

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

UNITED STATES OF AMERICA

-vs-

Case No. 6:04-cr-72-Orl-31KRS

VERN SHELTON

SENTENCING MEMORANDUM OPINION

Defendant, Vern Shelton, is a 38 year-old habitual user of cocaine. (PSR at ¶ 56).

Between February 19, 1987 and March 28, 1989, Defendant was arrested for three separate cocaine-related felony offenses. (PSR at ¶¶ 27-29). He was prosecuted in state court and served approximately 3 years in state prison. He was released from custody on April 6, 1992. Since that time, he has been convicted of several minor drug offenses, for which he has served only a few days in jail.

On December 6, 2003, Defendant sold a half cookie of crack cocaine (7.4 grams) to a DEA undercover agent for \$450 (the instant offense). As punishment for this conduct, the Government seeks to incarcerate Defendant for a minimum of 188 months – over 15 years.

The draconian sentencing scheme that produces this result is as follows: 7.4 grams of crack cocaine carries a base offense level under the U.S. Sentencing Guidelines of 26. U.S.S.G. § 2D1.1. Subtracting 3 levels for acceptance of responsibility and cooperation pursuant to § 3E1.1

results in a total offense level of 23. Defendant's level VI criminal history raises his sentence range to 92-115 months.¹

In addition, Defendant's past drug convictions would call into play the career offender enhancement under § 4B1.1 of the Guidelines. Since Defendant has two prior drug felonies, his adjusted score is increased to a level 31, with a sentencing range of 188-235 months. The Government recommends a sentence at the low end of this range.

Defendant objects to this scoring. He argues that the career offender enhancement should not apply, and that he should not be scored as a criminal history category VI.

Defendant argues that his 1987 conviction is stale and should not be counted as a qualifying offense. U.S. Sentencing Guideline § 4B1.1 provides in pertinent part: "(3) that the Defendant has at least two prior felony convictions of . . . a controlled substance offense." Application Note 3, § 4B1.2 states: "The provisions of 4A1.2 . . . are applicable to the counting of convictions under § 4B1.1." Section 4A1.2 deals with "Definitions and Instructions for Computing Criminal History," not the computation of an offense level. Nevertheless, § 4A1.2(e) provides that sentences in excess of 1 year and 1 month will be counted if within 15 years of the instant offense, while all other felony drug offenses are counted if within 10 years.

Although Defendant was sentenced to only 195 days for his 1987 conviction, he subsequently violated his parole, and received a 30-month sentence therefor. Thus, one needs to consider § 4A1.2(K)(1), which provides that the period of incarceration for violation of parole be

¹Interestingly, if Defendant had sold powder cocaine, his base offense level would only be 12. After application of § 3E1.1, Defendant would score at 10-VI, with a sentence range of 24-30 months. It has been noted that the crack/powder cocaine sentencing disparity amounts to discrimination against Blacks. Defendant is African-American.

added to the original sentence “to compute the criminal history points for § 4A1.1(a), (b) or (c), as applicable.” In doing so, Defendant served more than 13 months for his 1987 conviction, and this offense would therefore be counted if it is within 15 years of Defendant’s commencement of the instant offense. U.S.S.G. § 4A1.2(e)(1); *United States v. Coleman*, 9 F.3d 1480, 1485 (10th Cir. 1993).

Defendant’s 1987 sentence was “imposed” on September 1, 1987. Since the instant offense occurred on December 6, 2003, this prior offense would seem to be beyond the 15-year period. But, alas, one needs to look at Application Note 1 to U.S.S.G. § 4A.1.1 to learn that this time period is computed from the date the sentence was *completed*, not imposed. Thus, under the Guidelines, an offense that occurred more than 15 years ago may be counted for career offender status under § 4B1.1 and for criminal history scoring under § 4A1.1.

The other two convictions scored in paragraph 22 of the PSR are: (1) Case No. 88-9231 for delivery of cocaine in which a 3-year sentence was imposed on September 6, 1990 (PSR, ¶ 28); and (2) Case No. 89-2941 for trafficking in cocaine in which a 4 ½- year sentence was imposed on September 7, 1989 (PSR, ¶ 29). Both these offenses were committed prior to April 1989, and the sentences were served concurrently. Thus, while technically within the 15-year period, these convictions (which the sentencing court treated as one offense) could be considered stale from a subjective point of view.

There you have it – a simple, rational, fair and humane way to determine an appropriate sentence under the U.S. Sentencing Guidelines.² In sum, Defendant is not an individual, he is a number, i.e., 31-VI.

In *U.S. v. King*, Case No. 6:04-cr-35-Orl-31KRS, this Court held the U.S. Sentencing Guidelines unconstitutional, but indicated that it would look to the Guidelines for guidance. In this case, the Guidelines do not produce a just result. Mr. Shelton is a small-time drug user/dealer. The instant offense involved a trivial amount of drugs and his prior convictions (all served in one concurrent sentence) are subjectively stale by any reasonable standard. Under these circumstances, a 15-year sentence is clearly unwarranted.

This case illustrates the concern Justice Kennedy expressed by America’s reliance on incarceration as a means of criminal punishment, especially for drug-related offenses.³ At its meeting on August 10, 2004, the American Bar Association’s House of Delegates approved the Kennedy Commission’s recommendations which, among other things, urge repeal of mandatory minimum sentences⁴ and the exercise of judicial discretion; reserving lengthy sentences (like this)

²The term “guidelines” is a misnomer. In reality, the Guidelines are directives, from which the Court may not normally deviate unless, of course, it suits the Government’s purpose to depart downward pursuant to U.S.S.G. § 5K1.1.

³In 2002, 42 percent of all criminal sentences in federal court were for drug trafficking under § 2D1.1 of the Guidelines. The average sentence imposed was 71.2 months. In contrast, the average sentence imposed for larceny, fraud, embezzlement, counterfeiting, bribery and tax evasion was 10.3 months. 2002 Sourcebook of Federal Sentencing Statistics, Table 13 at 29.

⁴This offense carries a statutory minimum of 5 years. 21 U.S.C. § 841(b)(1)(B)(iii).

for offenders who pose the greatest danger to the community.⁵ Defendant is not one of these people.

Considering all relevant factors, including Defendant's criminal history, the Court believes that a sentence of 70 months is appropriate. Judgment will be entered accordingly.

DONE and **ORDERED** in Chambers in Orlando, Florida on this 30 day of August, 2004.


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
Vern Shelton

⁵U.S. Law Week, Vol. 7, No. 6 at 2092.