

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

CR 03-407-RE

vs.

OPINION AND ORDER

BASSAM E. KASSAB,

Defendant.

REDDEN, Judge:

The matter before the court is the government's request for a sentencing jury (doc. 30). That request is denied.

On August 27, 2003, defendant Bassam Kassab was indicted for one count of possession and distribution of pseudoephedrine. On March 24, 2004, defendant appeared in this court and pled guilty to possession and distribution of an unspecified amount of pseudoephedrine. This court accepted defendant's plea and set a date for a sentencing hearing. Prior to sentencing, the Ninth Circuit ruled in United States v.

Ameline, 376 F.3d 967 (9th Cir. July 21, 2004), that Blakely v. Washington, 524 U.S. ____, 124 S.Ct. 2531 (June 24, 2004), applies to the Federal Sentencing Guidelines and that defendants, even those in post-conviction procedural posture, are entitled to a jury determination of sentencing enhancements, with the burden of proof being beyond a reasonable amount. Thereafter, the government filed the request for a sentencing jury in this case to determine the amount of pseudoephedrine for which defendant should be held responsible at sentencing.

As a result of Blakely, the U.S. Probation Office has recommended, based on defendant's plea to an unspecified amount of the substance, a base offense level of 12 (which could result in a maximum sentence of 12 months of imprisonment). The government disagrees, arguing that the base offense level should be 38 (which could result in a maximum sentence of 210 months) based on its allegations that more than three kilograms of the substance are involved in this case. The government seeks to prove these allegations to a sentencing jury.

After the Ninth Circuit's decision in Ameline, the court decided United States v. Patterson, 381 F.3d 859 (9th Cir. August 20, 2004). In Patterson, the court held that once having accepted a defendant's plea, a district court does not have the authority to vacate that plea on its own motion or on the motion of the government. Id. at 865. Further, the court ruled that initial jeopardy attaches upon the district court's acceptance of the plea. Id.

In Patterson, the district court had accepted defendant's guilty plea to the manufacture of an unspecified amount of marijuana, which would have exposed him to

a maximum sentence of 60 months. Prior to sentencing, the Supreme Court decided Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt. Apprendi at 476. The government thereafter moved to vacate defendant's plea as insufficient under Apprendi. The district court vacated the plea, over defendant's objections, on the ground that "the number of marijuana plants was not stipulated to by Patterson, nor found by a jury beyond a reasonable doubt." Patterson at 863-64. Defendant went to trial, was found guilty of manufacturing 100 or more marijuana plants, and was sentenced to 188 months of imprisonment.

Defendant appealed on double jeopardy grounds, and the Ninth Circuit reversed the district court. The Ninth Circuit held that initial jeopardy attached when the district court accepted defendant's guilty plea. Id. at 862-63. Further, once jeopardy had attached, the district court was not free to vacate a defendant's plea, either on the government's motion or *sua sponte*. Id. at 865.

In this case, in order to impanel a sentencing jury on the issue of amount of pseudoephedrine, this court necessarily would have to vacate, over defendant's objections, his plea to an unspecified amount of pseudoephedrine. Under Patterson, this court is not permitted to vacate the plea in these circumstances. Id. at 865. Further, based on the Ninth Circuit's rationale in Patterson, this court concludes that because initial jeopardy attached when the court accepted defendant's guilty plea to an unspecified amount of substance, double jeopardy would attach to a subsequent jury

determination of the amount of substance involved, in violation of defendant's rights under the Double Jeopardy Clause of the Fifth Amendment. Defendant's guilty plea established only that he admitted to possession and distribution of an unspecified amount of pseudoephedrine, and that is the basis upon which he will be sentenced.

In sum, when this court accepted defendant's plea to an unspecified amount of pseudoephedrine, the government lost the opportunity to prove to a sentencing jury that defendant was responsible for a specified amount of the substance. This is a situation like Patterson where intervening changes in the law have resulted in the government losing, through no fault of its own, the opportunity to argue and prove the amount of substance at issue. Even though this arguably could result in a windfall to the defendant and prejudice to the government, the Fifth Amendment does not permit the defendant to be tried twice for the same offense. Patterson at 865 (citing United States v. Velasco-Heredia, 319 F.3d 1080, 1086-87 (9th Cir. 2003)).

Therefore, defendant's sentencing hearing of October 21, 2004, is stricken and reset to October 28, 2004. The government's request for a sentencing jury (doc. 30) is DENIED.

IT IS SO ORDERED.

Dated this 21st day of October, 2004.

/S/ James A. Redden
James A. Redden
United States District Judge