

United States of America
First Circuit Court of Appeals

NO. 10-1202

UNITED STATES OF AMERICA,

Appellee,

v.

RAYMOND COLE,

Defendant/Appellant

BRIEF OF DEFENDANT - APPELLANT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Raymond Cole plead guilty in the United States District Court for the District of New Hampshire to: Conspiracy to possess with intent to distribute and to distribute controlled drugs, contrary to 21 U.S.C. § 841(1)(1) and § 844 (count I); conspiracy to interfere with commerce through robbery, contrary to 18 U.S.C. § 1951 (count IV); and interference with commerce through robbery, contrary to 18 U.S.C. § 1951 (count V).

The court (*Steven J. McAuliffe, J.*) sentenced Mr. Cole to 180 months stand committed and four years supervised release on each count, to be served concurrently.

A notice of appeal was filed on February 11, 2010.

STATEMENT OF ISSUES

1. Did the court err in sentencing Raymond Cole to 30 extra months without notice of a *Booker* variance as mandated by local rules, and should he be re-sentenced due to the error?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Raymond Cole plead guilty to three crimes stemming from a robbery in which prescription drugs were stolen.

In its Pre-Sentence Investigation Report (PSI)¹, Probation and Pretrial Services calculated a guidelines sentencing range of 140-to-175 months. PSI at ¶ 107. This was based on a total offense level of 28, and a criminal history category of VI.

In arriving at an offense level of 28, the PSI assumed several add-ons, including a 2-point increase for the presence of a vulnerable victim. During his sentencing hearing Mr. Cole withdrew his objection to several upward variances suggested by probation in its PSI, but maintained that there was no justification for the “vulnerable victim” variance. *Sent.Trn.* at 3. After hearing evidence, the sentencing court held that because the government provided no proof of age, medical condition, or unusual vulnerability, there was insufficient proof of a vulnerable victim, and thus declined the two-point upward variance in the PSI. *Sent.Trn.* at 75. It therefore determined that Mr. Cole’s offense level was 26 rather than 28, *Sent.Trn.* at 76-77, 80, producing a guidelines sentencing range of 120-to-150 months, rather than 140-to-175. JUDGMENT (Feb. 10, 2010), *Addendum* at 13.

¹The PSI is included in a separate sealed appendix.

Prior to sentencing, Mr. Cole had entered a plea agreement with the government, which was approved by the court, *Sent.Trn.* at 99, providing:

The parties agree that the defendant will be sentenced to a term of imprisonment which may not be less than ten and one-half (10½) years nor more than fifteen (15) years. The parties agree that the United States will request that the [c]ourt sentence defendant to a fifteen (15) year term of imprisonment.

PLEA AGREEMENT ¶5.A.

At sentencing, the government made clear it wanted Mr. Cole to serve the agreed-to 15 years (180 months), regardless of how that number was arrived at or how the sentence was calculated. *Sent.Trn.* at 74 (“It makes zero difference as far as the ultimate sentence the United States is looking for is 15 years.”); *Sent.Trn.* at 75 (“It doesn’t matter, your honor. With respect to the vulnerable victim here, ultimately whether you assess two points or don’t assess it, the United States is going to say 15 years.”).

After performing the methodology specified in *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006), the court sentenced Mr. Cole to the 15 years (180 months) which the government requested. *Sent.Trn.* at 100; JUDGMENT IN A CRIMINAL CASE at 3. That sentence, however, is 30 months higher than the high end of the guidelines range which the court had determined (150 months), and 5 months higher than the high end of the guidelines range the PSI had suggested on the assumption there would be a finding of vulnerable victim (175 months).

SUMMARY OF ARGUMENT

Raymond Cole notes that local district court rules require four days notice before the government may ask for a *Booker* variance. At the sentencing hearing the court granted a variance worth 30 months. But because the variance was not requested by the government until it and the defendant were present at Mr. Cole's sentencing hearing, he did not get the mandated notice. Mr. Cole argues he should be re-sentenced without the *Booker* variance.

ARGUMENT

I. **Raymond Cole Did Not Have Four Days Notice of *Booker* Variance Mandated by Local Rule**

As noted, Mr. Cole's was sentenced to 30 months greater than the high end of the guidelines range which the court had determined. That 30 months is an upward variance from the guidelines range.

A. **Local Rules Mandate Notice**

The general rules of criminal procedure rules do not require any notice of an upward variance. *Irizarry v. United States*, 553 U.S. 708 (2008). But in the District of New Hampshire, the local rules require a four-day notice:

Any party requesting a departure under the sentencing guidelines and/or a variance must file a motion specifying the grounds for relief and legal authority for the departure and/or variance. This motion shall be filed no later than four (4) days prior to the scheduled sentencing, and a copy shall be served upon opposing counsel and the probation officer.

LOCAL RULE 32.1(I), *Addendum* at 12. The current version of the rule was promulgated after the Supreme Court decided *Irizarry*.²

No notice was provided in this case.

Although Mr. Cole agreed to a 15-year sentence in his plea which occurred

²Local rule 32.1(i) was first promulgated in 2000, and slightly revised in 2008 and 2009. The current rule was effective December 1, 2009. Earlier versions included the same four-day notice requirement.

more than four days before sentencing, the plea agreement does not constitute the notice required by the rule. First, the notice must be by motion with the formalities normally associated with a motion; not by other document. Second, although the rule does not specify what suffices as service, the rule makes clear that the motion must be “served” upon both the opposing lawyer and probation; a document such as an agreement that is mutually created is not served within any definition of the word. Third, the motion must specify both a grounds for the variance and legal authority for it; the plea agreement does neither. Fourth, the rule is mandatory; a party requesting a variance “must” file a motion which “shall” be filed at least four days before sentencing. Consequently, the plea agreement does not constitute notice within the rule.

The text of the local rule discloses its function. It does not allow a party – neither the government nor a defendant – from surprising the court, the opposing party or the probation officer, at the time of sentencing.

Upon prevailing in his vulnerable victim objection, Mr. Cole understood he would get the benefit of the reduction it produced. The government’s variance appears to have been invented by the government during the sentencing hearing, *Sent.Trn.* at 74-75, in order to justify the sentence it desired.

B. Remedy is Remand for Re-Sentencing

The appropriate remedy in this case is that Mr. Cole be re-sentenced. When a court issues a sentence with an upward variance of which the defendant was not given advance notice, it creates doubt as to the lawfulness of the sentence and thus remand for re-sentencing is warranted. *See, United States v. Jones*, 178 F. App'x. 27 (1st Cir. 2006).

C. Preservation and Standard of Review

Because this issue was not preserved below, it is reviewed by this Court on a plain error basis.

Review for plain error entails four showings: (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001). Here the error was clear. It affected Mr. Cole ability to argue against the variance and, by eclipsing his understanding of his plea agreement, impaired the fairness of both this plea and his sentencing proceedings. Moreover, the action here affected Mr. Cole's liberty. Condoning governmental failure to turn square corners when such a substantial constitutional right is at stake seriously impairs the integrity and public reputation of all judicial proceedings.

CONCLUSION

Based on the foregoing, Raymond Cole respectfully requests this Court to remand for re-sentencing, with orders that the non-noticed variance cannot be employed. Mr. Cole requests his attorney be allowed to present oral argument.

Respectfully submitted,

Raymond Cole,
By his Attorney,

Law Office of Joshua L. Gordon

/s/

Dated: December 17, 2010

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I hereby certify that on December 16, 2010, a copy of the foregoing will be forwarded to Seth R. Aframe, Esq., AUSA.

Dated: December 17, 2010

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X4, and that it contains no more than 1436 words, exclusive of those portions of the brief which are exempted.

Dated: December 17, 2010

Joshua L. Gordon, Esq.

ADDENDUM

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