UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

-vs- **Case No. 6:04-cr-199-Orl-31DAB**

MICHAEL HENRY BELVETT

ORDER

Michael Henry Belvett is a 28 year old Jamaican, with no prior history of criminal conduct. On November 7, 2004, Belvett was a member of the crew of the M/V Mariner of the Seas which was docked at Port Canaveral, Florida. While attempting to go ashore, it was discovered that Belvett was wearing sandals that contained approximately 1 kilogram of powder cocaine. Belvett wore the sandals at the request of another crew member, who agreed to pay him $2,000 for bringing the sandals through security (PSR ¶ 7).

Belvett was charged in a one-count Indictment (Doc. 7) with possession with intent to distribute approximately 1 kilogram of cocaine hydrochloride. Pursuant to a plea agreement (Doc. 19), he pleaded guilty to the offense. The plea agreement contemplated the filing of a "substantial assistance" motion if Belvett cooperates with the government. (*Id.* ¶ 9). The determination of whether such a motion will be filed is, of course, solely within the discretion of the government. *See, e.g., United States v. Alamin*, 895 F.2d 1335, 1337 (11th Cir. 1990).

Prior to Belvett's sentencing, the government filed a Motion for Downward Departure, based upon Belvett's substantial assistance (Doc. 26). In its Motion, the government noted that upon his arrest, Belvett immediately told the government all he knew about the illegal activity.

Unfortunately, by the time the government acted on the information, the other crew member who gave the sandals to Belvett had absconded. With its representation to the Court that Belvett gave the government complete, timely and useful information, the government recommended a 2-level departure under United States Sentencing Guideline ("Section") 5K1.1.

The Court granted the government's Motion, but did not accept the government's recommendation of a 2-level departure. Instead, for the reasons discussed below, the Court granted a 5-level departure and sentenced Belvett accordingly.[1] To this, the government immediately took exception, arguing that the departure was excessive in light of its opinion as to the worth of Belvett's assistance.

18 U.S.C. §3553(e) is the statutory authority for Section 5K1.1. The statute provides that, upon motion of the government, the court has authority to impose a sentence below the statutory minimum, in accordance with the sentencing guidelines. But the guidelines themselves make no effort to quantify the level of appropriate departures. Instead, the policy statement to Section 5K1.1 says that the appropriate reduction shall be determined by the court for reasons that may include, but are not limited to, consideration of the court's evaluation of (1) the usefulness of the defendant's assistance; (2) the completeness and reliability of the information provided; (3) the nature and extent of defendant's assistance; (4) whether defendant exposed himself to risk; and (5) the timeliness of defendant's assistance.[2] U.S. SENTENCING GUIDELINES MANUAL §5K1.1 (2004).

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[1]If it were determined that the Court abused its discretion by not adopting the government's recommendation, the Court would note that the sentence imposed is, in any event, consistent with the sentencing factors set forth in 18 U.S.C. § 3553(a).

[2]The Commentary to Section 5K1.1 provides, in part, that substantial weight should be given to the government's evaluation of the extent of defendant's assistance. U.S. SENTENCING GUIDELINE

The Commentary to Section 5K1.1 makes it clear that "The nature, extent and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above." *Id.* cmt. background.

It has been this Court's experience, after presiding over hundreds of sentencings, that the government's Section 5K1.1 recommendation usually falls within the range of 2 to 5 levels. The government's methodology (if it has one) of determining a recommended level of departure has never been disclosed to the Court. It is clear, however, that the government puts great weight on the "usefulness" factor, in the sense of whether other suspects were apprehended. In this case, for example, counsel for the government supported its objection with the contention that "[a]ll that Mr. Belvett did was give us a name of the man who supplied him with the cocaine." (Doc. 29 at 10). For reasons beyond Belvett's control, government agents did not succeed in apprehending the supplier.

Usefulness, in any sense, is only one of the specifically enumerated factors which the Court may consider in its determination of an appropriate departure. Here, based on the government's written motion and representations at the sentencing, it is clear to the Court that Belvett's assistance was truthful, timely, and complete. He immediately told the government everything he knew about the criminal conduct and the other person involved. He gave all the assistance he was capable of giving, as soon as he could give it.

MANUAL § 5K1.1 cmt. n.3.

While usefulness of the assistance is an important factor, it is not necessarily the most significant one. Indeed, one consequence of over-weighing this factor is the "cooperation paradox," whereby more culpable defendants receive shorter sentences than less culpable defendants. *See Am. Coll. Of Trial Lawyers Report and Proposal on Sec. 5K1.1 of the U.S. Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1503, 1524-25 (2001) ("ACTL Section 5K1.1 Report"). In this Court's view, that is not a desirable result.

The government, nevertheless, tolerates no views but its own in this regard, save ones that lead to harsher sentences. It is clear that since the Supreme Court's decision in *Booker*,[3] the government has taken the position that sentences below the applicable guideline range or the government's recommendation are *per se* unreasonable. After the Court completed the allocution during Belvett's sentencing, for instance, the government urged the Court to avoid the temptation to use Section 5K1.1 as a means to achieve what the Court might consider a fair sentence. (Doc. 29 at 6). Even though Section 5K1.1 provides a departure from the guidelines, the government explained its view that the sentencing guidelines give a structure. (*Id.* at 7). The Court, in turn, asked the government, "And your position is anything outside the guidelines is per se unreasonable and I'll be put on a *Booker* report, correct?" (*Id.*) To which the government responded, "That is the Department's policy, yes, your Honor." (*Id.*) This policy suggests that the government still deems the guidelines as a mandatory minimum, notwithstanding the Supreme Court's pronouncement to the contrary. In fact, Judges who sentence <u>below</u> guideline minimums or government-approved downward departures are reported to the Department of Justice in

[3] *United States v. Booker*, 543 U.S. ____, 125 S.Ct. 738 (2005).

Washington on a "Booker Sentencing Report Form" ("*Booker* Report"). *See* James P. Comey, Deputy Attorney General, U.S. Dept. of Justice, *Department Policies and Procedures Concerning Sentencing*, January 28, 2005. (Exhibit A at 2-4).

What we have here is a separation of powers issue. This case presents the next logical step in the government's philosophically one-sided bid to marginalize the judicial branch. Despite the government's constant refrain that it seeks uniformity in sentencing, the government's actual policy reveals that refrain to be disingenuous.[4] The government not only has absolute control over whether a defendant gets a substantial assistance departure below the guideline sentencing range; the government further insists that its case-by-case departure recommendation sets the only "just" and "reasonable" sentence, unless the Court exercises "discretion" to impose a harsher sentence. That position is at odds with the constitutional function of courts as a check on executive power, and the government's position is especially troublesome given its view that "justice" is concerned only with whether a sentence is too lenient. The government essentially demands that courts step in line and accept the ill-explained sentencing rationale of a prosecutorial advocate, unless a court thinks that the government is being too generous.

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[4]One of the basic goals of the sentencing guidelines was to reduce sentencing disparity. However, with respect to substantial assistance departures, this goal has not been achieved. Indeed, the commentators and the U.S. Sentencing Commission itself have noted the substantial sentencing disparity among Districts in the application of Section 5K1.1. AMERICAN COLL. OF TRIAL LAWYERS, U.S. SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 18 (2004); LINDA D. MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PROCEDURE 17 (1998). It would be naive to think that court discretion is the primary culprit driving the disparity, as the government controls the framing of Section 5K1.1 motions and often gets the departure it recommends.

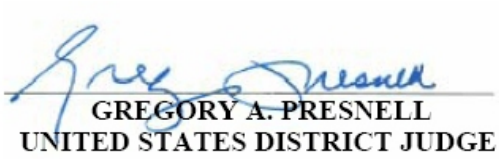
As a matter of law, the limit of the Court's discretion under 5K1.1 is whether the sentence imposed is reasonable. *United States v. Pippin*, 903 F. 2d 1478, 1485 (11th Cir. 1990) (citing *United States v. Wilson*, 896 F. 2d 856, 859 (4th Cir. 1990)). As the Eleventh Circuit has stated, "[g]overnment counsel should keep in mind . . . that the only authority delegated to the government by [§ 5K1.1] is the authority to *move* the district court for a reduction of sentence in cases in which the defendant has rendered substantial assistance." *Pippin*, 903 F.2d at 1485 (emphasis in original, certain internal marks omitted). Once it has made the motion, "the government has no control over whether and to what extent the district court departs from the Guidelines . . . ." *Id.*

In consideration of the relevant factors, and giving appropriate weight thereto, the Court, in its capacity as neutral, decided that a 5-level departure was appropriate under the particular circumstances of this case. Except for the government's contrary opinion as an advocate, there is nothing in this record to suggest that this conclusion is unreasonable.[5] Accordingly, it is

[5]According to the U.S. Sentencing Commission, the median percentage decrease nationwide for Section 5K1.1 departures in drug trafficking cases in 2002 was 46.7%. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 30 (2002). Here, the Court departed 5 levels from level 17 to level 12, a 30% reduction. Thus, if measured by the national norm, the Court's sentence was clearly within the range of reasonableness.

ORDERED that the government's objection is overruled.

DONE and **ORDERED** in Chambers in Orlando, Florida on March 17, 2005.



GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Marshal
United States Attorney
United States Probation Office
United States Pretrial Services Office
Counsel for Defendant
Michael Henry Belvett