No. 09-3395

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JON BARTLETT,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS APPELLEE

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JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is complete and correct.

STATEMENT OF ISSUE

Whether the district court erred in clarifying its intent and re-imposing the same sentence on remand that it imposed at the initial sentencing hearing.

STATEMENT OF THE CASE

On October 19, 2006, a federal grand jury returned an indictment charging former Milwaukee Police Department (MPD) officers Jon Bartlett, Andrew

Spengler, Daniel Masarik, Ryan Packard, and Ryan Lemke with conspiracy against rights in violation of 18 U.S.C. 241 (Count I) and deprivation of rights under color of law in violation of 18 U.S.C. 2 and 18 U.S.C. 242 (Count II). (R.1:1-4).[1] The right at issue is the right "not to be subjected to unreasonable seizure * * *, which includes the right to be free from the unreasonable use of force by a person acting under the color of law." (R.1:2). On July 6, 2007, Lemke pled guilty to a Superseding Information charging him with deprivation of rights under color of law in violation of 18 U.S.C. 2 and 18 U.S.C. 242. (R.129; R.143).[2]

The other four defendants proceeded to trial. On July 26, 2007, Bartlett,

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[1] References to "R.__:__" refer to the docket number and page number of items filed as part of the district court record; references to "Br. __" refer to Bartlett's opening brief in this appeal. "Bartlett First Appeal Br." refers to the brief Bartlett filed in Case No. 08-1196 on November 20, 2008. "Masarik First Appeal Br." refers to the brief Masarik filed in that Case No. 08-1198 on December 1, 2008. "Gov't First Appeal Br." refers to the brief the government filed in Case Nos. 08-1196, 08-1197, and 08-1198 on March 18, 2009.

[2] In addition to Lemke, three other former MPD officers – Jon Clausing, Joseph Schabel, and Joseph Stromei – also pled guilty to federal charges. Clausing pled guilty to deprivation of rights under color of law (18 U.S.C. 242). E.D. Wisc. No. 2:06-cr-00256-JPS (R.35). Schabel pled guilty to deprivation of rights under color of law (18 U.S.C. 242) and obstruction of justice (18 U.S.C. 1512(b)(3)). E.D. Wisc. No. 2:06-cr-00256-JPS (R.31). Stromei pled guilty to obstruction of justice (18 U.S.C. 1512(b)(3)). E.D. Wisc. No. 2:06-cr-00274-CNC (R.11).

Masarik, and Spengler were convicted on both counts. (R.159-161). Packard was acquitted on both counts. (R.162).

On November 29, 2007, the district court sentenced both Masarik and Spengler to 188 months' imprisonment, and sentenced Bartlett to 208 months' imprisonment. (R.201-203). The court did not impose a fine on defendants, but ordered that they be jointly and severally liable for restitution in the amount of $16,364.63. (R.201-203). An appeal followed.

On June 8, 2009, this Court affirmed the convictions of all three defendants. *United States* v. *Bartlett*, 567 F.3d 901, 910-911 (7th Cir. 2009), cert. denied, 2010 WL 154934 (2010) (*Bartlett I*).[3] It also affirmed the sentences of Spengler and Masarik. *Ibid.* With regard to Bartlett, this Court determined that the 208-month sentence the district court imposed was substantively reasonable. *Id.* at 910. However, this Court vacated and remanded Bartlett's sentence because it was not certain that the district court intended to impose an above-guideline sentence of 208 months. *Id.* at 909-911.

On remand, the district court clarified its intent and reimposed the same sentence. (R.278:21-25). This appeal followed.

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[3] Masarik filed a petition for a writ of certiorari, which the Supreme Court denied on January 19, 2010 (Case No. 09-302).

STATEMENT OF FACTS

In the interest of brevity – and in view of the limited nature of this appeal and the fact that this matter was previously before this Court – the government offers the following condensed statement of facts, which are set forth in the light most favorable to the government.[4]

This case centers on events that took place outside Spengler's Milwaukee home during the early morning hours of Sunday, October 24, 2004. Bartlett, Spengler, and Masarik – then members of the MPD – were off duty that evening and attended a party at the home. Alcohol was plentiful (R.222:422-424; R.223:762-763, 792; R.233:1741), and there is evidence that all three were intoxicated. (R.223:793; R.225:1338, 1372; R.226:1680-1681).

A group of four individuals – Frank Jude, Lovell Harris, Katie Brown, and Kirsten Antonissen – arrived at the party at approximately 2:40 a.m., but stayed for only a few minutes. (R.221:52, 59). Shortly after they departed, defendants came to believe one or more members of the group stole a police badge from the home.

Based on this mistaken belief, defendants and others from the party followed the group to Antonissen's pickup truck and used their authority as police

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[4] A more detailed version of the facts of this case may be found in the government's brief from the prior appeal. See Gov't First Appeal Br. 3-22.

officers to prevent them from leaving. They then forcibly removed Jude and Harris from the truck and assaulted them. They also vandalized both the truck and a car belonging to Jude. Jude suffered significant injuries from the attack.

SUMMARY OF ARGUMENT

Bartlett's appeal is entirely without merit. It is premised on the incorrect notion that the district court was required on remand to reevaluate various aspects of the sentence, despite the fact that the limited basis for remand was clear from this Court's prior opinion and the issues Bartlett seeks to raise were decided by this Court in the first appeal.

The basis for remand in this case was simple. The district court's statements during the initial sentencing caused this Court concern regarding whether the district court intended to impose an above-guideline sentence of 208 months. This Court therefore "ask[ed] the district judge to take another look, to ensure that the sentence rest[ed] on a deliberate choice rather than a mistake." *Bartlett I*, 567 F.3d at 910.

On remand, the district court did just that, stating its intent unequivocally and re-imposing the same sentence. Nothing more was required, as there were no other open issues following the first appeal. Moreover, Bartlett's challenges to his

sentence fail at any rate because they were briefed and decided in the first appeal. Accordingly, this Court should affirm the judgment below.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN RESENTENCING BARTLETT

A. Standard Of Review

In reviewing sentences, this Court "first consider[s] whether the district court committed any procedural error." *United States* v. *Rice*, 520 F.3d 811, 819 (7th Cir. 2008). It then reviews the "district court's application of the Guidelines de novo and findings of fact for clear error." *United States* v. *Samuels*, 521 F.3d 804, 815 (7th Cir. 2008). "A district court's factual findings are entitled to deference unless [this Court] ha[s] a definite and firm conviction that a mistake has been made." *Ibid.* (internal quotations omitted).

This Court reviews the overall sentence "for reasonableness under a deferential abuse-of-discretion standard." *United States* v. *Jackson*, 547 F.3d 786, 792 (7th Cir. 2008), cert. denied, 129 S. Ct. 1538 (2009). "A sentence that falls within a properly calculated advisory guidelines range is presumed reasonable." *United States* v. *Panaigua-Verdugo*, 537 F.3d 722, 727 (7th Cir. 2008). However, the reverse is not true with respect to sentences falling outside the advisory

guidelines. "[A] sentence outside the guidelines range must not be presumed unreasonable by the appellate court." *United States* v. *McIlrath*, 512 F.3d 421, 426 (7th Cir. 2008). Appellate courts "also may not hogtie sentencing judges with a rigid formula for determining whether the justification for an out-of-range sentence is 'proportional' to the extent of the sentence's deviation from the range." *Ibid.*

"A sentence is reasonable if the district court gives meaningful consideration to the factors enumerated in § 3553(a) and arrives at a sentence that is objectively reasonable in light of the statutory factors and the individual circumstances of the case." *Panaigua-Verdugo*, 537 F.3d at 727. In so doing, a court need not "discuss and make findings as to each of [the statutory] factors." *United States* v. *Laufle*, 433 F.3d 981, 987 (7th Cir. 2006). Rather, "[i]t is enough that the record confirms meaningful consideration of the types of factors that section 3553(a) identifies. A concise statement of the factors that caused the judge to arrive at a particular sentence, consistent with section 3553(a), will normally suffice." *Ibid.* (citation omitted).

B. Scope Of Remand

"Title 28 U.S.C. § 2106 grants appellate courts flexibility in determining the scope of remand." *United States* v. *White*, 406 F.3d 827, 831 (7th Cir. 2005), cert. denied, 549 U.S. 1018 (2006). The statute provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. 2106.

"When the district court addresses a case on remand, the 'law of the case' generally requires it to confine its discussion to the issues remanded." *United States* v. *Morris*, 259 F.3d 894, 898 (7th Cir. 2001) (citing *United States* v. *Story*, 137 F.3d 518, 520 (7th Cir. 1998)). "The law of the case doctrine, however, applies only to issues that have been resolved, generally leaving a district judge free to address issues that the appellate court left undecided." *Ibid.* (citing *Moore* v. *Anderson*, 222 F.3d 280, 283 (7th Cir. 2000); *United States* v. *Aramony*, 166 F.3d 655, 661 (4th Cir. 1999)).

Importantly, "[t]his power must be construed in harmony with [this Court's] familiar exhortation that parties cannot use the accident of remand as an opportunity to reopen waived issues." *Morris*, 259 F.3d at 898 (citing *United States* v. *Jackson*, 186 F.3d 836, 838 (7th Cir. 1999)). Thus, "on remand and in the absence of special circumstances, a district court may address only (1) the issues remanded, (2) issues arising for the first time on remand, or (3) issues that were timely raised before the district court and/or appellate courts but which remain undecided." *Ibid.*

C. The District Court Fulfilled Its Limited Obligation On Remand

Bartlett had a total offense level of 32 and criminal-history category of III, placing his advisory guideline range at 151 to 188 months. (R.241:41; R.278:24). At the original sentencing hearing, the district court imposed a sentence of 208 months, or 20 months above the advisory guideline range. (R.241:43).

On appeal, this Court vacated the sentence and remanded the matter to the district court "for proceedings consistent with [its] opinion." *Bartlett I*, 567 F.3d at 910-911. The meaning of this instruction must be derived from context. See *United States* v. *Husband*, 312 F.3d 247, 251 (7th Cir. 2002), cert. denied, 539 U.S. 961 (2003) ("The court may explicitly remand certain issues exclusive of all others; but the same result may also be accomplished implicitly."); *United States*

v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996) ("[T]he scope of the remand is determined not by formula, but by inference from the opinion as a whole.").[5] Viewed in context, this Court's ruling is best interpreted as a remand for the limited purpose of clarifying whether the district court intended to impose an above-guideline sentence of 208 months. See *Bartlett I*, 567 F.3d at 910 ("Given the risk of confusion, the better part of wisdom is to ask the district judge to take another look, to ensure that the sentence rests on a deliberate choice rather than a mistake."); see also *ibid.* (noting that Bartlett should not "lose 20 months of freedom because a district judge read across the wrong line in a table").[6]

Such an interpretation is consistent with this Court's case law. For example, in *Parker* this Court "vacated the judgment of the district court and remanded the case for further proceedings consistent with [its] opinion," 101 F.3d at 527-528 (citing *United States* v. *Parker*, 25 F.3d 442 (7th Cir. 1994)).[7] The issue in that

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[5] But see *United States* v. *Young*, 66 F.3d 830, 836 (7th Cir. 1995).

[6] The district court's comments at resentencing indicate that it, too, believed this Court's remand was a limited one. See R.278:4 ("The court does see its obligation at this time to be rather limited, and that is, the court must resentence Mr. Bartlett so as to make it [sic] clear its intention when this matter was initially before the court."); R.278:16 ("[M]y charge here, as I see it, is limited.").

[7] The prior opinion in *Parker* states, "we remand for resentencing in accordance with this opinion." 25 F.3d at 451.

case was whether the defendant should have received an enhancement for obstruction of justice; this Court determined that he should not. *Id.* at 528. When the defendant in *Parker* sought to raise additional issues in his second appeal, this Court refused to consider them: "The remand was limited to the enhancement for the obstruction of justice. Only an issue arising out of the correction of the sentence ordered by this court could be raised in a subsequent appeal. Any issue not arising out of that correction could have been raised in the original appeal and was therefore waived by not being raised then." *Ibid.* (citing *United States* v. *Polland*, 56 F.3d 776, 779 (7th Cir. 1995); *United States* v. *Soto*, 48 F.3d 1415, 1419 n.10 (7th Cir. 1995)).

Similarly, the remand in this case was limited to clarifying the district court's intent to impose an above-guideline sentence. Where, as here, this Court's "opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error." *Parker*, 101 F.3d at 528. See also *White*, 406 F.3d at 832.

Bartlett's argument to the contrary is based primarily on (1) this Court's decision in *United States* v. *Young*, 66 F.3d 830 (7th Cir. 1995), which held that an order vacating the defendant's sentence and remanding the matter for proceedings

consistent with this Court's opinion did not "constrain[] the scope of the issues the district court could consider on resentencing," *id.* at 836; see Br. 11; and (2) a handbook provision stating that district courts are "allow[ed] * * * to write on a clean slate" when a previous sentence has been vacated, Michael Monico & Barry Spevack, *Federal Criminal Practice: A Seventh Circuit Handbook* § 539 (2009 ed.); Br. 11. Neither provides an adequate foundation for Bartlett's claims.

First, although this Court has not expressly overruled *Young*, it has moved away from its holding in that case. See *White*, 406 F.3d at 832; *Parker*, 101 F.3d at 528. Second, even if *Young* remains good law, it cannot support the weight of Bartlett's argument. The fact that a district court *may* consider additional issues does not mean that it is *required* to do so. Indeed, this Court's subsequent decision in *White* directly undercuts Bartlett's expansive reading of *Young*. See *White*, 406 F.3d at 832 ("[V]acation of a sentence does not mean 'we must always order, and the district court must always engage in, complete resentencing'; rather, the calculus is a practical one.") (quoting *United States* v. *Polland*, 56 F.3d 776, 779 (7th Cir. 1995)) (citation omitted); see also *Husband*, 312 F.3d at 250 ("[T]his court does not remand issues to the district court when those issues have been waived *or decided*.") (emphasis added). Bartlett cites nothing to support his suggestion that district courts *must* reevaluate all aspects of a sentence on remand,

particularly where, as here, the narrow basis for remand is clear from this Court's resolution of the first appeal.

Further, even if the district court was required to do more than clarify its intent to impose an above-guideline sentence, it satisfied that obligation. In reimposing the same 208-month sentence on remand, the court noted that it "ha[d] considered the arguments of counsel, the statements of the Seventh Circuit in its opinion, as well as the materials which ha[d] been included in the presentence report." (R.278:21). The court stated its belief that the sentence "fulfills all the requirements of [18 U.S.C. 3553(a)(2)], inasmuch as the court has looked at the sentencing factors that must be applied in each case." (R.278:22). Specifically, the court noted that it had "considered the seriousness of [defendant's] offense; the need to promote respect for the law; [and] the need to provide for just punishment which affords adequate deterrence for not only people who have been engaged in such crimes but have not been prosecuted, but for anyone who might consider engaging in such crimes." (R.278:22). The district court also considered "the need to protect the public and to provide for [defendant's] needs." (R.278:22).

At the close of the resentencing hearing, the district court reiterated the key points:

> If there is any doubt whatsoever, I wish to erase that doubt and emphasize once more: I'm aware of the guideline range of 151 to 188 months for the case. I'm also aware that the court may impose a sentence of 10 years as to each count, or a total of 240 months. The court imposed a sentence of 208 months intentionally with due regard for the maximum sentence, with due regard for the advisory guideline range, and with due regard for the sentencing factors under [18 U.S.C. 3553(a)(2)].

(R.278:25). Accordingly, the district court more than fulfilled its limited obligation on remand.[8]

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[8] Even if this were not the case, Bartlett's challenges to his sentence were briefed and decided in the first appeal. His challenge to the guideline calculation, see Br. 15-20, is largely a reiteration of his prior argument. See Bartlett First Appeal Br. 29-33. Bartlett's assertion that this issue was not addressed in the first appeal, see Br. 14 n.3, is incorrect. The argument was adopted by a co-defendant, see Masarik First Appeal Br. 78-79, and this Court could not have affirmed Masarik's sentence, see *Bartlett I*, 567 F.3d at 910, without rejecting the guideline challenge. Accordingly, it was among the issues this Court "considered" and "reject[ed] * * * without comment." *Id.* at 905.

Bartlett's challenge to the substantive reasonableness of his sentence, see Br. 21-31, also was made in the prior appeal, see Bartlett First Appeal Br. 33-46. This Court resolved the issue in its opinion. See *Bartlett I*, 567 F.3d at 910 (holding that "[a] 208-month sentence *is reasonable substantively*," but remanding because "no one, not even a Bartlett, should lose 20 months of freedom because a district judge read across the wrong line in a table") (emphasis added).

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using WordPerfect X4. It contains no more than 3231 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, which has been sent to the Court by Federal Express on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

_____

DIRK C. PHILLIPS
Attorney

DATED: March 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2010, two paper copies and one electronic copy in CD format of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by Federal Express on the following counsel of record:

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