

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA

*

v.

*

Criminal No. WMN-00-093

SHAWN JOHNSON

*

* * * * *

SENTENCING MEMORANDUM

The defendant, Shawn Johnson, through counsel James Wyda, Federal Public Defender for the District of Maryland, and Carrie Howie Corcoran, Assistant Federal Public Defender, respectfully submits this memorandum in reference to the sentencing in the above-captioned case. For the reasons stated below, Mr. Johnson asks this Court to determine, pursuant to United States Sentencing Guidelines (“U.S.S.G.”) Section 2K2.1(a)(4), that his base offense level is 20. Mr. Johnson also asks this Court to depart downward pursuant to U.S.S.G. §4A1.3 from criminal history category IV to category III on the basis that category IV substantially overstates the seriousness of Mr. Johnson’s past criminal conduct.

I. Background and Plea Agreement

Mr. Johnson pled guilty to a one-count indictment charging him with being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1). Mr. Johnson fully accepted responsibility for this offense.

Although this case was originally assigned to this Court and is before this Court for sentencing, it was transferred to the Honorable Herbert N. Maletz for a period of time. On October 4, 2000, Mr. Johnson entered his guilty plea before Judge Maletz. The plea agreement specifically provided:

The parties agree that on or about March 10, 1999, Mr. Johnson was granted a probation before judgment for the offense of Second Degree Assault under Article 27, Section 12A of the Maryland Code (Case number 6B00111950). The parties understand that defense counsel will argue at sentencing that this conviction should not enhance Mr. Johnson's sentence under U.S.S.G. 2K2.1 or increase his criminal history category because Mr. Johnson was not represented by counsel and did not validly waive his right to counsel in that proceeding. The government is free to oppose this request.

Plea letter dated September 13, 2000 (executed by Mr. Johnson on September 15, 2000) at 4, ¶ c.

The agreement went on to state that the defendant may seek and the government may oppose a downward departure “on the argument that the defendant’s criminal history category over-represents the seriousness of his criminal history, pursuant to U.S.S.G. §4A1.3.” *Id.* at ¶ f.

II. Sixth Amendment violation

A. Law

Although a defendant generally is not permitted to collaterally attack a prior conviction in a federal case, the Supreme Court has carved out an exception where the prior conviction was obtained in violation of the Sixth Amendment right to counsel. *Custis v. United States*, 511 U.S. 485, 492-97 (1994)(holding that collateral attack is not permitted based on ineffective assistance of counsel or involuntariness of a plea where prior conviction enhanced defendant’s sentence under the Armed Career Criminal Act, but recognizing right to collaterally attack prior conviction based on violation of right to counsel). *See United States v. Bacon*, 94 F.3d 158, 163 (4th Cir. 1996)(finding reasoning of *Custis* “equally compelling in the context of Guideline Sentencing”).

Although the Sixth Amendment right to counsel attaches in most criminal cases, the right can be waived. In order for a waiver of the Sixth Amendment right to counsel to be constitutionally valid, it must be knowing and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). As the

Supreme Court has noted, “courts indulge every reasonable presumption against waiver of fundamental constitutional rights” and “do not presume acquiescence in the loss of fundamental rights.” *Id.* (quotations omitted). A waiver of the right to counsel must be “an intentional relinquishment or abandonment of a known right or privilege.” *Id.* “The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Id.*

While the Fourth Circuit requires no particular form of questioning of a defendant regarding waiver of the right to counsel, it has stated that the charges against the defendant, possible punishment and ways an attorney would be helpful must be explained by the trial court. Specifically, the Fourth Circuit has stated:

The court must make the defendant aware of the “dangers and disadvantages of self-representation, so that the defendant “knows what he is doing and his choice is made with his eyes open.” *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L. Ed.2d 561 (1975). Thus, the court must assure itself that the defendant knows the charges against him, the possible punishment and the manner in which an attorney can be of assistance. [*United States v. Townes*, [371 F.2d 930 (4th Cir. 1966)] at 933; *Aiken v. United States*, 296 F.2d 604 (4th Cir. 1961). The defendant must be made aware that he will be on his own in a complex area where experience and professional training are greatly to be desired. *United States v. Gillings*, 568 F.2d 1307 (9th Cir. 1978); *Stepp v. Estelle*, 524 F.2d 447 (4th Cir. 1975).

United States v. King, 582 F.2d 888, 890 (4th Cir. 1978). The characteristics of the defendant are also material in determining whether his or her waiver is knowing and intelligent. The Fourth Circuit has stated:

The district judges also should “develop on the record the educational background, age and general capabilities of an accused, so that the ability of an accused to grasp, understand and decide is fully known” to the trial court and fully disclosed by the record. *Townes v. United States*, 371 F.2d 930, 934 (4th Cir. 1966), *cert. denied*, 387

U.S. 947, 87 S.Ct. 2083, 18 L.Ed. 2d 1335 (1967).

United States v. Gallop, 838 F.2d 105, 110 (4th Cir. 1988).

B. Mr. Johnson did not validly waive his Sixth Amendment right to counsel¹

On March 10, 1999, at the age of 19, Mr. Johnson appeared in the District Court of Maryland. It is undisputed that Mr. Johnson did not have counsel. A transcript of that proceeding is attached as Exhibit A.² During the March 10, 1999, proceeding, the trial judge purported to advise Mr. Johnson of his right to counsel. As reflected in the transcript, the trial judge stated:

Judge: You are Mr. Shawn Johnson, you have two charges of assault in the second degree and deadly weapon. You want to go forward today, is that what you are saying? You don't want to have a lawyer, you want to proceed today? You don't want to have a jury trial or do you want a jury trial?

Johnson: No.

Transcript p. 1, lines 12-18. Thereafter, the Court indicated that it was too late in the morning to call the case and asked the parties to return at 2:00 p.m. Transcript p. 1, line 37- p.2, line 9. After resuming later in the day, the following exchange took place:

Judge: Alright Mr. Johnson this morning we indicated, we spoke and you indicated that you want to go forward today is that correct?

Johnson: Yes sir

¹The parties agree that Mr. Johnson was not represented by counsel when he appeared in the District Court of Maryland on March 10, 1999, and was found guilty of the offense of assault. Accordingly, the issue presented to this Court is whether Mr. Johnson validly waived his right to counsel in that case.

² Defense counsel obtained an audiotape of the March 10, 1999, proceeding from the District Court of Maryland and prepared a transcript. A copy of the audiotape and the transcript were provided to the government during plea negotiations in this case. It is counsel's understanding that the government does not oppose use of the transcript at sentencing.

Judge: You don't want to have an attorney.

Johnson: (Inaudible/unclear if defendant responded)

Judge: You don't want to have a jury trial.

Johnson: No sir

Judge: You want to have a trial here, is that right? Or do you want to proceed on the agreed statement of facts?

Johnson: (Inaudible/unclear if defendant responded)

Transcript p. 2, lines 26-42. Thereafter, the case proceeded to trial based on a “not guilty agreed statement of facts.”³ The agreed statement of facts, derived from the charging document, was read into the record and Mr. Johnson was found guilty by the Court.

The Court's cursory, leading statements to Mr. Johnson regarding his Sixth Amendment right to counsel do not approach the level of questioning and advisement required to constitute a valid waiver. The Court's initial attempt to advise Mr. Johnson of the right to counsel consisted of a statement followed by as many as five questions, some of them leading, addressing three different issues. All that is clear from the Mr. Johnson's response is that he answered “no” to the question, “. . . do you want a jury trial?” The Court's afternoon attempt to advise Mr. Johnson of his Sixth Amendment right to counsel is no better. It is not at all clear that Mr. Johnson responded to the Court's statement, “[y]ou don't want to have an attorney.” However, even if Mr. Johnson indicated that the judge's statement was correct, for the reasons stated in below, a constitutionally valid waiver

³Proceeding on a “not guilty agreed statement of facts” can be the functional equivalent of a guilty plea. See *Yanes v. State*, 448 A.2d 359 (1982)(stating that it a “hybrid plea,” not based in the Maryland Rules and is a “back handed” guilty plea for the purpose of expedience). However, it preserves the right to appeal legal issues presented in a case without the necessity of trial. See *Ward v. State*, 451 A.2d 1243, 1247-1248 (1982).

still cannot be established.

Although the Court attempted to address the issue of the waiver of the right to counsel, it failed to advise Mr. Johnson of the possible punishment against him, the dangers and disadvantages of self-representation and the ways an attorney could be of assistance. *King*, 582 F.2d at 890. Moreover, the Court failed to inquire regarding Mr. Johnson’s “educational background, age and general capabilities” order to determine whether he could “grasp, understand and decide” whether he wished to have counsel. *Gallop*, 838 F.2d at 110.

Had the Court inquired, it would have learned that Mr. Johnson was only 19 years old at the time of the proceeding. It would also have learned that Mr. Johnson only completed the ninth grade and had not obtained his G.E.D. Pre-sentence Report (“PSR”) ¶ 56. The Court would have known that Mr. Johnson had limited experience with the criminal justice system in that he had never been convicted of an adult offense. PSR ¶27. The combination of these factors, had they been known to the Court, would likely have shown Mr. Johnson’s inability to make a knowing and intelligent decision regarding the waiver of his right to counsel.⁴

Mr. Johnson’s relinquishment of his Sixth Amendment right to counsel was not made with “open eyes.” Rather, it was made through the young, inexperience, poorly educated eyes of a defendant who was not advised of the possible consequences of his acquiescence. As a result, Mr. Johnson did not validly waive his Sixth Amendment right to counsel in connection with the March

⁴Mr. Johnson’s utter confusion is evidenced by his willingness to proceed on a “not guilty agreed statement of facts.” As discussed at note 3, *infra*, the only purpose of this type of proceeding is to preserve a legal issue (e.g., denial of a pre-trial motion to suppress statements) for appeal. Because no legal issues were presented prior to the “not guilty agreed statement of facts” and because of Mr. Johnson’s abysmal lack of legal education, it would be absurd to suggest that he understood the nuances of proceeding in this manner.

10, 1999, conviction for assault. Accordingly, this conviction should not increase Mr. Johnson's offense level or criminal history category.⁵

III. Overrepresentation under U.S.S.G. 4A1.3

A. Law

Section 4A1.3 of the U.S.S.G. permits a Court to depart upward or downward from the sentencing range otherwise applicable if reliable information indicates that the criminal history category employed "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. §4A1.3, *United States v. Summers*, 893 F.2d 63, 67 (4th Cir. 1990); *United States v. Adkins*, 937 F.2d 947 (4th Cir. 1991); *United States v. Pinckney*, 938 F.2d 519, 521 (4th Cir. 1991). As the Fourth Circuit noted in *Adkins*:

'Criminal history' is, relatively, one of the most flexible concepts in the guidelines. While it is possible to classify the severity of current federal offenses with a reasonable degree of precision, mathematically accurate evaluation of the countless possible permutations of criminal history involving offenses high and petty committed in numerous jurisdictions, would be at best unwieldy. The Sentencing Commission recognized this difficulty, and though it prescribed a mathematical method to calculate criminal history, it specifically identified overstatement or understatement of the defendant's past conduct as a ground for departure from the raw criminal history score.

Adkins, 937 F.2d at 952.

Included among the criteria which have been evaluated by sentencing courts under U.S.S.G. §4A1.3 are the defendant's "criminal career, including his age when he committed the offenses, the

⁵If the Court finds that the assault conviction does not enhance Mr. Johnson's sentence under U.S.S.G. §2K2.1(a)(2), Mr. Johnson's offense level would be 20, as stated in the Pre-sentence Report. His criminal history score would change from 7 and criminal history category IV to 6 and criminal history category III. With a three level reduction for acceptance of responsibility, Mr. Johnson's sentencing range would be 30-37 months.

proximity in time of the [prior offense], and the state's assessment of the seriousness of the [defendant's crimes] as reflected by the state court's handling of sentencing and by the length of time . . . actually served." *United States v. Senior*, 935 F.2d 151 (8th Cir. 1991).

B. Mr. Johnson's criminal history overrepresents the seriousness of his conduct

The Pre-sentence Report indicates that Mr. Johnson is a criminal history category IV with a criminal history point total of 7. PSR at ¶37. This is based on the total of criminal history points for three prior convictions, which is 5, and an additional two points for having committed the instant offense while on probation. PSR ¶ 36.

Mr. Johnson has only two adult convictions. As discussed above, the first conviction resulted from an uncounselled trial at which the defendant proceeded on a "not guilty agreed statement of facts" in the District Court for the State of Maryland. For the reasons stated above, this conviction should not be included in calculating Mr. Johnson's criminal history. However, if considered by this Court, for the reasons stated below, it should be treated as a minor incident.

The offense of assault second degree carries a maximum punishment of ten years imprisonment. After being found guilty of this offense, Mr. Johnson received a sentence of unsupervised probation for a period of one year. PSR ¶ 31. He also received probation before judgment pursuant to Art. 27 Md. Ann. Code Section 641 which enables a defendant to have the conviction struck from his or her record upon successful completion of the probationary period. *Id.* The state trial judge's assessment that the conduct in this case warranted no incarceration, unsupervised probation and the possibility that the conviction could be struck from the record suggests that the offense was much less serious than most that the Court encounters.

In Mr. Johnson's only other adult conviction, the Circuit Court for the State of Maryland

determined that the service of approximately eighty-two days followed by probation constituted sufficient punishment for the offense of possession with intent to distribute and conspiracy to distribute cocaine. As a juvenile, Mr. Johnson was sentenced to the Department of Juvenile Justice and served approximately seventy-five days before a vacancy was available in a training program and he was released. The relative leniency of these sentences suggests that Mr. Johnson's conduct was much less serious than most that the Court encounters.⁶

By sentencing Mr. Johnson in a range defined by criminal history category III, rather than criminal history category IV, the true nature of his criminal history is placed in a more accurate context without disregarding the existence of his prior offenses. This balancing is exactly the result intended by the Sentencing Commission in formulating §4A1.3.

IV. Conclusion

For the foregoing reasons as well as for any other reasons set forth at a hearing on the matter, Mr. Johnson asks this Court to determine pursuant to U.S.S.G. §2K2.1(a)(4) that his base offense level is 20. Additionally, Mr. Johnson asks this Court to depart downward under U.S.S.G. §4A1.3 from criminal history category IV to criminal history category III on the basis that category IV overstates the seriousness of Mr. Johnson's past criminal conduct. Should the Court grant these requests, Mr. Johnson's sentencing range would be 30-37 months.

⁶Had Mr. Johnson received twenty-three fewer days of incarceration in connection with the adult charge and sixteen fewer days of incarceration in connection with the juvenile matter, his criminal history would be reduced by two points and his criminal history category would be III.

Respectfully submitted,

Carrie Howie Corcoran
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of November, 2000, a copy of the foregoing Sentencing Memorandum was hand delivered to Assistant United States Attorney James Pyne, United States Attorney's Office, 6th Floor, United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

Carrie Howie Corcoran
Assistant Federal Public Defender