



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

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GILMAN, J., delivered the opinion of the court, in which KEITH, J., joined. KENNEDY, J. (pp. 12-15), delivered a separate Dissenting opinion.

OPINION

Eddie D. Jeter appeals from the sentence he received after pleading guilty to various federal offenses. He argues that the district court erred in denying him a three-level sentence reduction for acceptance of responsibility. For the reasons set forth below, we AFFIRM the decision of the district court.

I. BACKGROUND

On November 13, 1997, a grand jury in the Western District of Tennessee returned eight separate indictments against Jeter. The charges against him in the various indictments included conspiracy to commit offenses against the United States in violation of 18 U.S.C. § 371, bank fraud in violation of 18 U.S.C. § 1344, fraudulent use of a Social Security number for the purpose of obtaining bank loans and other forms of credit in violation of 42 U.S.C. § 408(a)(7)(B), fraudulent receipt of Social Security benefits in violation of 42 U.S.C. § 408(a)(4), and money laundering in violation of 18 U.S.C. § 1956 (a)(1)(B)(i).

Pursuant to identical written plea agreements, Jeter pled guilty to at least one count of each indictment on February 24, 1998. Included in the agreements was the government's promise not to oppose Jeter's request for a three-level sentence reduction for acceptance of responsibility pursuant to § 3E1.1 of the United States Sentencing Guidelines (the "U.S.S.G.").

The Probation Office's Presentence Investigation Report calculated Jeter's adjusted offense level at 25, with a Criminal History Category of I and a sentencing range of 57 to 71 months. A reduction for acceptance of responsibility was not recommended in the report. The report based its denial upon



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

the fact that Jeter, after being arrested on June 21, 1996 on state charges for fraudulent loan transactions and indicted in October of that year, engaged in similar conduct on at least three subsequent occasions. Jeter objected to the report's failure to recommend this reduction. Although he admits that he continued to engage in similar criminal conduct after his arrest and indictment on the state charges, Jeter contends that the report should have awarded him a three-level sentence reduction for acceptance of responsibility based on his 1998 federal guilty pleas and his subsequent cooperation with the government.

Despite the government's lack of opposition, the district court accepted the report's recommendation and refused to award Jeter a reduction for acceptance of responsibility. It sentenced Jeter to serve a total of 60 months of imprisonment, five years of supervised release, and ordered him to pay restitution in the amount of \$345,225.54. The only issue raised by Jeter on appeal is the district court's refusal to award him a three-level sentence reduction for acceptance of responsibility.

II. ANALYSIS

A. Standard of review

Application Note 5 to U.S.S.G. § 3E1.1 explains that "[t]he sentencing Judge is in a unique position to evaluate a defendant's acceptance of responsibility[,] and the sentencing Judge's determination is therefore "entitled to great deference on review." Generally, the district court's Conclusion that a defendant is not entitled to an adjustment for acceptance of responsibility is considered a question of fact that "'normally enjoys the protection of the clearly erroneous standard, and will not be overturned unless it is without foundation.'" *United States v. Childers*, 86 F.3d 562, 563 (6th Cir. 1996) (quoting *United States v. Morrison*, 983 F.2d 730, 732 (6th Cir. 1993)). We engage in a de novo review, however, when, as in the instant case, "the only issue presented is the propriety of the application of the adjustment to uncontested facts, as this presents a question of law." *Childers*, 86 F.3d at 563.

B. U.S.S.G. § 3E1.1

Section 3E1.1(a) of the U.S.S.G. provides that the sentencing Judge should decrease a defendant's offense level by two levels if the defendant "clearly demonstrates acceptance of responsibility." Application Note 3 to § 3E1.1 instructs that the "[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction . . . will constitute significant evidence of acceptance of responsibility" Such evidence, however, "may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." U.S.S.G. § 3E1.1 note 3. Simply pleading guilty, therefore, does not entitle the defendant to a sentencing adjustment "as a matter of right." See *id.*

Application Note 1 to § 3E1.1 lists eight factors that a district court may consider in determining the appropriateness of an adjustment. Among the pertinent considerations are "truthfully admitting the



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

conduct comprising the offense(s) of conviction," "voluntary termination or withdrawal from criminal conduct or associations," and "the timeliness of the defendant's conduct manifesting the acceptance of responsibility." U.S.S.G. § 3E1.1 note 1(a), (b), & (h).

The defendant is entitled to an additional one-level decrease if (1) he qualifies for the two-level decrease, (2) prior to that decrease his offense level is Level 16 or greater, and (3) he "assisted authorities in the investigation or prosecution of his own misconduct by . . ." either "timely providing complete information to the government concerning his own involvement in the offense" or "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently[.]" U.S.S.G. § 3E1.1(b).

C. The district court did not err in refusing to adjust Jeter's sentence for acceptance of responsibility

Both the Presentence Investigation Report and the district court cited *United States v. Childers*, 86 F.3d 562 (6th Cir. 1996), in support of their Conclusion that Jeter's continuing engagement in fraudulent loan transactions after he was arrested on similar state charges in June of 1996 and indicted in October of that year precluded a finding that he had "clearly demonstrate[d] acceptance of responsibility." In *Childers*, this court stated as follows:

"It is well-established that the "voluntary termination or withdrawal" factor means that criminal conduct that continues following an acceptance of responsibility, especially when the conduct is of the same type as or related to the underlying offense, is a significant consideration that will, in almost every instance, make a downward adjustment inappropriate." *Id.* at 563-64 (emphasis added).

In light of Jeter's repeated criminal activity following his arrest and indictment on similar state charges, the district court reasoned that *Childers* was instructive because Jeter "did not voluntarily terminate or withdraw from criminal conduct after he was aware of -- even after he was aware of the fact that his conduct was by some, at least, in part detected."

Relying upon the emphasized portion of the above quotation, Jeter contends that *Childers* is inapplicable because he did not continue to engage in criminal conduct once he pled guilty to the federal charges. Because *Childers* involved a defendant who continued to engage in criminal conduct after he had confessed, it is understandable how Jeter would perceive his case to be distinguishable.

A more recent case from this circuit, however, has extended *Childers* to a situation much closer to Jeter's. In *United States v. Bennett*, 170 F.3d 632 (6th Cir. 1999), the defendant was indicted on federal drug charges in June of 1996 and then released on bond. While out on bond, he was subsequently arrested in Tennessee for drug offenses before the federal trial occurred. The Bennett defendant, citing *Childers*, contended that because the Tennessee-based drug offenses preceded his federal trial, such conduct could not be considered as criminal activity that continued after an acceptance of



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

responsibility. See *id.* He submitted that because "the occasion on which he fully accepted responsibility for the crimes charged in Counts 1-5 of the indictment [his federal court trial] did not take place until . . . more than three months later [than his arrest in Tennessee] . . .[,]" his conduct underlying the Tennessee offenses should not have been used to negate his later acceptance of responsibility. See *id.* at 640-41 (second set of brackets in original). This court rejected his argument, stating as follows:

"The defendant's position fails to appreciate that the district court is not bound to accept what the defendant declares is the appropriate date of acceptance of responsibility. Rather, the sentencing Judge's charge is to decide whether the defendant demonstrates a clear acceptance of responsibility. U.S.S.G. § 3E1.1(a). The court rightfully decided that defendant's subsequent criminal conduct did not adequately demonstrate the requisite acceptance of responsibility." *Id.* at 641.

Unlike the defendant in *Bennett*, Jeter pled guilty before his trial ensued, thus saving the government time and money. Furthermore, unlike the defendant in *Childers*, Jeter did not proceed to act inconsistently once he admitted guilt to the federal charges. This case therefore presents a novel fact pattern that requires us to further interpret § 3E1.1 beyond this court's current precedents.

Application Note 1(b) to § 3E1.1 provides that the district court, in determining whether a defendant qualifies for a reduction under § 3E1.1(a), may consider the defendant's "voluntary termination or withdrawal from criminal conduct or associations." As stated previously, the district court viewed Jeter's continued engagement in fraudulent loan transactions after his state arrest for similar offenses as inconsistent with the acceptance of responsibility. We are thus faced with the following issue: In determining whether a defendant has voluntarily terminated or withdrawn from criminal conduct, should the inquiry begin (1) when the federal indictment is returned, (2) only after the defendant verbally accepts responsibility for the federal charge at issue, or (3) after an arrest and indictment, be it state or federal, for criminal conduct that is similar to the instant federal offense? We find that neither the language of § 3E1.1 nor its commentary provides an answer to this question.

Existing case law is also of little assistance. Most cases that discuss the "voluntary termination" factor involve situations in which the criminal conduct follows the defendant's verbal acceptance of responsibility. See, e.g., *United States v. Byrd*, 76 F.3d 194, 196-97 (8th Cir. 1996) (upholding the denial of a reduction for acceptance of responsibility where the defendant pled guilty, but then used marijuana while awaiting a sentence for assault with a dangerous weapon); *United States v. McDonald*, 22 F.3d 139, 144 (7th Cir. 1994) (affirming the denial of an acceptance of responsibility reduction where the defendant pled guilty, but then used cocaine while awaiting sentencing for counterfeiting); *United States v. Morrison*, 983 F.2d 730, 735 (6th Cir. 1993) (vacating the sentence because the district court denied the reduction where the defendant pled guilty to receipt and possession of a firearm by a felon, but then engaged in unrelated criminal conduct while out on bond).

We have found only three cases that come close to addressing the district court's power to consider



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

criminal conduct that occurs prior to the defendant's verbal acceptance of responsibility for the federal offense in relation to the § 3E1.1 reduction. The first is *United States v. Bennett*, 170 F.3d 632 (6th Cir. 1999), which we have previously cited. In *Bennett*, the court was faced with a defendant who continued to engage in similar criminal conduct after his federal indictment, and then attempted to accept responsibility very late in the game (after his conviction by the jury). Thus, when the *Bennett* court stated that "the district court is not bound to accept what the defendant declares is the appropriate date of acceptance of responsibility[.]" it clearly had the lack of timeliness of defendant's acceptance in mind. See *id.* at 641. Upon those facts, it makes perfect sense to hold that the district court did not err in finding that the defendant had failed to show a "clear acceptance of responsibility." The impact of *Bennett* on the present case is problematic because Jeter's criminal conduct preceded his federal indictment, he pled guilty prior to his federal trial, and he provided assistance to the government.

The second relevant case is an unpublished Fourth Circuit opinion in *United States v. Miller*, 61 F.3d 901, 1995 WL 428055 (4th Cir. July 12, 1995). While incarcerated pending his federal trial for conspiracy to possess heroin with intent to distribute, one of Miller's visitors brought him a small amount of marijuana. See *id.* at *2. At the same time, he was in the process of actively seeking a plea agreement. The court held that "[e]ven though the incident occurred before Miller's guilty plea, we cannot say the district court clearly erred in finding that Miller demonstrated a disregard for the law just at the time he was attempting to negotiate a plea agreement, and in so doing showed that he had not accepted responsibility for his criminal conduct." *Id.* Although *Miller* is instructive, its facts are distinguishable in that the relevant conduct in Jeter's case occurred before his federal indictment was returned.

Finally, the Second Circuit in *United States v. Rodriguez*, 928 F.2d 65 (2d Cir. 1991), was confronted with a defendant who pled guilty to cocaine violations that he committed while out on bail in connection with a prior indictment for cocaine violations. In denying a reduction for acceptance of responsibility, the district court considered the criminal activity that had preceded Rodriguez's guilty plea to the federal offense at issue. The Second Circuit vacated the sentence, emphasizing the following:

"As several courts have ruled, the fact that a defendant commits a second crime after pleading guilty and while awaiting sentencing for a first offense is a relevant consideration in denying the acceptance of responsibility adjustment in selecting the sentence for that first offense. The second crime refutes the disavowal of future criminal activity implied by the guilty plea to the first crime. But Rodriguez was sentenced for his second crime, and no criminal activity followed his plea to that offense that could provide a basis for doubting his intention, at the time of that plea, to withdraw from criminal activity." *Id.* at 67 (internal citations omitted).

Although the Second Circuit remanded the case for resentencing because the district court may have improperly used the prior criminal conduct in refusing to grant the requested reduction, it explicitly



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

gave the district court an opportunity to exercise its discretion in determining whether to grant or deny the acceptance of responsibility adjustment. See *id.* at 68. The Rodriguez opinion held that the district Judge could deny the reduction if based upon a factual finding that "the plea to the second crime was not to be understood as a good faith renunciation of future criminal activity in view of the defendant's committing a second offense while on release from the first offense[,] but he could not, as he may have, reject the adjustment because the defendant had been shown not to have disavowed criminal conduct in connection with his court appearance for the first crime." *Id.* at 67. In so doing, the court acknowledged that "[t]he distinction is a fine one," but nonetheless one that might have been critical in the case before it. See *id.*

Rodriguez is the most analogous of the three cases, and the only one lending a degree of support to Jeter's argument that the court below inappropriately considered his criminal conduct preceding his guilty plea. We are of the opinion, however, that the Second Circuit's formulation is too fine a distinction to be workable.

The sentencing guidelines, after all, were created to provide guidance to district court Judges who must apply them in practice. In this case, the guidelines, even though quite detailed, do not answer the question of whether a district court is permitted to consider criminal conduct that precedes a defendant's guilty plea in evaluating the genuineness of the defendant's verbal acceptance of responsibility at a later time. The existence of the "voluntary termination" factor, however, evidences the guidelines' intent that the district court should have the power to determine whether a defendant's "actions speak louder than his words." That is exactly what the district court did in this case. We conclude that once Jeter was arrested and indicted on state charges for fraudulent loan transactions and knew that "the jig was up," his continuing to engage in similar conduct was a factor that the district court could properly consider among the many factors that are relevant to the question of whether he had clearly demonstrated an acceptance of responsibility.

In so holding, we would emphasize that the commentary to § 3E1.1 explicitly provides eight factors that a district court may consider in determining whether a defendant qualifies for the "acceptance of responsibility" reduction. The commentary also states that the district court is not limited to the listed factors. Thus, in concluding that the court below did not err in applying the guidelines to the facts of this case, we do not wish to imply that, in other cases involving different facts, the sentencing Judge would be restricted from viewing the other factors as outweighing the dispositive factor in the case before us.

In sum, although we acknowledge Jeter's guilty plea to the instant federal offenses and his assistance to the government, we find that the district court did not improperly apply the guidelines when it concluded that Jeter's continuing criminal conduct following his arrest and indictment on similar state charges was both inconsistent with his subsequent verbalization of guilt and did not "clearly demonstrate[] acceptance of responsibility." See U.S.S.G. § 3E.1.1(a).



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

III. CONCLUSION

For all of the reasons set forth above, the decision of the district court is **AFFIRMED**.

DISSENT

KENNEDY, Circuit Judge, Dissenting. While I agree that this case presents a new challenge for this court, I cannot agree with my colleagues that the district court may use Jeter's preindictment state crimes as a basis for denying him a reduction for acceptance of responsibility on the federal charges. Because I believe that the defendant at least must be on notice that the federal government has an interest in his or her affairs before § 3E1.1 comes into play, I respectfully Dissent.

Unlike the majority, I do not believe that district courts should have unbridled discretion in determining the time period for acceptance of responsibility. The panel's opinion today would allow a district court to deny a sentencing reduction for acceptance of responsibility based on any similar state crimes that a defendant committed prior to the federal charges. Consequently, any defendant who has a prior record of similar crimes would be at risk of having the district court deny a reduction for acceptance of responsibility, even if the defendant has pled guilty early in the proceedings and cooperated with the government throughout the federal investigation. Such an approach could deter defendants from pleading guilty and encourage them to take their cases to trial, a position contrary to the underlying purpose of reducing unnecessary trials and conserving resources. See *Corbitt v. New Jersey*, 439 U.S. 212, 222-23 (1978) (plea bargaining system is mutually beneficial to the defendant and the government); *Brady v. United States*, 397 U.S. 742, 753 (1970) (affirming the validity of benefitting a defendant who accepts responsibility by entering a guilty plea). Although district courts need a great deal of discretion when making sentencing determinations, the result today will lead to inconsistent sentences, with different courts accepting various events as triggering the critical date for evaluating acceptance of responsibility.

As the majority points out, § 3E1.1 of the United States Sentencing Guidelines ("U.S.S.G.") provides for a two or three level reduction in a defendant's sentence if the defendant "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). The Commentary to § 3E1.1 provides:

"Entry of a plea of guilty prior to the commencement of the trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 . . . will constitute significant evidence of acceptance of responsibility for the purposes of subsection(a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." U.S.S.G. § 3E1.1, app. note 3.

Our case law interpreting this provision has granted the district courts leeway when making determinations under this sentencing guideline. See *United States v. Bennett*, 170 F.3d 632 (6th Cir.



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

1999); *United States v. Childers*, 86 F.3d 562 (6th Cir. 1996). I believe that this case, however, stretches our prior case law too far.

In *Childers*, postal inspectors questioned the defendant because they suspected him of stealing mail from collection boxes on at least four occasions. At the time the federal authorities first questioned the defendant about the thefts, he told the inspectors that he was sorry for his actions and was willing to make restitution. 86 F.3d at 563. After his confession, but before the initiation of any federal charges, the defendant was arrested and convicted of several similar state charges. *Id.* He later pled guilty to the federal charges and, at sentencing, the district court refused to give him a reduction for acceptance of responsibility because he had committed the state crimes after confessing to the postal inspectors. We held that in denying a reduction for acceptance of responsibility, the district court could consider defendant's continuing course of criminal conduct as "illuminating the sincerity, or lack thereof, of the defendant's claimed acceptance of responsibility." *Id.* at 564. Proved insincere when the crime was being investigated, the Judge could find his later claim of acceptance of responsibility equally insincere. *Id.*

In *Bennett*, the defendant did not plead guilty, but proceeded to trial. After conviction, he sought a reduction based on voluntary termination or withdrawal. 170 F.3d at 640; see also U.S.S.G. § 3E1.1, app. note 1(b). Since he had been committing similar state offenses after his arrest on federal charges but before his trial on those charges, the district court denied him a reduction for withdrawal from criminal activity. 170 F.3d at 640-41. We similarly rejected the defendant's argument that his federal trial should be the date from which to calculate his voluntary acceptance or withdrawal from criminal activity. *Id.* at 641. Instead, we determined that "the district court is not bound to accept what the defendant declares is the appropriate date of acceptance of responsibility." *Id.* We did not, however, further define when an acceptance of responsibility must occur to be rightfully accepted or rejected. Since the defendant went to trial, we did not have the circumstance of a guilty plea as substantial evidence of acceptance of responsibility which we have here under the Commentary.

Although neither *Childers* nor *Bennett* resolves the question before us, the two cases are distinguishable from the instant case and provide some useful guidance. Both cases concerned defendants who committed state offenses after their arrest or interrogation on federal charges. Unlike *Jeter*, *Childers* and *Bennett* were put on notice that they faced federal charges or were under suspicion by the federal government for their illegal activity prior to committing the state crimes. *Jeter* was indicted in October, 1996, on state charges and then continued to engage in similar fraudulent conduct on three occasions in November and December of 1996. There is no indication that *Jeter* had any knowledge that he would be federally prosecuted until the federal government issued an indictment on November 13, 1997. Accordingly, I would hold that the relevant time period for an acceptance of responsibility cannot begin until November 13, 1997, the date that federal authorities indicted *Jeter* and he became aware that he was subject to federal investigation and prosecution. Had *Jeter* confessed to federal authorities prior to the indictment or responded in some way to investigators to indicate his remorse or cessation of criminal activity like the defendant in



United States v. Jeter

183 F.3d 480 (1999) | Cited 1 times | Sixth Circuit | July 12, 1999

Childers, then I would agree with the majority. The facts of this case, however, present a much different situation and lead me to the opposite Conclusion.

Despite my hesitance to adopt a bright-line rule in the case of a guilty plea, I at least would require that there be some conduct that the court can find is inconsistent with that specific acceptance of responsibility referred to in the Commentary, namely the acceptance of the guilty plea. To be denied an acceptance of responsibility reduction for similar crimes committed before federal indictment without some specific finding that the crimes are inconsistent with that acceptance of responsibility is contrary to the Commentary, which favors a guilty plea as "significant evidence" of acceptance of responsibility unless defendant's inconsistent conduct outweighs that acceptance. U.S.S.G. § 3E1.1, app. note 3. It seems to me that to extend the denial of acceptance of responsibility reduction to mere similar criminal conduct before the defendant has been called to account on the federal charges is to penalize the defendant for a criminal Disposition, not because he has not accepted responsibility to the federally charged conduct.

For the stated reasons, I would REVERSE and REMAND to the district court for resentencing.

