

FOURTH CIRCUIT UPDATE  
6/19/2006

***United States v. Allen*, Docket No. 04-4088 (14 June 2006)**

The government appealed the 63-month sentence imposed by the district court following the defendant's plea of guilty to the charge of felon in possession of a firearm.

The PSR determined that defendant was an Armed Career Criminal with an adjusted offense level of 30 and a criminal history category of VI.

Pursuant to a plea agreement, the Government made a 5K1.1 motion, and defendant argued for further departure based on his substantial assistance, his criminal history category over-representing his criminal history, and that duress allegedly made him commit the violation. The district court reduced defendant's criminal history category to IV and departed to an offense level of 22, based on substantial assistance and duress. This resulted in a sentencing range of 63 to 78 months.

On appeal, the Government argued that defendant was not entitled to a duress departure or to a departure on the basis that his criminal history category over-represented his criminal history.

The Fourth Circuit reversed, not based on the Government's argument, but based on its own determination that the 5K1.1 motion did not authorize the trial court to depart from a statutory mandatory minimum. The Court held that such a departure required a motion pursuant to 18 U.S.C. §§ 3553(e) or (f), and the Government had not made such a motion. The Court reversed even though the prosecutor maintained at closing argument that the parties' intent was to file a motion pursuant to 3553(e).

The Court did indicate that the prosecutor would be obligated to file a motion pursuant to 3553(e) on remand.

***United States v. Smith*, Docket No. 05-4111 (13 June 2006)**

Defendant appealed his convictions by a jury of conspiracy to possess with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. § 846, and possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1). His sentence was enhanced pursuant to 21 U.S.C. § 851. The Court of Appeals found no error.

Defendant unsuccessfully argued that he withdrew from the conspiracy when he was incarcerated in 1998 and did not rejoin it. The Court held that ample evidence supported the jury's conclusion that defendant actively participated in the conspiracy after his release from prison.

Defendant also unsuccessfully argued that the defendants' activities were separate,

multiple conspiracies. The Court held that the jury was entitled to conclude that there was one conspiracy, because the distribution ring involved the same core participants over the same time period, and these conspirators were shown to have shared the same objectives and methods.

There was no error in district court's denial of defendant's motion to sever; no error in the district court's refusal to excuse a juror; harmless error in the trial court's restriction on defendant's ability to cross-examine law enforcement officers about the destruction of drug evidence seized from defendant; no error in district court's permitting certain witnesses to testify whom defendant asserted lacked personal knowledge; no error in trial court's refusing to permit him to cross-examine a witness concerning the witness' alleged participation in an unrelated shooting once the witness denied being present at the alleged shooting.

The Court also held that enhancing defendant's sentence pursuant to 21 U.S.C. § 851 did not violate the Sixth Amendment and *Booker*, since the fact of a prior conviction may be used to enhance a sentence under *Apprendi*.

Defendant also argued that the convictions used to support the 21 U.S.C. § 851 enhancement were not properly used, because they occurred during the period of the conspiracy and therefore were not "prior" convictions. The Court held that, when a defendant is convicted of a drug conspiracy under 21 U.S.C. § 846, prior felony drug convictions that fall within the conspiracy period may be used to enhance the defendant's sentence if the conspiracy continued after his earlier convictions were final.