Nos. 05-1812; 05-1889; 05-2143; 05-2294; 05-2295

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee - Cross-Appellant,

-vs-

PATRICK CARSON, ROBERT HEY, PETER JACQUEMAIN,

Defendants-Appellants,

ROBERT JACQUEMAIN,

Defendant-Appellant-Cross-Appellee.

On Appeal From The United States District Court
For The Eastern District Of Michigan Southern Division

PROOF REPLY BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT

STEPHEN J. MURPHY
United States Attorney

DANIEL R. HURLEY
Assistant U.S. Attorney
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
(313) 226-9780

RENA J. COMISAC
Acting Assistant Attorney General

DIANA K. FLYNN
ANGELA M. MILLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station, RFK 3720
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4541

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I. THE DISTRICT COURT FAILED TO CONSIDER THE APPLICABLE GUIDELINE RANGE.

A sentence is procedurally unreasonable if a district court fails to consider the correct guideline range. *United States v. Webb*, 403 F.3d 373, 386 (6th Cir. 2005). The district court here made three errors in calculating the correct guideline range, and the resulting sentence is thus unreasonable.

A. The district court erroneously granted a 3 level departure under USSG §5K2.20.

In his response brief, defendant makes no effort to defend the district court's grant of a three level departure under USSG § 5K2.20 for aberrant behavior. Rather, defendant asserts that no such departure was awarded. Defendant rests his argument on the fact that, at one point in the sentencing hearing, the district judge announced that the guideline offense level was 14, with a corresponding range of 15-21 months. The record is clear, however, that at a later point in the proceeding, the court reconsidered the issue and decided to grant a departure on this basis. Defendant claims that the court was speaking merely hypothetically, but this is simply incorrect.

As the court began to articulate its sentencing analysis, the court expressly stated that "before I even get to 3553(a), that I believe that there is a basis in the guidelines themselves for a departure based on aberrational behavior here." (R. 195: at 33/JA). The prosecutor interrupted to ask whether the court was speaking

hypothetically, or was actually granting such a departure. *Id*. at 34. The prosecutor also pointed out that factual findings would have to be made, and argued that in light of the extensive conduct in this conspiracy the guideline simply could not support the departure. (*Id*.) The court responded "[w]ell, I think that it can ... I believe that it is an appropriate departure." *Id*. at 34-35. The court then stated that with this additional reduction, the applicable guideline range was now 8-14 months, and the court intended to sentence "below that guideline range," i.e. below the 8-14 month range she had just determined to be applicable. (*Id.*) Then, in the part of the judgment where the court delineated its findings and analysis, the district court explicitly stated that "the court finds that a three level reduction, pursuant to §5K2.20 is applicable, resulting in an offense level of 11." (R. 164: Judgment, Statement of Reasons at 1/JA). There can be no real question that the court awarded a three level departure under USSG §5K2.20.

There can also be no question that the departure is impermissible under Section 5K2.20. The commentary to that section makes clear that the offense must have been of limited duration, and have been committed without significant planning. Here, the conspiracy that was the offense of conviction spanned more than a year, and involved false reports, false testimony in state court proceedings, false statements to law enforcement agents, coordinated outreach and meetings to make certain that co-

conspirators "stuck to the story," and false testimony in federal court. This simply cannot qualify as being "of limited duration" and "without significant planning." USSG §5K2.20, comment. (n.1). Therefore, the district court failed to consider the correct guideline range, as required by 18 U.S.C. § 3553(a)(4).

B. The district court erroneously failed to include an enhancement under USSG §3A1.3 for a restrained victim.

The district court correctly recognized that, because defendant was convicted of an obstruction of justice offense that involved obstructing the investigation and prosecution of a criminal offense, the guideline offense level should be the higher of the offense level as calculated under USSG §2J1.2 or the offense level as calculated under USSG §2X3.1. Here, the offense level determined under § 2X3.1 was higher.

Under that guideline, the court is required to first determine the offense level for the underlying criminal conduct. This baseline offense level for an accessory must include both the base offense level for the crime covered up, and any specific offense enhancements that were known, or reasonably should have been known, by defendant. USSG §2X3.1, comment. (n. 1). The application notes explicitly refer to the Relevant Conduct guideline and its commentary as being controlling, specifically the comment that provides "[i]n the case of ... accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to

determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant." USSG §1B1.3, comment n.10.

Since defendant was convicted of conspiring to obstruct the investigation and prosecution of the civil rights violations committed by Patrick Carson and Duane Poucher, he is accountable for all conduct that was relevant to determining their adjusted offense levels, of which he was or should have been aware. Here, that relevant conduct includes both the base offense level for the civil rights violation, and several enhancements. First, the base offense level is 12, because defendant knew that the beating involved two or more participants. USSG §2H1.1(a)(2). Moreover, defendant knew that the beating was committed under color of law, so six levels are added under USSG §2H1.1(b)(1)(B). The relevant conduct for both Carson and Poucher included their convictions for filing false police reports. Since defendant knew that they had filed false reports, under §1B1.3 he is responsible, as an accessory, for that relevant conduct. Therefore, two levels must be added pursuant to USSG §3C1.1. This brings the baseline accessory offense level to 20, from which the district court then subtracted six levels to account for the accessory status.

The government contends that the relevant conduct for Carson and Poucher's beating included the fact that the victim was restrained when he was being beaten.

Under USSG §3A1.3, 2 levels are to be added if a victim "was physically restrained in the course of the offense." Here, Paxton was clearly restrained when Carson punched him in the head and when Poucher kicked him. Defendant was aware that the victim was restrained, for he (among others) restrained him. Under the plain language of the guideline, the enhancement should apply to Carson's and Poucher's offense level as relevant conduct, and since defendant was aware of it, two levels should be added to the baseline accessory offense level (bringing it to level 22).

Defendant argues that he did not know, when he was restraining the victim, that unreasonable force was being used. That is not the relevant time frame. Under this court's precedent, defendant's knowledge is to be measured as of the time he engaged in his own criminal conduct, not whether he knew of Carson's conduct at the time it was happening. *United States v. Miller,* 161 F.3d 977, 990 (6th Cir. 1998)("It only makes sense to look at the defendant's knowledge when the defendant acted.").

Similarly, it is of no consequence that defendant himself was not convicted of using unreasonable force, or that his own efforts to restrain the victim were in the course of a permissible arrest. What matters is that, when defendant engaged in his obstructive conduct, he knew (or should have known) that the victim had been restrained when he was being beaten. There is no dispute that Paxton was restrained, and that he was beaten while restrained. The enhancement should have applied to

Carson and Poucher, and it should apply to defendant's accessory baseline offense level as well.

In his brief, defendant argues that any error in failing to apply the §3A1.3 enhancement was offset because there was a double counting of obstruction of justice activities. Defendant argues that, because his offense of conviction involved obstruction of justice, there should be no enhancement for obstruction of justice in setting his offense level. Defendant fails to acknowledge that when his offense level is determined under §2X3.1, the focus is on his knowledge of the actions (i.e. the relevant conduct) of Carson and Poucher, not his own actions. The baseline accessory offense level was simply enhanced to reflect "all conduct that was relevant" to setting Poucher and Carson's offense level, conduct for which he is responsible under §1B1.3 because he knew of it when he engaged in his own subsequent obstruction of justice. The obstruction of justice activity being captured at this stage of the inquiry is not defendant's actions, but rather the actions of Poucher and Carson which defendant covered up. There was simply no double counting, and no error to "offset" the other guidelines errors identified by the government.

C. The district court improperly failed to apply an enhancement under USSG §3C1.1 based upon defendant's obstruction of justice committed during the trial.

The parties agree that defendant should not receive an obstruction of justice enhancement under USSG §3C1.1 merely because he was convicted of an obstruction of justice offense. An enhancement on that basis alone would be double counting. But, defendant should receive an enhancement because there was "a significant further obstruction [that] occurred during the...prosecution...of the obstruction offense itself." USSG §3C1.1 comment. (n.7). The government contends that defendant's false trial testimony constituted a significant further obstruction of justice, and the guidelines expressly countenance imposing an enhancement under §3C1.1, in that circumstance.

Defendant contends that he did not commit a significant further obstruction of justice by testifying falsely, because the district court stated that he had "testified as best he could" and that an obstruction enhancement was "not appropriate." According to defendant, these statements of the district court are entitled to great deference.

But the same district court repeatedly recognized that the basic version of events related by defendant at trial was wholly false. Defendant's trial testimony perfectly tracked his police report (as well as that of his brother) as to all issues, and the court expressly found that the police reports were false. (R.164: Judgment,

Statement of Reasons p.1/JA). And that same court acknowledged, in the context of sentencing defendant Carson, that the obstruction conspiracy comprised "activities that occurred over the course of many months." (R. 166: 6/8/2005 Carson Sentencing Tr. at 21/JA). But defendant was convicted of participating in that conspiracy, and the "activities that occurred over the course of many months" consisted primarily of defendant repeating the same false story that he told at trial. These "activities" included defendant's providing false testimony at the state court preliminary examination of Paxton, approaching Duane Poucher to ensure his loyalty to the conspiracy, and providing false statements to the FBI investigators. Since the object of the conspiracy was to falsely claim that "Paxton got out and came at us,"then defendant's trial testimony (like his police report) must have been false.

It appears that the district court simply concluded that an enhancement under §3C1.1 was "not warranted" because the court did not want to enhance the offense level. But if false and material testimony is purposely offered in court to stymie a prosecution, the district court does not have discretion under the guidelines to elect not to apply the enhancement to the adjusted offense level. Once the testimony is determined to have been intentionally false, the two level enhancement is mandatory. *United States v. Hurst*, 228 F.3d 751, 762 (6th Cir. 2000). There is simply no way to

reconcile the district court's own statements, or the jury verdict, with the refusal to apply the enhancement under §3C1.1.

In his brief, defendant relies heavily upon *United States v. Reyna*, 1992 WL 42349 (6th Cir. 1992). Not only is that case unpublished, but its holding rests upon a provision of the Guidelines that was subsequently removed. Prior to 1997, the commentary to §3C1.1 did provide that the court should evaluate the contested testimony in the light most favorable to the defendant. That instruction was removed by Amendment 566 in 1997, however, and that is no longer the correct standard. If the testimony is false, and material, and not the result of mistake, confusion or faulty memory, then the enhancement must be applied in determining the correct guideline range.

Here, Robert Jacquemain's trial testimony was intentionally false. Defendant did not attempt to equivocate, or to "thread the needle" of denying some facts and admitting others. Defendant testified unequivocally that Paxton got out of the pickup truck on his own, before defendant was even out of his patrol car, and that Paxton "came at them" in an irate manner, waving his fists. (Robert Jacquemain, Tr. Vol. 8 at 44-48). This was the exact version of events proposed to Duane Poucher at the outset of the conspiracy, and it was what made the police reports false. In light of the

overwhelming evidence that the testimony was false, an enhancement was warranted for defendant's significant further act of obstruction. USSG §3C1.1.

II. THE SENTENCE OF PROBATION IS SUBSTANTIVELY UNREASONABLE.

In his brief, defendant repeatedly asserts that this court should not substitute its judgment for that of the district court. If applied literally, this notion would preclude substantive review of the reasonableness of sentences. But both the Supreme Court and this court have recognized that the remedial opinion in *United States v. Booker,* 543 U.S. 220 (2005) provided for some form of substantive review of sentences. *See, e.g.*, *Rita v. United States*, 127 S. Ct. 2456, 2469-790 (2007); *id.* at 2473 (Stevens, J., concurring)("[O]ur remedial opinion in *Booker*. . . plainly contemplated that reasonableness review would contain a substantive component."); *United States v. Poynter*, 495 F.3d 349 (6th Cir. 2007)(reversing a sentence for substantive unreasonableness). This court has an obligation to ensure that the sentence imposed is reasonable, in light of the necessary purposes of sentencing set forth at 18 U.S.C. § 3553(a)(2). A sentence of probation in this case is not reasonable, and should be reversed.

Here, the district court reasoned that for a police officer convicted of an obstruction of justice offense, the mere fact of a conviction is punishment enough,

and *any* term of imprisonment is "excessive." But the sentencing guidelines call for a sentence of 27-33 months' imprisonment, and there is nothing unique about this defendant. At sentencing, the district court stated that defendant compared favorably to officers who are accused of excessive force violations, but those officers are not the relevant benchmark for this defendant, who was convicted of obstruction of justice offense conduct (and was not being sentenced for committing excessive force violations).

Nothing about the obstruction of justice conduct in this case was minimal or of lesser seriousness-if anything, it was among the more serious types of obstruction imaginable, for it included not only false reports to cover up a beating, but false testimony in state court proceedings in support of false charges against the victim. As the court recognized in another context, the prospect of police officers lying under oath about important matters is especially insidious. (6/8/2005 Carson Sentencing Tr. 22/JA). ("[T]here is a danger represented by what happened here that is more insidious even then [sic] some of the more obvious and violent dangers that we encounter on our streets.").

The sentencing guidelines recognize this policy judgment, for they impose a 6 level enhancement for certain offenses that are committed "under color of law," an enhancement that roughly doubles the applicable guideline range of imprisonment.

See USSG § 2H1.1(b)(1). Despite acknowledging the validity of the principle, the district court failed to give effect to it, and failed to adequately explain how a sentence of probation could adequately reflect the seriousness of the offense and promote respect for the law. A sentence of probation for this defendant instead creates the impression that police officers are above the law, and will not be punished even when their official conduct impairs the integrity and public reputation of the criminal justice system.

Similarly, the district court failed to explain how a sentence of probation could afford adequate deterrence to criminal conduct. 18 U.S.C. § 3553(a)(2)(B). Defendant suggests that deterrence of his own criminal conduct is sufficient under this provision, but that is wrong. A different part of the statute, § 3553(a)(2)(C), expressly requires a court to impose a sentence sufficient to protect the public from further criminal conduct of defendant, so section 3553(a)(2)(B) must contemplate something more than simply deterring defendant. In fact, it speaks to general deterrence of others, and a sentence of probation simply fails to achieve that deterrence.

This is especially true for crimes such as these, which involve planning, coordination and repeated acts in furtherance of the conspiracy. Several courts of appeals have recognized that certain categories of offenders and offenses are

especially susceptible to deterrence through the imposition of incarceration. *See, e.g.*, *United States v. Davis*, 458 F.3d at 498-99 (white collar offenders), *United States v. Tomko*, 498 F.3d 157, 166-67 (3d Cir. 2007)(reversing as inadequate a sentence of probation in part because of "the message a sentence of probation for the indisputably serious offense of willful tax evasion sends to the public at large and would-be violators."); *United States v. Carlson*, 498 F.3d 761, 765 (8th Cir. 2007)(reversing sentence of probation for tax evasion because sentences in such cases have a significant responsibility to deter future tax evaders). The government submits that police officers are among those potential offenders who are especially susceptible to deterrence, and such deterrence is especially important to society, because they must decide daily whether to tell the truth in their reports, their interviews and their testimony. A sentence of probation simply fails to achieve adequate deterrence in this context.

The government is not suggesting that no police officer could ever warrant a sentence of probation for an obstruction of justice offense. Indeed, the government is not appealing the sentences of probation imposed upon Peter Jacquemain and Robert Hey. As noted by the district court, Hey was not involved in the beating, and refused to advance the false story propagated by Robert Jacquemain. Similarly, the evidence at trial showed a very limited role in both the beating and coverup for Peter

Jacquemain. Peter Jacquemain wrote a false police report immediately following the incident, but there was little or no evidence of further obstructive conduct by Peter Jacquemain. The government is not appealing either defendant's sentence of probation.

But the conduct of those two defendants stands in stark contrast to that of Robert Jacquemain. Robert Jacquemain did not commit one impetuous act on the night of the beating, he orchestrated a long running conspiracy to cover up what happened. He recruited other participants, he testified falsely in state court proceedings in support of false charges against Paxton, and he took steps to maintain the conspiracy in the face of numerous investigations. Robert Jacquemain alone among the defendants voluntarily testified at trial, again offering the false version of events that Paxton "came at them," in order to help all of them avoid responsibility for the unlawful beating.

To this day, Robert Jacquemain has never wavered from that false version of events, even after the district court expressly recognized that it was false. Defendant has displayed no remorse, only defiance. *Cf. Davis*, 458 F.3d at 499 (noting that extraordinary variance should be reserved for defendants who have taken steps to rehabilitate themselves, made restitution, expressed remorse, etc.). Although some variance from the 27-33 month guideline range may well be warranted, based upon

some of the factors identified by the district court, a 100% variance in this context is unreasonable and fails to provide adequate deterrence, fails to promote respect for the law, and fails to reflect the seriousness of the offense.

Respectfully submitted,

RENA J. COMISAC
Acting Assistant Attorney General

STEPHEN J. MURPHY
United States Attorney

DIANA K. FLYNN
ANGELA M. MILLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station, RFK 3720
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4541

DANIEL R. HURLEY
Assistant U.S. Attorney
211 W. Fort Street
Suite 2001
Detroit, MI 48226
(313) 226-9780

Dated: October 19, 2007

CERTIFICATE OF SERVICE & FILING

I certify that on this 19th day of October, 2007, I served a copy of the attached Proof Reply Brief for the United States on opposing counsel by depositing it in the United States mails in a postage-paid envelope addressed to:

Scott C. Holbrook
1900 E. Ninth Street
Suite 3200 National City Center
Cleveland, OH 44114

Steven F. Fishman
615 Griswold, Suite 1125
Detroit, MI 48226

James C. Thomas
535 Griswold Street
Suite 2632 Buhl Building
Detroit, MI 48226

Spiros P. Cocoves
610 Adams Street, Second Floor
Toledo, OH 43604-1423

I further certify that the attached original Proof Reply Brief for the United States was filed with the Clerk of the United States Court of Appeals for the Sixth Circuit by placing it in the United States mails, with postage prepaid and addressed to the Clerk of the Court, on the same date.

_____
Paula Bielen, Legal Assistant
United States Attorney's Office

APPELLEE'S DESIGNATION OF RECORD

Appellee, pursuant to Sixth Circuit Rule 30(b), hereby designates the following filings in the district court's record as items to be included in the joint appendix:

REF. NUMBER	DOCUMENT	DATE
R. 164	Judgment, Statement of Reasons	7/26/2005

TRANSCRIPTS	DATE / VOLUME	PAGE(S)
R. 195		33-35

WITNESS TRANSCRIPTS	DATE / VOLUME	PAGE(S)
Carson, Patrick (R. 166)	6/8/2005	21-22
Jacquemain, Robert	Vol. 8	44-48