

*No. 09-2972*

*Criminal*

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*In the*

*UNITED STATES COURT OF APPEALS*

*For the Eighth Circuit*

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*UNITED STATES OF AMERICA,*

*APPELLEE,*

*v.*

*PAUL ROBERT JONES,*

*APPELLANT.*

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*Appeal from the United States District Court for the*

*District of Minnesota*

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*BRIEF OF APPELLEE*

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**SUMMARY OF THE CASE**

Paul Robert Jones' sentence of eighty-two months was reasonable. The district court properly considered the § 3553(a) factors in arriving at the decision that a sentence above the guidelines range was warranted. The district court did not err in concluding that Jones' criminal history was underrepresented.

**STATEMENT REGARDING ORAL ARGUMENT**

The United States does not believe that oral argument is necessary to resolve the legal issue presented in this appeal. The briefs and entire sentencing record adequately present the facts and the legal arguments. If the Court grants oral argument then the United States believes that ten minutes per side will be sufficient.

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STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT IMPOSED A REASONABLE SENTENCE OF EIGHTY-TWO MONTHS AFTER CONCLUDING THAT JONES' CRIMINAL HISTORY WAS UNDER REPRESENTED?

United States v. Haak, 403 F.3d 997 (8th Cir. 2006)

United States v. Harlan, 368 F.3d 870 (8th Cir. 2004)

**STATEMENT OF THE CASE**

On December, 2008, Paul Robert Jones made his first appearance on a complaint charging him with aggravated assault.

On January 13, 2009, Jones was indicted on multiple counts in violation of the Major Crimes Act. Title 18, United States Code, Section 1153.

On May 18, 2009, Jones entered a guilty plea to one count of aggravated assault in violation of Title 18, United States Code, Section 113.

On August 4, 2009, Jones was sentenced by the Honorable Joan N. Ericksen, District Court Judge, to a term of imprisonment of 82 months.

On August 10, 2009, the district court entered the judgment of conviction.

On August 14, 2009, Jones filed a notice of appeal. The appeal challenges the reasonableness of his 82 month sentence.

The present appeal followed.

**STATEMENT OF THE FACTS**

On May 18, 2009, Robert Paul Jones pled guilty to one court of aggravated assault in violation of Title 18, United States Code, Sections 113(a)(6), 1151 and 1153(a). Pre-Sentence Report ¶¶ 1-2 9 (hereinafter PSR). Jones climbed into a bedroom window and stabbed his estranged wife on November 26, 2008, within the within the exterior boundaries of the Red Lake Indian Reservation. PSR § 5. The victim had sought a protective order from the Red Lake Tribal Court and Jones violated the conditions of the tribal protective order. PSR ¶ 7. The victim suffered severe lacerations to her face, right breast, right hand and left arm. PSR ¶ 6.

The parties signed a plea agreement in which Jones was put on notice that the government would ask the district court to impose a sentence of one hundred months, an upward departure. PSR ¶ F.1 - F.2. The parties filed sentencing memoranda: The government asked the district court to depart based on the harm to the victim; the defendants extreme cruelty toward the victim; and, Jones' underrepresented criminal history. Government's Sentencing Memorandum, P.1. The government asked the district court to impose a term of one hundred months. Id. at 5. Jones asked the district court to impose a term of fifty-one months. Defendant's Sentencing Memorandum, p.1.

The district court held a sentencing hearing on August 4, 2009. The victim allocated about the serious nature of the assault, the injuries she suffered, the impact the crime had on the children and her feeling that Jones wanted to kill her. Sentencing T. 4-9. The district court found that Jones' criminal history was underrepresented. Id. 20-21. Jones' criminal history included State of Minnesota convictions that were not counted. PSR ¶¶ 25-30. He has a juvenile auto theft from 1991 that was not counted. Additionally, an adult conviction for auto theft from 1993 was not counted. PSR ¶ 27. The other minor convictions, were excluded because of the petty nature of the crimes and did not factor into the district court's calculations. PSR ¶¶ 28-30, 32. Jones' tribal convictions drew the district court's attention. Sentencing T. 21. Jones has nine tribal convictions. PSR ¶¶ 36-45. Five of those convictions were within ten years fo the present assault. PSR ¶¶ 41-45. Based on his history, the district court concluded that Jones has ". . . a very significant propensity to reoffend." Sentencing T. at 21. Given the serious nature of the crime and the need to protect society from future crimes, the district court sentenced Jones to a term of eighty-two months.



**SUMMARY OF THE ARGUMENT**

The District Court did not abuse its discretion when it imposed a sentence of 82 months after considering the Title 18, United States Code, Section 3553(a) factors. The District Court discussed the factors considered in determining an appropriate sentence including Jones' criminal history, the nature and circumstances of the relationship between Jones and his victim, and the serious nature of the brutal domestic assault.

**ARGUMENT**

**I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING AN EIGHTY-TWO MONTH SENTENCE AFTER CONCLUDING JONES' CRIMINAL HISTORY WAS UNDERREPRESENTED**

A. Standard of Review

This court reviews the sentence imposed by the district court for an abuse of discretion. United States v. Garcia, 512 F.3d 1004, 1006 (8th Cir. 2008) citing Gall v. United States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 586, 597 (2007); United States v. Long Soldier, 431 F.3d 1120, 1122-23 (8th Cir. 2005). "A sentencing court abuses its discretion if it fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors. Garcia at 1006; Long Soldier at 1122-1123.

B. The District Court Imposed a Reasonable Sentence.

This Court has adopted a three step process to determine an appropriate sentence. United States v. Haak, 403 F.3d 997, 1002-03 (8th Cir.) cert. denied, 546 U.S. 913 (2005); United States v. Sitting Bear, 436 F.3d 929, 934 (8th Cir. 2006).

A District Court's first step in sentencing proceedings is to correctly determine the appropriate guideline sentencing range. Gall v. United States, 552 U.S. \_\_\_, 128 S.Ct. 586, 596 (2007)(citation omitted). "The guidelines should be the starting

point and the initial benchmark," but they are not the only consideration." Id. "After giving both parties an opportunity to argue for whatever sentence they deem appropriate, the District Court should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." Id. The District Court must then make an individualized assessment of the case based on the facts presented. The District Court needs to adequately explain the sentence to allow for meaningful appellate review and to give the mere perception of fair sentencing. In explaining the sentence imposed, however, the sentencing court does not have to "categorically rehearse" each of the § 3553(a) factors on the record as long as it is clear that the court considered those factors. United States v. Jones, 509 F.3d 911, 915 (8th Cir. 2007) (quoting United States v. Dicken, 432 F.3d 906, 909 (8th Cir. 2006); United States v. Robinson, 516 F.3d 716 (8th Cir. 2008); and United States v. Hernandez, 518 F.3d 613 (8th Cir. 2008)(en banc). "If a District Court adverts to some of the considerations contained in § 3553(a), we have been satisfied that the [Sentencing] Court ... was aware of the entire contents of the relevant statute." Jones, 509 F.3d at 915 (internal quotations and citations omitted, alterations in original).

In United States v. Yahnke, 395 F.3d 823, 825 (8th Cir. 2005), this Court held, "After Booker, this Court determines whether a sentence is unreasonable based on the factors in Section 3553(a)."

United States Code, Title 18, Section 3553(a) provides in part, as follows:

(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 sentences available;

(4) the kinds of sentence and the sentencing range established for--

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

A review of the record shows that the district court went through a detailed § 3553(a) analysis. The district court acknowledge Jones' drug, alcohol and mental health issues. T. 21. In examining Jones' characteristics, the district court also noted his underrepresented criminal history. Id. 20-21. The district court concluded that given Jones' background he has "... a very significant propensity to reoffend." Id. At 21-22. The district court also noted the serious nature of the crimes. T. 22.

In a nearly identical case, this Court addressed the use of tribal convictions as it relates to the issue of an underrepresented criminal history. United States v. Harlan, 368 F.3d 870, 874-875 (8th Cir. 2004). The Harlan case was also an aggravated assault from an Indian reservation in North Dakota. This Court approved the use of two tribal court assault convictions and a former federal manslaughter conviction to move a defendant's criminal history category up two levels. Id. at 875. This court held "... the manslaughter conviction, as well as the tribal convictions, was a permissible basis for the departure." Id.

The district court followed the same procedure as that found in Harlan. Jones had nine tribal court convictions. PSR ¶¶ 36-45. Five of those convictions were within ten years of this assault (11-26-2008). By assigning one point for the assault of an officer (PSR § 41); one point for receiving stolen property (PSR § 42); and, one point for two counts of child endangerment (PSR § 45), Jones would have had 10 criminal history points or a criminal history category V (77-96 months). Therefore, the sentence of eighty-two months was the product of the district court's use of the procedure approved in Harlan. Sentencing T. 21-22.

Jones was previously convicted in federal court for assault with a knife. PSR ¶ 31. During his incarceration, Jones had several violations which included assaults. Id. During his supervised release his performance was poor. Id. He committed new criminal acts for which he was not revoked or where modifications were made to the conditions of his supervised release. Id. This disturbing history demonstrates that even in controlled setting (correctional or under supervision), Jones is a serious threat to public safety.

The judgment of conviction adopted the findings set out in the PSR. The PSR set out Jones' long criminal history. The PSR correctly noted that Jones tribal court convictions did not count toward his criminal history score but still could be

considered for the purposes of determining the adequacy of Jones' criminal history pursuant to U.S.S.G. § 4A1.2(i). PSR § 35, 94. The PSR then set out nine tribal convictions including assault (PSR § 41) and child endangerment (PSR § 45). Jones also has a pending misdemeanor assault charge from Beltrami County, Minnesota District Court. PSR ¶ 51. Jones failed to appear for arraignment and a warrant was issued. This warrant was one of two active warrants at sentencing. Id.

The eighty-two month sentence was justified because Jones' criminal history category did not reflect the seriousness of his past violent misconduct and the reality that he has ". . . a very significant propensity to reoffend. T. 21-22.

The district court also examined the serious nature of the crime. § 3553(a)(1).

"When you go through a window and stab a person, no matter how you feel about them and there's a child in the bed, you have to know you're going to go to prison for a long time. And that is society's way of protecting itself against people who can't stop themselves from doing that, and it's also a statement of punishment for the severe crime that was committed.

And the range of 51 to 63 is not adequate to protect the public or to recognize the actions that you took that night in view of all the circumstances that we have come to understand."

T. 22.

**CONCLUSION**

Appellant's sentence of 82 months for the brutal domestic assault of his estranged wife is reasonable. The record shows that the District Court fully applied the 18 U.S.C. § 3553(a) factors. The District Court's sentence should be affirmed.

**CERTIFICATE OF COMPLIANCE**

The undersigned attorney for the United States certifies this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32. The brief has 254 lines of monospaced type. The brief was prepared using WordPerfect X3. The undersigned attorney also certifies that the computer diskette containing the full text of the Brief of Appellee has been scanned for viruses and to the best of our ability and technology, believes it is virus-free.

Dated: January 8, 2010

Respectfully submitted,

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