

FOURTH CIRCUIT UPDATE
Published opinions filed 5/1/2006 - 5/24/2006
Plus U.S. v. Milam

United States v. Milam, 443 F.3d 382 (4th Cir. 2006)

Held: The facts stated in a presentence report may not, at sentencing, be deemed to be admissions by the defendant sufficient to bypass the Sixth Amendment right to a jury trial as articulated in *United States v. Booker*, 125 S. Ct. 738 (2005), even though the defendant, who had been given the presentence report before sentencing did not object to the facts. The District Court violated the defendant's Sixth Amendment rights when it relied on facts stated in the presentence report to enhance the defendant's sentence beyond the statutory minimum.

Facts: The two defendants pleaded guilty to aiding and abetting each other in distributing an unspecified quantity of Ecstasy. During the plea colloquy, the defendants admitted to participating in a sale to a confidential informant of 51 Ecstasy pills for \$20 each.

The presentence report concluded that the codefendants had purchased amounts of cocaine and Ecstasy equivalent to 157.7 kilograms of marijuana. This calculation was based on 80 pills purchased by one defendant, 500 pills purchased by the other, and specified amounts of cocaine purchased by each. The probation officer also proposed a two-level enhancement for each defendant based on possession of a firearm. The probation officer also suggested no downward adjustment, because both defendants had tested positive for drugs while released on bond.

One defendant objected at sentencing to the drug amounts and gun enhancement; the other did not.

As to the defendant who objected at sentencing, the Court of Appeals found plain error, under *Booker*, where the trial court found the defendant responsible for a greater quantity of drugs than he had admitted.

As to the defendant who failed to object at sentencing, the Court found that he did not admit the drug amounts by failing to object at sentencing to the use of the amounts set out in the presentence report.

Note: *Milam* does not address whether its holding applies to post-*Booker* sentences where the trial court is applying the Guidelines in an "advisory" manner. But see footnote 2 in *United States v. Revels*, below.

United States v. Revels, ___ F.3d ___, 2006 WL 1134148 (4th Cir. May 01, 2006)

Held: (1) District Court erred under *Booker*, in applying a four-level sentencing enhancement and imposing a 120-month sentence under the then-mandatory Sentencing Guidelines, because the facts underlying the enhancement were neither admitted by the defendant nor

proved to a jury beyond a reasonable doubt, but (2) because the district court issued an alternative identical sentence treating the Guidelines as advisory only, any error was rendered harmless, and the judgment of the District Court is affirmed.

Facts: Defendant was convicted of possession of a firearm by a convicted felon and pleaded guilty. He objected at sentencing to the application of a four-level enhancement for brandishing a firearm in connection with a robbery.

Note: In footnote 2, the Court states that its opinion does not disable district courts from using undisputed, though not affirmatively admitted, facts in calculating an advisory Guideline range. Silence will suffice to render a fact undisputed. The Court goes on to state that “nothing about this decision or *Milam* affects in any way the district court’s calculation of an advisory Guidelines range after the *Booker* decision.”

United States v. Currence, ___ F.3d ___, 2006 WL 1172337 (4th Cir. May 04, 2006)

Held: Reverses district court’s suppression of evidence pursuant to Fourth Amendment. Search was permissible, because it was incident to the defendant’s lawful arrest, and scope of search was permissible..

Facts: Police received information from a confidential informant that a man on a bicycle was selling drugs on a street corner in Richmond. Informant gave a detailed description of the man. Two detectives went to the location and approached defendant, who matched the informant’s description. At the request of an officer, defendant stepped off his bike and was frisked, and only money was found. Police ran a radio check on him, found out he had an outstanding arrest warrant, handcuffed him and placed him under arrest.

After defendant was under arrest, a third officer arrived and searched defendant’s bicycle, finding crack cocaine hidden in the hollow end of the bicycle handlebar.

United States v. Allen, ___ F.3d ___, 2006 WL 1195956 (4th Cir. May 05, 2006)

Held: The district court properly considered Defendant’s prior convictions in sentencing him as a career offender, when those convictions were entered when Defendant was 17 years old, in Superior Court in North Carolina, because under North Carolina law, juvenile convictions always occur in North Carolina district court.

Prior convictions were properly counted, even though they did not result in a sentence of imprisonment for more than a year, because they were punishable by imprisonment for more than one year.

Pre-*Booker* sentencing; defendant did not object at sentencing, so court considers issue under plain error standard. Court violated *Booker* by considering testimony that probation officer spoke with North Carolina authorities, who told him that defendant’s

prior convictions were adult convictions. Error was not plain because it did not affect defendant's substantial rights.

United States v. Shatley, ___ F.3d ___, 2006 WL 1320631 (4th Cir. May 16, 2006)(split decision of panel)

Held: Although district court committed *Booker* error, in light of the district court's announcement of an alternative sentence, the error was harmless.

United States v. Hartwell, ___ F.3d ___ (4th Cir. May 24, 2006)

Held: The Court has jurisdiction to consider defendant's appeal from the trial court's grant of Government motion to withdraw its Rule 35(b) motion for reduction of sentence.

Under Rule 7 of the Federal Rules of Criminal Procedure, Defendant in a capital case cannot waive indictment, but noncompliance with this requirement is not a defect of subject-matter jurisdiction.

Language in plea agreement giving government sole discretion to file a Rule 35(b) motion also includes the discretion to file a motion to withdraw it.

District court did not abuse its discretion in denying defendant an evidentiary hearing on his claim that the government breached its plea agreement.

Facts: Defendant pleaded guilty, pursuant to a plea agreement, to a one-count criminal information charging him with murder-for-hire resulting in death, in violation of 18 U.S.C. § 1958(a). Under agreement, government agreed not to seek the death penalty and to consider, in its sole discretion, filing a motion at a later time for a reduction in sentence below the statutory minimum, if defendant cooperated in investigating criminal activity.

Over the course of the next year, defendant cooperated, with questionable degree of truthfulness, at one point saying he had perjured himself at the AUSA's direction, and then recanting that statement. USA filed a Rule 35(b) motion for reduction in sentence to toll the limitations period but later withdrew motion when defendant filed an affidavit falsely stating that the government had promised him an 18-year sentence, and later recanted that statement. Defendant sought an evidentiary hearing on whether the government had violated the plea agreement, but the trial court allowed the government to withdraw its motion without a hearing.