

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

UNITED STATES OF AMERICA

VS.

CASE NO: 6:17-cr-147-Orl-31KRS

TYRONE SMITH

BENCH SENTENCING OPINION

On February 9, 2018, Tyrone Smith appeared before me for sentencing. After considering the presentence investigation report (Doc. 80), Defendant's sentencing memorandum (Doc. 84), and argument of counsel, the Court reserved ruling to consider the matter further. Now, with the benefit of a transcript of the hearing (Doc. 90) the court renders this, its Sentencing Opinion.

I. Background

This is an all too familiar story. Mr. Smith is a young black male who was raised in abject poverty. He never met his biological father, his mother was a drug addict, and he had a difficult relationship with his mother's boyfriend, who abused drugs and his sister, Tiffany Smith (Doc. 80, ¶ 76-80). The father figure in his life, his maternal uncle, died of AIDS when Smith was 12 years old. The emotional trauma of his uncle's death caused Smith to attempt suicide (Doc. 80, ¶ 87).

Smith had an avenue of escape from the horrific circumstances of his young life—he was a gifted athlete in football and basketball. But he dropped out of school in the

10th grade to support his family by selling drugs (*Id.* at ¶ 90). And like many young black men in our society, he began using drugs (*Id.* at ¶88).

On April 24, 2007, Smith sold \$60 worth of crack cocaine to an undercover agent. A year later, in the summer of 2008, he sold cocaine to undercover agents on two consecutive days for a total of \$60. For these three offenses, totalling \$120 worth of cocaine, Smith served 83 months in state prison. He was released in July 2014 (*Id.* at 67-69).

The instant offense occurred on April 6, 2017. On that day, Smith made a delivery of 28 grams of carfentanil to a CS on behalf of co-defendant Paul Andre McNeal (*Id.* at 25-26). It should be noted here that McNeal was the drug kingpin in this indictment and was sentenced by me to 120 months in prison for selling 119 grams of fentanyl analogues over a period of several months (Doc. 66, ¶ 9-39). Smith had no involvement with McNeal's drug activity other than this one delivery.

II. The Guideline Score

Smith was arrested and charged in Count 2 of the Indictment with distribution of a mixture containing a detectable amount of carfentanil. He pled guilty and appeared before me for sentencing. The PSR (Doc. 80) scored defendant with a base of 24. Subtracting two levels for his minor role in the offense and three levels for his acceptance of responsibility, his guideline score would be 19. With a criminal history score of III, his suggested guideline sentence would be 37-46 months. But the prior state court offenses described above make defendant a career offender as defined by USSG 4B1.1. Application of this enhancement increases defendant's score from 19-III to 29-VI,

resulting in a guideline range of 151-188 months, a 400% increase for selling \$120 worth of cocaine ten years ago!

III. Statutory Sentencing Factors

When imposing sentence, the court is required to compute the guideline score and then use it as a benchmark when considering the factors set forth in 18 U.S. C. § 3553(a). But the guideline score itself may be subject to scrutiny on policy grounds. (*Kimbrough v. United States*, 552 U.S. 85 (2007)) This is such a case.

A. **Policy.** In some cases, the career offender enhancement adequately captures the statutory factors. Here, for example, the Court concluded that McNeal's enhancement was justified and he was sentenced accordingly. But to equate Smith's history and culpability with McNeal's demonstrates the arbitrary and grossly disproportionate application of USSC4B1.1 in this case. Evidence of the policy problem with 4B1.1 is found in the Nationwide Sentencing Statistics. For example, in 2016, three-quarters Of the career offenders were in drug trafficking cases, and of these cases, 76% Received a below guideline sentence. (2016 Annual Report and 2016 Sourcebook of Federal Sentencing Statistics, USSC Table 22). Almost half of these variances were government sponsored and in 2016 these offenders received an average sentence reduction of approximately 50%. Quick Facts p. 2-3. In light of this, the Commission has concluded that non-violent drug trafficking-only career offenders (like Mr. Smith) are not meaningfully different from other drug trafficking offenders and should not

categorically be subject to the significant increases in penalties required by the career offender enhancement. *See* Report to the Congress: Career Offender Sentencing Enhancements, USSC, 2016. I therefore join with Judge Bennet in the growing chorus of federal judges who reject application of the career offender guideline in certain cases. *United States v. Newhouse*, 919 F.Supp.2d 955, 967 (N.D. Iowa 2013).

B. The 3553(a) factors.

(1) **Seriousness of the offense.** Turning to the 3553(a) factors, the Court first considers the seriousness of the offense. As noted in Mr. McNeal's sentence, these opioid analogues are dangerous and a serious menace to society. But here, Smith simply acted as a courier in only one transaction. His culpability compared with McNeal is miniscule. Overall, this is a mitigating factor in the calculus of determining a fair sentence for Mr. Smith.

(2) **History and characteristics of the defendant.** Mr. Smith is not a bad person. Like many other young Black males in this country, he has engaged in the business of selling illegal drugs. But as the record reflects, he is basically a non-violent low-level drug dealer who has significant redeeming characteristics. This is evident from the eloquent testimony of Mr. Smith's sister:

"Good morning, Your Honor. My name is Tiffany Smith, and I am Tyrone Smith's sister.

"Judge, I'm very scared and nervous right now, but

this is for Tyrone's life; and no matter how scared I am, I need to speak for him today. Speaking here is difficult for me, so I had to write down what I wanted to say.

"Your Honor, if it wasn't for Tyrone, I would not be here today. My brother raised me, my brother protected me, and my brother saved me. We grew up with nothing and surrounded by drugs. We did not have money or food, and there were times where we were even homeless, sleeping in a park. But Tyrone always took care of me and my brothers. He would not eat so we could eat. He worked odd jobs as a boy to support us. He made sure we got to school. He fed us. He even washed my clothes. Tyrone always put my and my brother's needs ahead of his own.

"When we did have a home, my mother's boyfriend, Clinton Griffin, lived with us, and he was an evil man. He used crack and drank every day. And when he was high or drunk, he would tie Tyrone to a bunk bed and beat him with his hands or a belt or pretty much anything that was around. Tyrone was just a boy, and he did not deserve those beatings, but he took it as long as my brothers and I were not getting beat.

"Then, when I was in third grade, Griffin began to abuse me, and he wouldn't have stopped if it wasn't for Tyrone. Tyrone reported him when no one else would. Because of Tyrone, they sent Griffin to jail, but Griffin got out. And when he got out, Tyrone wasn't living with us. And I was so scared. I had no one to protect me. But Tyrone came right away. He stayed by my side, and I was safe.

"Judge, Tyrone is my hero. He was the father I needed and never had. I know what he did was wrong, but I also know what a great human man -- great human being my brother is, and now it is my turn to take care of him.

"Judge, I've had problems in my life. I used to drink a lot to save -- save myself from the pain. But Tyrone was always there, and if it wasn't for Tyrone, I would have killed myself a long time ago.

"Judge, I want to take care of him. [] I have a good job in a hospital. I have a good home. I am raising my six-year-old nephew. When Tyrone gets out, he is going to live with me. I will support him and take [] care of him, just like he took care of me. I want my nephew to have a father figure like Tyrone, to know what it means to grow up like a true man. Judge, I just ask you to give Tyrone a chance."

(3) **Deterrence.** Specific deterrence posits that a lengthy sentence will reduce the likelihood this defendant will re-offend in the future. General deterrence is based on the principle that a lengthy sentence given to this defendant will deter others from engaging in similar conduct. There is, however, no empirical evidence that the length of a sentence has any corresponding beneficial effect on either specific or general deterrence. In short, while the prospect of timely punishment may have a deterrent effect, the degree of that punishment does not. (National Institute of Justice—“Five Things About Deterrence” USDOJ, May 2016) Thus, enhancing defendant’s punishment from 37 months to 151 months would not further the statutory objective of deterrence.

(4) **Protection of the public.** Defendant is not a violent person and has never engaged in serious criminal conduct. It is this Court’s hope and belief that defendant will disengage from the illegal drug business and find a way to prosper by lawful means. The Court finds, therefore, that defendant is not a threat, and that the public needs no protection from him.

(5) **The need to avoid unwarranted sentencing disparity among defendants.** This is often a material factor when dealing with co-defendants. This factor is particularly germane here because Mr. Smith

and his co-defendant have the same guideline score, but their culpability and criminal histories are vastly different. McNeal's base offense level was 30 (enhanced to 32 by 4B1.1), and his unenhanced criminal history score is VI. This stands in stark contrast to Mr. Smith's score of 22 (after his role reduction) and criminal history score of III. Although Chapter 4 scores both defendants at 29-VI, it would be a travesty of justice to impose the same sentence on Mr. Smith as that given to McNeal.

(6) Just punishment, respect for the law, and the parsimony principle.

Providing for a just punishment and respect for the law is, in my view, the ultimate goal of applying the other sentencing factors and should be considered in conjunction with the parsimony principle of imposing a sentence sufficient, but not greater than necessary, to comply with the 3553(a) factors. This is unquestionably a subjective analysis, based upon the weight given to each of the sentencing factors and judged with appropriate deference to the guideline score. Having done so here, I conclude that a guideline sentence would be wholly inconsistent with a fair and just sentence under the circumstances of this case. Indeed, the significant mitigating facts here compel a substantial variance.

Both the probation officer and the prosecutor agree that a variance is called for. The question becomes, how much? Counsel for the government suggests a 1 to 3 level downward variance from the Chapter

4 offense level and a 1 level horizontal departure on the criminal history score. At best, this would produce a score of 26-V with a sentencing range of 110 to 137 months. Defense counsel argues that the Court should entirely ignore the Chapter 4 score and instead consider the mitigating factors using 37 months as the benchmark. But the Court does not categorically reject the application of 4B1.1 in all cases. Rather, in this case the Court gives little weight to defendant's career offender status because the 3553(a) factors dictate a substantial variance.

IV. Conclusion

Considering the limited weight given to the application of Section 4B1.1 and in light of the 3553(a) factors discussed above, the Court concludes that a reasonable sentence in this case is 30 months, which constitutes a modest downward variance from the low end of defendant's unenhanced guideline score.

This sentence also comports with the goal of 3553(a)(2)(D) to provide needed training, care, and treatment in a cost-effective manner. In order to achieve the goals of sentencing, Mr. Smith needs drug treatment in order to interrupt the drug abuse/criminal justice cycle for offenders with drug abuse problems. *Newhouse* at 977. This sentence should give Mr. Smith sufficient time to participate in the Bureau of Prisons' RDAP program, which ordinarily

requires a sentence of at least 24 to 30 months. (BOP Directory of National programs (9/13/17)).

It is, therefore, the judgment of the Court that Defendant, Tryone Smith, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 30 months.

DATED February 27, 2018.




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