancement, the court did state its disagreement with the guidelines, saying that "if I had written these sentencing guidelines, I don't know that I would have held it against a fellow so much getting on the stand denying his guilt." As a result, the court chose to base the obstruction enhancement on "destruction of the documents, and the conversations [Triplett had] with the witnesses during the time, [but] not necessarily [Triplett's] testimony on the witness stand." R121:28. Thus, the only time the district court expressed disagreement with the guidelines' use of a given fact to enhance the sentence, it did not rest the enhancement on that ground. If the court had disagreed with any other applicable guidelines provision, it presumably would have said so.

[5] In *Shelton*, the district court "indicated an express desire to impose a sentence lesser than the low end of the Guidelines range." 400 F.3d at 1333-34. The court also had "expressed several times its view that the sentence required by the Guidelines was too severe, and noted that

guideline range because the Court believes that is *sufficient punishment* for the defendant's involvement in the instant offense *and meets the sentencing goals of punishment and general deterrence*." R121:60 (emphasis added). This shows that the court properly took all of the section 3553 sentencing factors, including punishment and deterrence, into account. The court said that "I can understand how you got into this in the years that you worked for Pratt Company and then felt like that Pratt Company had not treated you correctly at the end." R121:57. "But I still believe from listening to the evidence that you knew what you were doing in this. You knew it was not the right thing to do." *Id.* "I consider it somewhat a tragedy for you and your family to wind up in this position at the end of your career. But nevertheless, it's my duty to impose a sentence pursuant to the guidelines, and pursuant to the Sentencing Reform Act of 1984." R121:58. Following *Booker*, a court still has a duty to impose a sentence "pursuant to the guidelines, and pursuant to the Sentencing Reform Act of 1984." *See Booker*, 125 S. Ct. at 766. And Triplett has not even attempted to show that a sentence below the guidelines level, even if the district court *had* wanted to impose it, would "be permissible and reasonable in light of *Booker* and the § 3553(a) factors." *Shelton*, 400 F.3d at 1333.

Finally, even if Triplett could satisfy the third prong of plain error, he could not satisfy

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'unfortunately' Shelton's criminal history category under the Guidelines was based on his past charges rather than on the actual nature of the crimes as reflected in the sentences imposed in those cases." *Id.* at 1332. The court also said that the lowest sentence permitted by the guidelines was "more than appropriate." *Id.* at 1332. Together, this demonstrated that the sentencing court would have imposed a lesser sentence if it had not felt bound by the guidelines, thus warranting a remand. *Id.* at 1332-33. But the remand was for the district court to determine *whether or not it should resentence*. As this Court cautioned, "[a]lthough the district court's comments convince us that on remand the district court will sentence below the range indicated by the Guidelines, we do not know exactly what sentence it will impose after consulting the § 3553(a) factors. Until we find out, we will not attempt to decide whether a particular sentence below the Guidelines range might be reasonable in this case. If there is an appeal of the actual post-remand sentence which raises that issue, we can decide it then." *Id.* at 1333 n.11.

the fourth prong. "A plain error affecting substantial rights does not, without more, satisfy the plain-error test, for otherwise the fourth prong and the discretion afforded by the fourth prong would be illusory." *Shelton*, 400 F.3d at 1333. When the first three prongs are satisfied, this Court "'may then exercise its discretion to notice a forfeited error, *but only if* (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Shelton*, 400 F.3d at 1329, quoting *United States v. Cotton*, 535 U.S. 625, 631 (2002) (emphasis added). The discretionary fourth component of plain error restricts the class of plain errors that may be noticed to those that are "particularly egregious," and discretion "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Young*, 470 U.S. 1, 15 (1985) (quotations and citation omitted); *United States v. Gonzalez-Huerta*, 2005 WL 807008, at *7 (10th Cir. 2005) (*en banc*). Triplett has made no effort to satisfy the fourth prong of plain error. He merely quotes the standard, without attempting to show that he meets it. And he relies (LB at 13-14) on cases from other circuits, such as *United States v. Milan*, 398 F.3d 445, 452 (6th Cir. 2005), which this Court has expressly refused to follow. *See Duncan*, 400 F.3d at 1305-06; *Rodriguez*, 398 F.3d at 1301-06. The law of this Circuit controls the outcome of this case.

In this case, the district court sentenced Triplett within the guidelines pursuant to the factors required to be considered by 18 U.S.C. § 3553 and the Supreme Court's decision in *Booker*. Moreover, Triplett has failed to show that his sentence seriously affects the integrity of public proceedings. Accordingly, resentencing is unwarranted.[6]

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[6] As Judge Easterbrook said, dissenting in *United States v. Messino*, 382 F.3d 704, 715 (7th Cir. 2004), "It would be weird to hold that a sentencing process used since 1987 with the Supreme Court's approbation (*see, e.g., Edwards v. United States*, 523 U.S. 511 (1998)), plus the support of all federal circuits even after *Apprendi*, now must be deemed so unreliable that it undermines the fairness, integrity, and public reputation of judicial proceedings."

The Court should reinstate its prior decision affirming Triplett's conviction and sentence.

Sincerely,

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