

In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 09-2972

Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL ROBERT JONES,

Appellant.

Appeal from the United States District Court for the
District of Minnesota

BRIEF OF APPELLANT

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Paul Jones pled guilty to assault resulting in serious injury. At sentencing he sought a sentence of 51 months, the bottom of his advisory guideline range of 51 to 63 months. The District Court sentenced Mr. Jones to 82 months, an upward departure from his guideline range, on grounds of criminal history inadequacy. Mr. Jones appeals that sentence and maintains that the District Court erred by using his criminal tribal record as its basis for the upward departure, and maintains that the sentence was greater than necessary to achieve the purposes of sentencing under 18 U.S.C. § 3553(a).

Mr. Jones seeks ten minutes in which to present oral argument to the Court.

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PRELIMINARY STATEMENT

The Honorable Joan Ericksen, United States District Judge for the District of Minnesota, presided at Mr. Jones' guilty plea and sentencing. The government invoked the jurisdiction of the District Court pursuant to 18 U.S.C. §3231.

The District Court entered its judgment on August 10, 2009. Mr. Jones filed notice of appeal on August 14, 2009. This notice was timely within the meaning of Federal Rule of Appellate Procedure 4(b). Mr. Jones invokes the jurisdiction of this Court pursuant to 18 U.S.C. §3742 and 28 U.S.C. §1291.

STATEMENT OF ISSUES

I.

THE 82 MONTH SENTENCE IMPOSED UPON MR. JONES WAS IMPROPER BECAUSE THE DISTRICT COURT GAVE TOO MUCH WEIGHT TO INDESCRIBED TRIBAL CONVICTIONS AND FAILED TO ADEQUATELY CONSIDER THE INDIVIDUAL CHARACTERISTICS OF THE DEFENDANT AND THUS IMPOSED A SENTENCE GREATER THAN WAS NECESSARY TO COMPLY WITH THE PURPOSES OF SENTENCING.

Gall v. United States, 552 U.S. 38, 128 S.Ct. 586 (2007)

United States v. Bain, 537 F.3d 876 (8th Cir. 2008)

18 U.S.C. § 3553(a)

STATEMENT OF THE CASE

Mr. Jones was charged by complaint with an assault resulting in serious injury on December 16, 2008. Following his detention hearing in federal district court on December 22, 2008, the court, *sue sponte*, ordered Mr. Jones committed for a psychiatric and competency evaluation. (Docket#6). The court ordered examination concluded that he was competent. (Docket # 16).

On May 18, 2009, Paul Jones pled guilty to assault resulting in serious injury, in violation of 18 U.S.C. §113(a)(6), 18 U.S.C. §1151, and 18 U.S.C. § 1153(a). At the change of plea hearing, Mr. Jones acknowledged that he was guilty of assaulting his ex-wife, R.S., although he told the court that he had no recollection of doing this. As part of the sentencing process, the probation department conducted a presentence investigation which he cooperated with and was interviewed about his background. The PSR was relied upon by the District Court at sentencing and its factual findings were adopted by the district at the time of sentencing.

Following a sentencing hearing, the court determined that the advisory guideline range for the offense was 51 to 63 months, based on a total offense level of 22 and a criminal history category of III. The defense asked for a 51 month sentence at the bottom of the guideline range, and the government asked for a

sentence of 100 months. The court sentenced Mr. Jones to 82 months, and cited at the sentencing and in its “Statement of Reasons,” criminal history inadequacy for its primary reason because his criminal history score did not reflect his tribal court record. This appeal followed.

STATEMENT OF FACTS

Paul Jones is a 35 year old Red Lake Indian who has a history of mental illness and alcohol problems. He has lived in Red Lake all his life. His parents were never married, and both of parents were severe alcoholics. His father was abusive towards his mother. When he was five, he and his brother Michael were taken in by his grandparents, and he was raised by his grandparents for the next several years. He moved back into his parents house at age twelve, and began demonstrating behavioral issues and getting into trouble. He began having truancy problems, was placed at various juvenile facilities and quit school in ninth grade. Around this same time he began using drugs and alcohol on a regular basis, including ingesting inhalants. He was committed to the custody of the Department of Corrections when he was only 16. (PSR, pp. 10-13).

At an early age, Mr. Jones was diagnosed as suffering from depression. His first of several suicide attempts occurred when he was twelve. The PSR noted several previous suicide attempts, his most recent incident following his arrest for

the current offense, and the history of treatment since his arrest and imprisonment. (PSR, pp. 12-13).

On the night of November 26, 2008, Mr. Jones entered the home of his estranged wife, R.S., by going through a bedroom window. They were separated at the time, and she had an order for protection against him for a previous domestic dispute. He stabbed her numerous times while she was in her bed, laying down with their five year old son. She sustained lacerations to her face, right breast, right hand and left arm which required sutures and surgery. (PSR, ¶¶ 5-9).

Mr. Jones left the residence before the police arrived and was arrested about a week later. After being arrested on these charges in Red Lake tribal court, Jones tried to commit suicide by hanging himself in the Red Lake jail. (PSR ¶ 61). He was discovered unconscious and was rushed to the Mesabi Medical Facility in Hibbing, where he was hospitalized for the next several weeks. He complained that he suffered from auditory hallucinations. The diagnosis of the doctors there was that he suffered from paranoid schizophrenia and major depressive disorder with psychotic features. They implemented a regimen of strong anti-psychotic drugs, including injections of Haldol, a strong anti-psychotic medicine, as well as depakote, congentin and mirtazapine. (¶61). This was the first time in his life that he has been put on a regular anti-psychotic drug regimen.

Following his guilty plea, Mr. Jones cooperated with the probation office in the preparation of the PSR. The PSR determined his overall offense level to be 22 and calculated his criminal history as level III, resulting in a guideline range of 51-63 months. His criminal history was based on a felony assault from 1995 and a motor vehicle theft from 1999, resulting in six total criminal history points. (PSR, pp. 7-8). The PSR also noted several Red Lake tribal court convictions, including an “assault on an officer” from 1998 (6 months jail), receiving stolen property from 1999 (90 days jail), and child endangerment from 2004 (fine and community service). The PSR contained no description of what took place in any of these cases other than the tribal court record of charge and disposition. (PSR. pp. 9-10, ¶¶ 41, 42, 45). The PSR appropriately noted that tribal court convictions are not counted in determining criminal history. (PSR, ¶ 35).

As part of the sentencing process, Mr. Jones submitted a personal statement for the PSR which outlined his acceptance of responsibility for the course of events which led to his guilty plea and conviction in the case:

I am very sorry for what I did to Becky and I apologize for hurting her so. I am ashamed that I did this. Even though I have no recollection of doing this horrible act, I know that I am responsible for the things I do. I accept full responsibility for this assault, and it hurts me to know that I inflicted such pain and suffering on her. She did not deserve this and I hope that maybe one day she might forgive me. I hope that I can get some help while in prison, and the medication I am

taking now is helping me quite a bit. I am sorry for what I did and I plan on following the treatment and mental health plan that is put in place for me so that nothing like this ever happens again.

(PSR ¶ 12).

The defendant also submitted a detailed sentencing memorandum which outlined the defendant's position with respect to his sentencing. (Docket No. 44). The defendant's sentencing memorandum discussed the aspects of Mr. Jones individual characteristics under 18 U.S.C. §3553(a) that the defendant thought were important for the Court to take into consideration at sentencing:

Upon application of the sentencing factors in 18 U.S.C. §3553(a), the defense maintains that a sentence of 51 months is appropriate in this case. As observed at the change of plea hearing and as noted in the statement Mr. Jones provided to the probation office for the PSR, he accepts full responsibility for what he did, and he seeks help. As the Court may recall from the change of plea hearing, Mr. Jones has no recollection of what occurred. He has not used his lack of recollection as an excuse nor has he ever attempted to minimize the seriousness or significance of what happened. It is indeed a frightening and daunting realization for him to realize that he committed this horrible act, and his lack of recollection has only furthered his personal commitment to seek the necessary treatment and change in his life so that nothing like this ever happens again. He did this to a person who he loves and who is the mother of his children, and despite whatever difficulties they may have had the past, he knows that in no way did she deserve this. His actions are indeed frightening to himself, and his remorse was so great that he tried to take his own life. This is a gentleman who is truly very sorry and remorseful. (Position on Sentencing memorandum, at 1-2).

The defense further maintained:

[I]t is submitted that it is incumbent on the Court to consider the facts and circumstances of Mr. Jones' life before it decides what constitutes a just sentence. Mr. Jones has learned his lesson and has started the difficult process of trying to fix himself. He recognizes the need for real drug treatment and maintaining a commitment to sobriety. He recognizes that he suffers from identifiable mental illness and that he must adhere to the prescribed drug program. The drugs that he is taking are helping immensely, and he feels the benefits of the medication and realizes that it is up to him to be responsible for maintaining sobriety and a commitment to taking prescription drugs as a way of life.

Paul Jones is not a bad person. He is good father. He wants help and for one of the few times in years he feels that there is a future worth living and that he can rise to the challenges of daily living, control his behavior, and stop doing bad things that hurt other people and land himself in prison. He asks for forgiveness and a second chance. Taking into consideration the factors under 18 U.S.C. §3553(a), a sentence of 51 months is appropriate and reasonable in this case. (Position Paper at 10-11).

At sentencing, the Court heard from victim R.S., and she discussed the extent of the injuries she suffered and discussed the harm that Mr. Jones had caused over the course of their relationship. (T. 4-9). In his elocution, Mr. Jones stated:

I'd like to apologize to my ex-wife and my children first. My parents, I'd like to ask forgiveness that they understand that what I did was wrong. . . . I'd like to ask for forgiveness today. I understand what I did was wrong. If it wasn't for my mental health, drinking and drug related and anger problems, it would not have took place.

This has been a really awakening hell for me because I'm dealing with why I think about what I did was wrong. That for all

these persons that I let down I just pray and hope that the court takes into consideration my children need me, so that I can get back out there and become a better father and a parent and a member of the community. (T. 19-20).

The defense asked for a sentence of 51 months, the bottom of the guideline range, noting Mr. Jones' true remorse, his improvement following the regimen of mental health drugs that he had been placed on since his suicide attempt the previous December, and argued that this was a person in need of mental health treatment, not imprisonment. (T. 10-14). The government asked for 100 months, citing the brutality of the crime, the fact it occurred in front of their five year old, the history of their relationship, as well as the adequacy of his criminal history. (T.14-19).

The court sentenced Mr. Jones to 82 months stating that his criminal history category of III was not an adequate reflection of his criminal history due to uncounted tribal convictions:

I conclude that your history is more significant than is reflected in those numbers is part because you have an extensive tribal history, and a lot of those things wouldn't count anyway; they're either too old or they're not the kind of thing that would count.

Some of them appear to be things that had they not been tribal offenses would have added to your numbers. For example, the assault of an officer, the receiving stolen property and the child endangerment, so I'm not going to do an exact calculation. If they added, say, two for the first two and one for the child endangerment, your guidelines would be 77 to 96 months, but we can't take that as an

exact calculation because they were in tribal court, they weren't in state or federal court, and so that correspondence isn't exact. But what is certain is that your criminal history is more significant than your points indicate.

(T. 20-21). In its sentencing order, the Court's "Statement of Reasons" checked the box entitled "Criminal History Inadequacy" as the only basis for its above guideline range sentence. This appeal followed.

SUMMARY OF ARGUMENT

Paul Jones pled guilty to assault involving serious injury. At sentencing, he sought a sentence of 51 months, the bottom of his guideline range of 51-63 months. The District Court sentenced Mr. Jones to 82 months, above the top of his guideline range, citing criminal history inadequacy. The District Court committed procedural error by over weighting unscored and undefined tribal convictions noted in the PSR, and abused its discretion by giving insufficient weight to the individual characteristics of Mr. Jones and thus imposed a sentence greater than necessary for the purposes of sentencing set forth in 18 U.S.C. §3553(a).

ARGUMENT

I. THE 82 MONTH SENTENCE IMPOSED UPON MR. JONES WAS IMPROPER BECAUSE THE DISTRICT COURT GAVE TOO MUCH WEIGHT TO INDESCRIBED TRIBAL CONVICTIONS AND FAILED TO ADEQUATELY CONSIDER THE INDIVIDUAL CHARACTERISTICS OF THE DEFENDANT AND THUS IMPOSED A SENTENCE GREATER THAN WAS NECESSARY TO COMPLY WITH THE PURPOSES OF SENTENCING.

A. Standard of review.

When a criminal defendant challenges his sentence, this Court must review that sentence for an abuse of discretion. Gall v. United States, 552 U.S. 38, 51, 128 S.Ct. 586, 596 (2007). A sentencing court abuses its discretion when it (1) fails to consider a relevant factor that should have received significant weight; (2) gives great weight to an irrelevant or improper factor; or (3) commits a “clear error in judgment” as it is weighing the appropriate factors. See United States v. Haack, 403 F.3d 997, 1003 (8th Cir. 2005) (quoting Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984)). The Eighth Circuit recently summarized its standard of reviewing sentences:

[When] reviewing a sentence, this Court must “first ensure that the District Court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors,

selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range.” Gall v. United States, ___ U.S. ___, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007). “If the decision was ‘procedurally sound,’ we then review the ‘substantive reasonableness of the sentence’ under the abuse-of-discretion standard considering the totality of the circumstances.” *880 United States v. Alvizo-Trujillo, 521 F.3d 1015, 1017 (8th Cir. 2008), citing Gall, 128 S.Ct. at 597.

United States v. Bain, 537 F.3d 876, 879 (8th Cir. 2008).

B. Legal Analysis

The Supreme Court has explored the role of the United Sentencing Guidelines following its landmark decision from United States v. Booker, 543 U.S. 220 (2005). In all instances, a District Court must follow the dictates of 18 U.S.C. §3553(a) in imposing sentence.

Title 18 U.S.C. §3553(a) states in relevant part:

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentence available;

(4) the kinds of sentence and the sentence range established (by the guidelines) . . .

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines. . . ;

(5) any pertinent policy statement (in the guidelines). . . ;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

See 18 U.S.C. §3553(a).

Since the landmark decision of Gall v. United States, 552 U.S. 51, 128 S. Ct. 586 (2007), the Courts have continued to develop and clarify the standard applicable to review of sentences on appeal. A reviewing Court must consider “both the procedural soundness of the District Court’s decision and the substantive reasonableness of the sentence imposed.” United States v. Bear Robe, 521 F.3d

909, 910 (8th Cir. 2008). The second part of this assessment, for substantive reasonableness, is reviewed for an abuse of discretion. Id. ; Gall, 552 U.S. at 51; 128 S. Ct. at 597.

Mr. Jones maintains that the court erred by placing too much emphasis on ill-defined tribal convictions that did not score points in his criminal history. Those offenses were old and minor, and these tribal convictions lack the procedural guarantees of due process necessary for them to be used against a defendant. There were no facts described in the PSR as to whether any of these incidents were serious, yet the court treated them as such. For instance, the court arbitrarily assigned one point for a “child endangerment” incident for which a sentence of community service was imposed. The court also arbitrarily assigned two points for an assault on an officer and receiving stolen property which were not otherwise described. By doing so, the court effectively counted these convictions against him, and arbitrarily raised his criminal history to category V, resulting in a guideline range of 77 - 96 months, then sentenced him about midway at 82 months. Such logic skewers the court’s 3553(a) analysis and the use of tribal convictions in this fashion is inappropriate.

In addition, Mr. Jones maintains that the District Court abused its discretion because the Court failed to give weight to the individual characteristics of the

defendant. In fact, it seems that the Court gave little consideration to the significant benefits that Mr. Jones had derived from the course of mental health treatment that he had undertaken since the assault, and ignored anything positive that was presented on his behalf. Instead, the Court focused on what negative information it had available about him and his offense. Accordingly, the District Court gave little to no consideration to the “history and characteristics” of the defendant as required under 18 U.S.C. §3553(a)(1). Specifically, the District Court gave no little weight to his unique cultural circumstances, including the difficulties of his youth, and his ongoing mental health struggles. Although strongly mitigating facts were presented in Mr. Jones sentencing position, in the PSR, in his acceptance of responsibility statement in the PSR, and through his statements at the sentencing hearing, the District Court ignored much about Mr. Jones true remorse and commitment to rehabilitation in its sentencing.

In sum, the Court abused its discretion, improperly relied on and gave too much weight to undescribed tribal convictions, improperly sentenced above the high end of the guidelines range, and imposed an unreasonable sentence. The resulting sentence of 82 months was greater than necessary to accomplish the goals of sentencing, and the case should be reversed with instructions for resentencing with instructions that the court assign less weight to tribal convictions and give fair

weight to the individual circumstances of Mr. Jones, including his remorse, mental health issues, and rehabilitation.

CONCLUSION

For the foregoing reasons, Mr. Jones seeks remand for resentencing with instructions for the Court to fully apply the criterion of 18 U.S.C. §3553(a), giving less weight to his tribal record and due regard to the relevant individual characteristics of the defendant.

Dated: November 9, 2009

Respectfully submitted,

s/ Douglas Olson

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Appellee,)	
)	CERTIFICATE OF COMPLIANCE AND
v.)	OF VIRUS FREE DISK
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PAUL ROBERT JONES,)	
)	
Appellant.)	

I hereby certify that the Brief of Appellant filed in contains 3,312 words, excluding the table of contents, table of citations, statements with respect to oral argument, preliminary statement, statement of issues, addendum and certificates of counsel and service, as counted by the word-processing system (WordPerfect 11) used to generate the brief. The brief otherwise complies with the type-volume limitations set forth in F.R.A.P. 32(a)(7)(B) and (C)(Dec. 1, 1998) and Eighth Circuit Rule 28A(c).

I also certify that the floppy disks forwarded to the court and opposing counsel have been scanned for viruses and are virus free.

Dated: November 9, 2009

Respectfully submitted,

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ADDENDUM