Paul Hurst

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Martinsburg Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	File No. CR 89-228-02
	)	
RANDALL LEE BROWN	)	

MEMORANDUM OPINION

This matter is before the Court on the Defendant's Motion to Dismiss Petition, Vacate Warrant for Arrest, Vacate Sentence of Probation, and for Release pursuant to Fed. R. Crim. P. 35(a).[1] For the reasons discussed below, the Defendant's motion will be granted, and the sentence of probation and warrant for arrest will be vacated.

Factual Background

Upon his plea of guilty, the Defendant, Randall Lee Brown, was convicted of one count of conspiracy to distribute cocaine, an offense he committed prior to November 1, 1987, the effective date of the Sentencing Guidelines. On May 31, 1990, Judge Merhige, sitting by designation in the United States District Court for the Northern District of Virginia, originally sentenced the Defendant

[1]The rule applicable to offenses committed prior to November 1, 1987 provides as follows:

> (a) **Correction of Sentence.** The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentences.

Fed. R. Crim. P. 35(a).

to a term of imprisonment of five years, suspended all but one year of that sentence, and placed him on probation for a period of five years to commence upon completion of his one-year term of imprisonment. The court also imposed a special parole term of three years on Mr. Brown.

On August 28, 1990, because he had been granted credit for time served before sentencing, the Defendant completed his one-year prison term and began serving his probationary term. Three days later, on August 31, 1990, Judge Merhige, perhaps not realizing the extent of prison time actually served by the Defendant, sua sponte entered an order modifying Mr. Brown's original sentence to provide for suspension of all but six months of the term of imprisonment and ordering a probationary term of four-and-a-half years.

On October 15, 1991, a Petition on Probation was filed against Mr. Brown, charging him with possession and use of controlled substances, in violation of Standard Condition No. 7 of his conditions of probation. Mr. Brown was placed under house arrest by Magistrate Judge Cunningham in the Southern District on October 23, 1991. The Defendant eventually spent eight months in home detention. On November 6, 1991, jurisdiction over the Defendant was transferred to the Southern District of West Virginia where the Defendant resides. Defendant moved to dismiss the petition in the Southern District of West Virginia, contending that his sentence of probation was illegally imposed. The Southern District ruled that it had no authority to correct a sentence imposed by the

Northern District of West Virginia and ordered that questions concerning the legality of the Defendant's sentence be determined by the Northern District of West Virginia.

Issue

Under 18 U.S.C. § 3651, where a defendant has received a sentence of five years imprisonment with all but 4 years suspended followed by a five year term of probation, and where the defendant has already served a year in prison, whether a district court could "correct" the illegal sentence by reducing the amount of time served to six months and installing a term of probation of four-and-a-half years.

Argument

Section 3651 was enacted on August 23, 1958.[2] Its primary purpose was to enable a judge to impose a short sentence, not exceeding six months, followed by probation on a one count indictment. See United States v. Cohen, 617 F.2d 56, 59 (4th Cir. 1980) (citing S.Rep.No.2135., 85th Cong., 2d Sess., reprinted in

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[2]18 U.S.C. §3651 provides in part:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provided that the defendant be confined in a jail-type institution or treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

(1958) U.S. Code Cong. & Admin. News, p. 3841.) Essentially, this statute gave judges an option when they thought a defendant ought to be admitted to probation, but that he ought to serve a little prison time before he has the benefit of probation. See S.Rep.No.2135., 85th Cong., 2d Sess., reprinted in (1958) U.S. Code Cong. & Admin. News, p. 3842 (remarks of Chief Judge John J. Parker).

A district court has no inherent power to suspend sentences or to place defendants on probation.[3] For cases occurring prior to the effective date of the Sentencing Reform Act of 1984, 18 U.S.C. § 3651, the "split-sentence" provision, allows a court to impose a term of imprisonment followed by probation, but only if the term of imprisonment does not exceed six months. Thus, it is clear that Mr. Brown's original sentence -- one year in jail followed by five years of probation -- was illegal. See Cohen, 617 F.2d at 58 (holding that a sentence of three years with 23 months suspended followed by four years probation was "clearly illegal . . . because the statute limits to six months the permissible period of actual confinement where a part of a sentence is suspended").

In addition, the sentencing court's attempted modification of Mr. Brown's sentence -- imposing a retroactive term of imprisonment of six months and four-and-a-half years of probation -- was also illegal since Mr. Brown had already been sentenced and served a

[3]A probation order, although it does not penalize a defendant by fine or imprisonment, restrains a defendant's conduct. The power to order such restraint comes from the legislative branch. See United States v. Urdaneta, 771 F. Supp. 28, 31 (E.D.N.Y. 1991).

year in prison. Once he had completed his prison term, the district court had no authority to "reduce" his sentence to make it a legal one. Furthermore, under 18 U.S.C. § 3651, because Mr. Brown could not have served a year of imprisonment and then placed on probation, his term of probation should be vacated, and the Petition alleging that he violated a term of his probation should necessarily be dismissed by the Southern District of West Virginia.

The Defendant finds support for his position in Sullens v. United States, 409 F.2d 545 (5th Cir. 1969). In that case, under the split-sentence provision, Sullens received a sentence of six months in prison and two-and-a-half years probation. The six months were to run from July 12, 1968, despite the fact that Sullens had already been in jail for seven months. On July 24, 1968, after having concluded that the July 12 sentence was "improper,"[4] the district judge resentenced Sullens to three years imprisonment, with no provision for probation. Id. at 546-47.

Before considering the double jeopardy issue, the Fifth Circuit addressed the July 12 split-sentence received by Sullens. In an opinion by Judge Wisdom, the court held that having invoked the split-sentencing provision, section 3651, the district judge could not sentence Sullens to more than six months in prison and

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[4]Sullens had already served seven months in jail. The Bail Reform Act, 18 U.S.C. § 3568, provides that the sentence of one who remains in jail pending trial "shall commence to run from the date on which he is received at such jail or other place of detention." The time spent by Sullens in jail, therefore, had to be considered as time served in prison under the July 12 sentence, and subtracted from the maximum further time that the court could impose under the split-sentencing provision, i.e., six months. Sullens, 409 F.2d at 546.

was bound to credit jail time as part of the six months. Because Sullens had already served more than six months in jail, the court could not invoke the split-sentence provision as it had tried to do on July 12. Id. at 546. Thus, under the principle enunciated by the Fifth Circuit in Sullens, Mr. Brown could not be sentenced under 18 U.S.C. § 3651, as Judge Merhige tried to do, once he had already served more than six months of his sentence.

The Government attempts to convert Mr. Brown's argument into a double jeopardy issue. The United States then goes on to state that the court's order of August 31, 1990 did not increase the Defendant's sentence in the slightest, it only decreased the period of ordered incarceration on the intended split-sentence from an improper period of 12 months to a correct period of six months.

The United States, however, misunderstands the thrust of the Defendant's argument, as well as the significance of the fact that Mr. Brown actually served a year in prison. The Defendant's argument is quite simple: Mr. Brown's original sentence of one year followed by probation was illegal because 18 U.S.C. § 3651 only authorizes a split sentence if the term of imprisonment is no more than six months. If the sentencing judge wanted Mr. Brown to serve anywhere from seven to sixty months in jail, then he could have given the Defendant such a sentence, although he could not have added a term of probation. However, if the judge wanted Mr. Brown to have the benefits of a probationary term, he could not sentence him to more than six months in jail.

After realizing that the May 31 sentence was illegal, Judge

Merhige should have simply vacated the term of probation. "Reducing" Mr. Brown's sentence by six months in order to validate the term of probation is unreasonable since Mr. Brown had just completed a term of imprisonment of one year. Unfortunately for Mr. Brown, time wrongly imposed cannot be given back. Under 18 U.S.C. § 3651 and Sullens, once Mr. Brown served a sentence of more than six months in jail, probation was no longer an option.[5] Therefore, because the sentencing court had no authority to place Mr. Brown on probation, there is no way he could have violated his probation.

Conclusion

Mr. Brown was sentenced to an illegal sentence of probation after he received a sentence of five years imprisonment with all but four years suspended. The sentencing judge could not correct this mistake once Mr. Brown had already served more than six months in prison. Thus, that part of Mr. Brown's sentence that imposed a period of probation will be vacated. The Southern District of West Virginia has jurisdiction over the pending Petition on Probation, and that court can now address Mr. Brown's alleged probation violation. Of course, Mr. Brown necessarily cannot be held accountable for violating a term of probation that is no

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[5]Increasing Mr. Brown's jail time would also not have been a viable option. Once the Defendant completed his jail time, it would have clearly been improper to resentence Mr. Brown to more prison time in lieu of the lost term of probation. See United States v. Lundien, 769 F.2d 981, 987 (4th Cir. 1985) ("[D]ue process may also be denied when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them.").

longer valid. The Court notes, however, that nothing in this ruling should impact on the question of whether Mr. Brown violated a term of his special parole.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

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DATE

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UNITED STATES DISTRICT JUDGE