

Fourth Circuit Updates
September 5, 2006

United States v. Curry, Docket # 05-5090, 05-5173 (28 August 2006)

Here is yet another example of how the “advisory” guidelines continue to be mandatory, not advisory. The Government appeals a sentence that varies downward from the Guidelines.

Defendant was charged with 13 counts of mail fraud, 9 counts of wire fraud, and three counts of unlawful monetary transaction arising from his purported sale on e-Bay of gold coins which he did not actually possess. The jury convicted him on all but two counts.

Although the Guideline range was between 41 and 51 months, the district court sentenced defendant to concurrent 12-month sentences on each count, followed by 12 months of home confinement, three years of supervised release, \$122,965.46 in restitution, a \$7500 fine, and a \$2500 special assessment. The district court arrived at this variance sentence because it “was impressed with Curry’s payment of restitution. . . and believed that Curry did not ‘set out to run a scam,’ . . . and ‘had every intention of giving the money back.’” Slip op. at 6.

Before reaching the sentencing issue, the Court concluded that the evidence was sufficient to support the conviction, holding that “neither the wire fraud nor mail fraud statute requires that the government prove precisely when the intent to defraud first materialized. Moreover, even if an individual had an innocent intent at the outset, a mail or wire fraud conviction can be sustained if that individual used the mails or wire communication to disseminate falsehoods designed to calm nervous buyers.” Slip op. at 7. Further, the Court held that “[t]he intent to repay eventually is irrelevant to the question of guilt for fraud.”

With respect to sentencing, the Court held, first, that the Government was not required to object to the variance sentence in order to preserve that issue for appeal. Arguing for a sentence in the Guideline range was sufficient to preserve the issue for appeal.

In addressing the reasonableness of the district court’s sentence, the Court followed *United States v. Green*, 436 F.3d 449 (4th Cir. 2006), and *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006), holding that the more the sentence varies from the Guideline range, the more compelling the reasons for divergence from the Guidelines must be. The Court of Appeals found that the district court’s reasons for the variance sentence were inadequate, based on its determination that the court’s sentence was counter to the weight of the evidence and the jury’s verdict, and the court erred in sentencing Curry based on a conclusion that contravened the jury’s verdict. The Court went on to find that Curry’s restitution was, by itself, insufficient to justify the “70% variance at issue.” Slip op. at 12.

United States v. Hurwitz, Docket # 05-4474 (22 August 2006)

Jury convicted defendant of multiple counts of drug trafficking for prescribing narcotic pain medicine in violation of 21 U.S.C.A. §§ 841(a)(1) and 846, and Defendant was sentenced to 25 years in prison. Defendant appealed, arguing that the district court improperly admitted

evidence recovered in a search of his office and incorrectly instructed the jury on the law. The Court of Appeals affirmed the district court's decision to admit the evidence but reversed and remanded for a new trial based on its conclusion that the district court improperly instructed the jury on the controlling law.

Defendant was a physician practicing in Virginia who prescribed extraordinarily high doses of opiates to his patients for chronic pain. Some patients were addicted, and some sold their drugs on the street.

Defendant challenged the validity of a search warrant used to obtain all of his patient files, on the grounds that it failed to identify the items to be seized with sufficient particularity and on the grounds that it was fatally overbroad. Defendant's argument about particularity was based on the fact that the warrant, rather than specifying the things to be seized, referred to the attachment to the submitting officer's affidavit. The Court concluded that the particularity requirement can be satisfied by cross-reference in the warrant to separate documents that identify the property in sufficient detail. Defendant argued that the affidavit did not accompany the warrant when the warrant was executed.

The Court acknowledged a circuit split but concluded that, in the Fourth Circuit, "it is sufficient *either* for the warrant to incorporate the supporting document by reference *or* for the supporting document to be attached to the warrant itself." Slip op. at 10.

The Court also addressed whether the trial court erred in instructing the jury with regard to Defendant's charges under 21 U.S.C.A. § 841, under an abuse of discretion standard, noting that a court abuses its discretion when it makes an error of law. Slip op. at 15.

To convict a doctor of violating section 841, the government must prove: (1) "that the defendant distributed or dispensed a controlled substance"; (2) that the defendant "acted knowingly and intentionally"; and (3) "that the defendant's actions were not for legitimate medical purposes in the usual course of his professional medical practice or were beyond the bounds of medical practice." Slip op. at 16. Defendant contended that the district court erred by not including a good-faith instruction in connection with the section 841 charges and by specifically instructing the jury that it could not consider defendant's good faith as to any of the drug-trafficking charges.

The Court of Appeals found that, although the defendant's proposed good-faith instruction was "subjective" rather than "objective," the district court did not err in refusing to give it. However, the district court did err when it instructed the jury that it could not consider the defendant's good faith with respect to the section 841 charges.