United States v. Love

1991 | Cited 0 times | Ninth Circuit | March 6, 1991

MEMORANDUM

Appellant raises several challenges on appeal. First, appellant asserts the district court erred in concluding that it could not depart downward from the sentencing guidelines. Second, appellant objects to the district court's methodology in computing his criminal history category. Third, appellant argues that the sentencing guidelines' policy statement regarding drug addiction violates the Eighth Amendment. Finally, appellant asserts that the sentencing guidelines violate due process for failure to provide an individualized sentence.

Statement of Facts

On December 1, 1988, at approximately 4:00 p.m., appellant entered a Sanwa Bank of California in San Diego and placed a note on a teller's counter which read "I have a gun in my jacket. Give me all your twenties first." The teller, attempting to stall for time to activate the bank's alarm and surveillance cameras said, "You do?". Appellant said nothing but patted the left breast portion of his jacket with his right hand indicating that he did have a gun. [He was in fact unarmed.] Believing appellant had a gun, the teller opened her cash drawer and handed appellant approximately $679.00. Appellant took the money and headed for one of the exits in the bank.

Finding the door at the exit locked, appellant headed for a different door. As appellant did so, the teller pointed at appellant and yelled "Stop him, stop that guy." Appellant then bolted for the second door while customers in the bank ran after him. At about the same time, another employee of the bank, Claudia Lucas, attempted to hold the second door, which weighed approximately 300 pounds and was made of glass and metal, shut. Appellant then literally ran into Ms. Lucas and the door, knocking the door off its hinges and onto the floor, shattering it. As a result of the collision, Ms. Lucas sustained numerous scrapes and scratches, and an injury to her left arm which made it difficult for her to raise her arm above her shoulder for three months.

Appellant was captured shortly after his flight from the bank by the combined efforts of bank customers and a nearby police officer. When appellant was arrested he confessed to the robbery of the Sanwa bank and also said he had robbed another bank a few days earlier.

During the presentence interview appellant told the probation officer that approximately two weeks prior to the robbery of the Sanwa Bank he had been released from state prison on parole after serving two years and eight months in custody. Appellant explained that he became discouraged when he

could not find a job, and so began hanging out with his old friends, who began providing him with drugs. As a result, appellant relapsed into his $200 to $300 a day cocaine habit. Appellant told the probation officer he started robbing banks to support his habit. Appellant also acknowledged shattering the bank door when he fled the Sanwa robbery, but said he did not recall a female employee blocking his path.

The probation officer determined that the offense level applicable to appellant was 19 [Red Brief at 8]. Appellant did not challenge this computation. The probation officer then made a first determination of appellant's criminal history category, to which appellant filed objections. The objections prompted the officer to make some downward modifications, but the appellant filed two more sets of objections. The district court ultimately accepted the probation officer's final computation placing the appellant in category VI, with a guideline range of sixty-three to seventy-eight months. Appellant made several arguments for a downward departure, all of which the court rejected. The court sentenced appellant to sixty-three months, with three years supervised release, a 120-day residence in a community treatment center upon release, and restitution.

Discussion

I. Whether the district court erred by refusing to depart downward from the sentencing guidelines.

Appellant's first argument is that the district court improperly held that it did not have legal authority to give appellant a downward departure based on his alleged "reduced mental capacity" due to drug addiction.

This court does not have jurisdiction on appeal to review a district court's discretionary decision not to depart downward from the sentencing guidelines. United States v. Morales, 898 F.2d 99 (9th Cir. 1990).

In Morales, the Ninth Circuit joined the First, Second, Third, Sixth, Seventh, Eighth and Eleventh Circuits in holding that 18 U.S.C. § 3742 does not authorize an appeal of a district court's refusal to depart downward from an applicable guideline range.[1] See, e.g., United States v. Tucker, 892 F.2d 8, 11 (1st Cir. 1989); United States v. Colon, 884 F.2d 1550, 1552 (2nd Cir.), cert. denied, 110 S. Ct. 553 (1989); United States v. Denardi, 892 F.2d 269, 271-272 (3rd Cir. 1989); United States v. Draper, 888 F.2d 1100 (6th Cir. 1989); United States v. Franz, 886 F.2d 973, 978 (7th Cir. 1989); United States v. Evidente, 894 F.2d 1000 (8th Cir.), cert. denied, 110 S. Ct. 1956 (1990); United States v. Davis, 878 F.2d 1299, 1301 (11th Cir.), cert. denied, 110 S. Ct. 341 (1989).

However, the Morales court stated in a footnote that discretionary refusals to depart should be distinguished from instances in which a district court refuses to depart because it believes that 18 U.S.C. § 3553(b) prohibits departure.[2] Morales, 898 F.2d at 102,n.2. That is, if a district court believed it had the authority to depart downward but chose not to do so, that decision is not reviewable on

appeal. If, on the other hand, a district court believed it was legally barred from departing downward by the directives of § 3553(b), then that court's conclusion is reviewable on appeal. Id. Other circuits have made this same distinction. See United States v. Franz, 886 F.2d 973 (7th Cir. 1989) (there is appellate review of a sentencing court's erroneous conclusion that it did not have the power to depart); United States v. Medeiros, 884 F.2d 75, 77 (3rd Cir. 1989) (there is appellate jurisdiction when the "sentencing court erred in concluding that it did not have the power to deviate downward from the Guidelines").

The appellant argues the district court erroneously determined that it lacked the power to deviate downward from the guidelines. In support of his assertion, appellant cites the district court's statement at the sentencing hearing that "I really don't feel that there is any basis upon which I can legally depart below the guidelines." However, as is discussed below, the appellant's characterization of the court's remark is not borne out by a reading of the statement in context. In fact, the district court imposed a sentence it recognized as "appropriate" within the applicable guideline range.

The court, in refusing to grant appellant's request for a downward departure, stated:

I really don't feel that there's any basis upon which I can legally depart below the guidelines. I have picked and selected a mid-term guidelines sentence I feel that's really an appropriate sentence in this case, which could indicate, or should indicate to you, Mr. Love, that I feel there is some hope for you, and I really honestly hope that you can get off this drug dependency and straighten away your life and become a productive citizen. (emphasis added)

The court went on to state:

The court finds that the sentence imposed in this case is sufficient, but not greater than necessary to reflect the seriousness of the offense and to promote respect for the law, to afford adequate deterrence to criminal conduct and to protect the public from further crimes by the defendant. (emphasis added)

It is apparent the district court did not, as appellant urges, believe it lacked authority under § 3553(b) to depart downward from the guidelines, but rather believed that appellant did not qualify for a downward revision under the guidelines.[3]

II. Whether the district court erred in its consideration of three cases consolidated for sentencing when calculating the appellant's criminal history score.

Appellant next asserts that the district court improperly computed his criminal history category.

A district court's calculation of a defendant's criminal history category under the sentencing guidelines is reviewed de novo. United States v. Mackbee, 894 F.2d 1057 (9th Cir.), cert. denied, 110 S.

Ct. 2574 (1990). However, the findings of fact underlying a sentencing determination are reviewed for clear error. United States v. Wills, 881 F.2d 823 (9th Cir. 1989).

Appellant contends that three of his prior convictions which were scored separately for purposes of computing his criminal history category are "related cases" and should have been scored together.

Section 4A1.2, comment. (n.3) discusses the definition of "related cases" for purposes of criminal history computation.

Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances where this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history. . . For example, if the defendant commits a number of offenses on independent occasions separated by arrests, and the resulting cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either the seriousness of the defendant's criminal history or the frequency with which he commits crimes. . .

In this case, appellant asked the district court to consider three cases as "related"; namely, a 1984 conviction for receiving stolen property (Case Number C55430); a 1985 conviction for receiving stolen property (Case Number CR73388); and a 1986 conviction for robbery and taking a vehicle (Case Number CR77789). Appellant does not dispute that all of these cases arose out of separate arrests for separate crimes. Nor does appellant dispute that he was originally sentenced separately on each of these three counts.[4]

Appellant claims these cases are related because on March 6, 1986, his sentence in Case Number CR77789, was ordered to run concurrently both with the probation revocation sentence he received the same day in Case Number CR73388 and with the sentence he was serving for violating probation in Case Number C55430. However, as the probation officer noted in the district court, the appellant's probation revocation and his sentencing in Case Number C55430 took place almost a year earlier, on April 3, 1985.

Further, although appellant argues that the consolidation of his cases for sentencing upon revocation of his probation renders the cases "related," he nonetheless urges the court to consider only his original sentences, rather than the original sentences plus the additional sentences imposed upon his probation revocation. Thus, he contends that the district court should have awarded only two criminal history points for each of Case Number C55430 and Case Number CR73388. Appellant does not contest that he should have received three points for Case Number CR77789. Appellant concludes that he should have received, therefore, only seven criminal history points for these offenses under the guidelines, and not the nine awarded by the probation officer. Appellant reasons that since the original sentences in Case Numbers C55430 and CR73388 were initially under thirteen

months, he can only be scored two, and not three, points for each of these offenses, even though appellant ultimately served more than thirteen months in each of these cases when probation was revoked.

Appellant's argument must be rejected. Appellant's approach of arguing that the cases are "related", but of then scoring them separately does not comport with the guidelines. Under the guidelines related cases are generally scored as if they were a single offense. Section 4A1.2, comment. (n.3). Further, section § 4A1.2(k)(1) of the guidelines provides that when probation is revoked the sentence imposed upon a revocation shall be added to the original sentence imposed and the resulting total used to compute criminal history points. Therefore, the probation officer correctly determined that after adding the additional sentences imposed upon appellant for violation of probation in Cases CR73388 and C55430, the sentence in each case exceeded thirteen months, and under the guidelines, scored three points each. When added to the other three points for appellant's conviction in CR77789, the probation officer correctly determined the appellant's total criminal history score was nine. See United States v. Gross, 897 F.2d 414 (9th Cir. 1990).

III. Whether the guidelines policy statement regarding drug addiction violates the Eighth Amendment prohibition against cruel and unusual punishment.

Appellant argues that sentencing guidelines policy U.S.S.G. § 5H1.4 Statement is a "rejection of the disease concept relating to drug addiction" and "must be challenged since the policy violates the ban against cruel and unusual punishment set out in the Eighth Amendment to the . . . Constitution".

Whether a sentence is legal is an issue of law reviewed de novo. United States v. Pomazi, 851 F.2d 244, 247 (9th Cir. 1988). The Eighth Amendment's prohibition on cruel and unusual punishment forbids sentences which are disproportionate to the crime committed. United States v Kinsey, 843 F.2d 383, 392 (9th Cir.), cert. denied, 487 U.S. 1223 (1988). In evaluating Eighth Amendment claims, reviewing courts must grant substantial deference to the broad authority of the legislature to set punishments for crimes. Solem v. Helm, 463 U.S. 277, 290 (1983); United States v. Savinovitch, 845 F.2d 834, 840 (9th Cir.), cert. denied, 488 U.S. 943 (1988). Outside the context of capital punishment, successful challenges to the proportionality of sentences will be rare. United States v. Kidder, 869 F.2d 1328, 1333 (9th Cir. 1989), quoting Solem at 289-90.

A sentence within the statutory limits is not normally subject to appellate review, although this court may review constitutional concerns. United States v. Citro, 842 F.2d 1149, 1153 (9th Cir), cert. denied, 488 U.S. 866 (1988).

Appellant argues that because policy U.S.S.G. § 5H1.4 of the guidelines rejects "the disease concept relating to drug addiction" that policy "violates the ban against cruel and unusual punishment".[5] Appellant cites a variety of sources for the proposition that drug addiction is a disease. From this point the appellant concludes that "the Sentencing Commission ignored the realities of addiction in

its policy statements." Appellant points in particular to the Commission's statements that "mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the Guidelines," U.S.S.G. § 5H1.3,[6] and that "drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines." U.S.S.G. § 5H1.4 Appellant asks this court to rule that the Guidelines policy statement to ignore drug dependence as a reason for imposing a sentence below the guidelines is "wrong" (presumably meaning unconstitutional).

Appellant's Eighth Amendment challenge must be rejected. Appellant has simply failed to establish either that his sentence was so grossly disproportionate to the crime as to constitute cruel and unusual punishment, or that the methodology of the sentencing guidelines violates the Eighth Amendment.

Further, in reviewing Eighth Amendment claims, reviewing courts must grant substantial deference to the broad authority of the legislature to set punishments for crimes. Solem v. Helm, 463 U.S. 277, 290 (1983). Here, Congress has delegated to the Sentencing Commission the task of formulating sentencing guidelines to promote uniformity and proportionality in sentence.

In addition, U.S.S.G. § 5H1.3 and U.S.S.G. § 5H1.4 do not absolutely prohibit a sentencing court from considering a defendant's mental or physical condition. Those sections simply state that mental, emotional, and physical conditions "ordinarily" are not reasons for imposing a sentence outside the guidelines.

The appellee correctly points out that several recent cases have considered Eighth Amendment challenges to various aspects of the sentencing guidelines, and rejected them. See United States v. Buckner, 894 F.2d 975 (8th Cir. 1990) (distinction between cocaine and cocaine base under Guidelines U.S.S.G. § 2D1.1(a)(3) and 21 U.S.C. § 841(b) did not violate ban against cruel and unusual punishment under the Eighth Amendment); United States v Colbert, 894 F.2d 373 (10th Cir.), cert. denied, 110 S. Ct. 2601 (1990) (sentencing guidelines for distribution of cocaine did not violate the Eighth Amendment's prohibition against cruel and unusual punishment); United States v. Francois, 889 F.2d 1341 (4th Cir. 1989), cert. denied, 110 S. Ct. 1822 (1990) (sentence which was within the Guidelines and within maximum range provided by statute was not a violation of Eighth Amendment prohibition against cruel and unusual punishment).

Appellant's Eighth Amendment challenge to the sentencing guidelines must be rejected.

IV. Whether the Guidelines violate due process for failure to provide an individualized sentence.

Appellant lastly argues that the sentencing guidelines violate due process by infringing on a defendant's right to an individualized sentence. The Ninth Circuit has recently joined ten other circuits in rejecting this due process challenge. United States v. Brady, 895 F.2d 538 (9th Cir. 1990). Therefore appellant's argument must be rejected.

Conclusion

The sentence of the district court is AFFIRMED.

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

1. 18 U.S.C. § 3742(a) provides: A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence -- (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than the sentence specified in the applicable guidelines range. . .; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

2. Section 3553(b) provides, in pertinent part: The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds there exists an aggravating or mitigating circumstance, of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different than that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. (emphasis added)

3. Appellant also argues that the district court erred in finding it could not consider appellant's efforts to avoid drugs as a basis to depart downward from the guidelines. However, the record makes it clear that the district court felt that appellant did not qualify for a downward departure under the guidelines. Since this discretionary decision of the district court is not reviewable, it is not necessary at this time for this court to reach the question of whether a downward departure would be permissible if a drug addict were seriously attempting to cure his condition.

4. In Case Number C55430 appellant was sentenced on August 20, 1984; in Case Number CR73388 he was sentenced on May 8, 1985; and in Case Number CR77789 he was sentenced on March 6, 1986.

5. Section 5H1.4 Physical Condition, Including Drug Dependence and Alcohol Abuse Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, any extraordinary physical impairment may be a reason to impose a sentence other than imprisonment. Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program. If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program. This provision would also apply in cases where the defendant received a sentence of probation. The substance abuse condition is strongly recommend and the length of probation should be adjusted accordingly. Failure to comply would normally result in revocation of probation.

6. Section 5H1.3. Mental and Emotional Conditions (Policy Statement) Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in the general

provisions of Chapter Five. Mental and emotional conditions, whether mitigating or aggravating, may be relevant in determining the length and conditions of probation or supervised release.