

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA) Criminal No. 1:14CR373
)
v.) Honorable Liam O’Grady
)
TYLER EUGENE HARBER) Sentencing Hearing: June 12, 2015

UNITED STATES’ MEMORANDUM IN AID OF SENTENCING

The defendant, Tyler Eugene Harber (“Harber”), is currently before the Court for sentencing, having pleaded guilty to knowing and willful violations of our campaign finance laws. As the Campaign Manager and Consultant for a federal candidate, Harber made a calculated and carefully concealed effort to unlawfully deploy hundreds of thousands of dollars of money, available to him through a Super PAC under his secret control, to attack his candidate’s opponent in a federal Congressional race. The defendant’s willful and deliberate conduct is a form of campaign finance crime that is especially difficult to detect, and, likewise, is especially subject to the deterrent effect of a criminal sanction. It warrants a substantial sentence.

The opportunity for campaign finance coordination offenses like this one has increased dramatically with the increased sources and amounts of money available to individuals or groups making independent expenditures. Specifically, in the wake of *Citizen’s United v. Federal Election Commission*, 558 U.S. 310 (2010), the source of funds to independently influence federal elections has expanded greatly to include the general treasury funds of corporations, labor unions, and other entities previously barred from such participation in the federal political process. As a result, Super PACs and other organizations now raise and spend unlimited amounts of money, and they may do so freely and legally so long as they do not coordinate with candidates and political

campaigns, as the defendant did here. Given the substantial opportunity for coordination crimes that is presented by the vast amounts of political spending, it is important to make clear that violations of these laws will not be tolerated.

Accordingly, the government recommends a substantial term of imprisonment for defendant's knowing and willful crimes. Specifically, in accordance with the United States Sentencing Guidelines (Guidelines), the government recommends a term of 46 month of imprisonment, which is at the low end of the sentencing guidelines calculated by the Probation Office.

I. The Applicable Guidelines Range for Imprisonment is Correctly Calculated at 46-57 Months

As this Court is aware, after *United States v. Booker*, 543 U.S. 220 (2005), the district court must engage in a multi-step process in sentencing a defendant. First, the district court must correctly determine, after making appropriate findings of fact, the applicable guideline range. *United States v. Moreland*, 437 F.3d 424, 432 (4th Cir. 2006); *United States v. Hughes*, 401 F.3d 540, 546 (4th Cir. 2005). In doing so, the Court must make factual findings, supported by a preponderance of the evidence, to substantiate any pertinent guidelines enhancements. See *United States v. Harvey*, 532 F.3d 326, 337 (4th Cir. 2008); *United States v. Quinn*, 359 F.3d 666, 680 (4th Cir. 2004). "Next, the court must 'determine whether a sentence within that range serves the factors set forth in § 3553(a) and, if not, select a sentence [within statutory limits] that does serve those factors.'" *Moreland*, 437 F.3d at 432 (quoting *United States v. Green*, 436 F.3d 449, 455 (4th Cir. 2006)).

That the Sentencing Guidelines are non-binding does not render them irrelevant to the imposition of an appropriate sentence. On the contrary, "[a]s a matter of administration and to

secure nationwide consistency, the Sentencing Guidelines should be the starting point and the initial benchmark” for determining a defendant’s sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Abu Ali*, 528 F.3d 210, 260 (4th Cir. 2008). Indeed, given the Sentencing Commission’s important institutional role and expertise, the recommended guidelines range typically will “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.” *United States v. Kimbrough*, 552 U.S. 85, 89 (2007) (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)); *United States v. Lymas*, – F.3d –, 2015 WL 1219553, at *4 (4th Cir. Mar. 18, 2015). The district court must therefore “consider the guideline range applicable to the defendant and pertinent policy statements of the Sentencing Commission.” *United States v. Perez-Pena*, 453 F.3d 236, 241 (4th Cir. 2006); *see also Hughes*, 401 F.3d at 548 (“In the wake of *Booker* . . . a sentencing court is still required to ‘consult [the] Guidelines and take them into account when sentencing.’” (quoting *Booker*, 543 U.S. at 264)). And, if the district court imposes a sentence outside the guideline range, the court must explain its reasons for the variance as required by 18 U.S.C. § 3553(c)(2). *Id.*; *see also United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009); *Abu Ali*, 528 F.3d at 260 (“If the sentencing court believes ‘an outside-Guidelines sentence is warranted, [it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.’” (quoting *Kimbrough*, 552 U.S. at 597)); *Moreland*, 437 F.3d at 434 (“The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be.”).

The United States has reviewed the initial Presentence Investigation Report (PSR). The PSR properly calculates a combined base offense level of 23 for Counts One and Two, pursuant to the Guidelines. PSR at ¶¶ 60-69, 114. (The government notes, however, that the proper

two-point enhancement applied in ¶ 60 of the PSR is supported by Guidelines § 3C1.1, as correctly stated in ¶¶ 47, 48, and 56.

For his part, the defendant challenges only the obstruction of justice enhancement by letter of counsel dated May 18, 2015. While the government agree with the defendant that he is not known to have destroyed or attempted to destroy evidence, the Court should reject his objection and apply the enhancement both because the defendant attempted to conceal computer evidence from the government by “directing or procuring another person to ... conceal evidence), Guidelines § 3C1.1 app. n.4(D), and because the lies he told a Special Agent of the Federal Bureau of Investigation were both material and significant in that they directly exculpated the defendant and further required numerous interviews by the Special Agent to disprove the false statement (e.g. interviews of the staff of the campaign for which the defendant was the Campaign Manager and Consultant).

II. The Defendant is Unable to Pay a Fine

The PSR found that the defendant is unable to pay a fine. Accordingly, the government does not seek a fine. The government notes, however, that the defendant’s inability to pay a fine within the Guidelines range means that the statutory sentencing factors addressed below can only be satisfied by a term of imprisonment, and therefore this fact weighs in favor of applying a term of imprisonment at the low-end of the sentencing guidelines.

III. The 18 U.S.C. § 3553(a) Sentencing Factors Support a Guidelines Sentence

Under 18 U.S.C. § 3551, a defendant must be sentenced in a manner “so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.” This mandate is repeated in the first

sentence of § 3553(a), which provides: “The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” This section then states that in determining a particular sentence, a sentencing court must consider certain enumerated factors. Thus, § 3553(a) serves two functions:

First, it prescribes that every sentence comply with the four announced *purposes* for sentencing. Second, it lists seven *factors* that a court must consider in determining a particular sentence, and included as one of the factors is the list of announced purposes for sentencing in § 3553(a)(2).

* * * *

The proper application of § 3553(a) therefore requires a sentencing court to focus on the four *purposes* of sentencing, as applicable in a particular case, and to consider, in determining a sentence that achieves those purposes, the seven *factors* listed in § 3553(a)(1)-(7).

United States v. Shortt, 485 F.3d 243, 247-48 (4th Cir. 2007) (emphasis in original). These factors can overlap in their application. *United States v. Johnson*, 445 F.3d 339, 345 (4th Cir. 2006) (comparing, for example, promoting respect for the law under § 3553(a)(2)(A) and affording adequate deterrence under § 3553(a)(2)(B)).

In this case, the applicable § 3553(a) factors are consistent with a sentence of imprisonment for 46 months. Of particular significance are (1) the nature and circumstance of the offense and the need for the sentence imposed to reflect the seriousness of the offense, (2) the history and characteristics of the defendant, and (3) the need for the sentence imposed to promote respect for the law and afford adequate deterrence.

A. The Nature and Circumstances of the Offense and the Need for the Sentence Imposed to Reflect the Seriousness of the Offense

The nature and circumstances of the offenses for which the defendant has been convicted as well as the need for the sentence to reflect the seriousness of his crimes, warrant a 46 month term of imprisonment for a number of reasons. 18 U.S.C. § 3553(a)(1) & (a)(2)(A).

The defendant was convicted of having *willfully*, that is, knowing that his conduct was illegal, executing a scheme to coordinate campaign contributions of a supposedly independent Super PAC, while supporting himself and his family during the endeavor. This deliberate crime was detected only because an official of the political party of the defendant's candidate inquired into the spending of the defendant's Super PAC, and was met with the defendant efforts, using an alias, to threaten that party official personally in an attempt to prevent further inquiry. Thus, Harber maliciously betrayed his own political party to further his own political and financial aims in a long course of conduct that advanced to include directly lying to the FBI. His offense included a willingness to employ any means necessary to achieve his goals and evade detection by his party or the government. In sum, the defendant's conduct directly undercut the transparency that Congress has demanded for the arena involving campaign contributions.

B. The History and Characteristics of the Defendant

The history and characteristics of the defendant further support the need for a substantial sentence in this case. 18 U.S.C. § 3553(a)(1). The defendant's criminal conduct was not borne of ignorance, naiveté or mistake. Rather, the conduct engaged in here was undertaken by an intelligent and careful man with significant experience in politics and campaign finance. He knew exactly what he was doing, and exactly the best way to conceal it from his party and from

law enforcement. He is, in short, the most dangerous sort of political operative by virtue of his knowledge and experience, and he employed both to successfully complete the crimes he intended.

C. The Need for the Sentence Imposed to Promote Respect for the Law and Afford Adequate Deterrence

In addition, imposing a substantial prison sentence in this case is necessary to promote respect for the law and afford adequate deterrence to criminal conduct. 18 U.S.C.

§ 3553(a)(2)(A) & (a)(2)(B). The importance of these factors cannot be overstated. This is the first illegal coordination case prosecuted before a United States District Court. It occurs in the context of expanding opportunities for coordination crimes as ever more money enters the control of political operatives like the defendant. A low-end guidelines sentence of imprisonment in this case would send an appropriate and much needed message to all similarly situated individuals that intentional breaches of the campaign finance laws will be pursued and punished.

Our campaign finance laws promote transparency and stand as a bulwark against corruption and the appearance of corruption. A substantial term of imprisonment would support the public's respect for those laws and send a message that coordination crimes like this one should be taken seriously.

IV. Conclusion

This case stands as an important precedent in our campaign finance law. It presents a calculating and able defendant committing a crime against a fundamental element of our campaign finance laws -- a crime that is most amenable to deterrence by a sentence of imprisonment. The defendant's conduct warrants a sentence of 46 months imprisonment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to all parties.

By _____ /s/

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