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Southern District of Georgia

PRESENTENCE REPORT REVIEW and RECCOMENDATIONS

Report Date: August 15, 2012

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Case Number 8:11CR00002

Assigned Judge: Susan Long, District Judge

Defendant: John Cosmos
a/k/a "Pale Rider"

1. Credit for Acceptance of Responsibility is not automatically precluded

"If a defendant clearly demonstrates acceptance of responsibility for his offense," the court may reduce his offense level by two (see U.S.S.G. § 3E1.1(a)). "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility," and thus "the determination of the sentencing judge is entitled to great deference on review" (see U.S.S.G. § 3E1.1, Commentary Application Note 5). "In determining whether a defendant qualifies for an offense level reduction under § 3E1.1(a), the district court may consider whether the defendant "truthfully admitt[ed] the conduct comprising the offense(s) of conviction, and truthfully admitt[ed] or not falsely den[ied] any additional relevant conduct for which the defendant is accountable under [U.S.S.G.] § 1B1.3 (Relevant Conduct)" (see U.S.S.G. § 3E1.1, Commentary Application Note 1(A)).

At U.S.S.G. § 3E1.1, Commentary Application Note (2) reveals the following: The reduction "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt." However, "conviction by trial...does not automatically preclude a defendant from consideration for such a reduction." A reduction may still be warranted such as "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)." In such cases, a determination that a defendant has accepted responsibility *will* be based primarily upon *pre-trial* statements and conduct."

Following Cosmos's arrest on January 11, 2012, Cosmos admitted to agents that he sold large amounts of cocaine to Paul Drake describing Drake as one of his "biggest customers" (PSR Paragraph 19). Cosmos additionally provided specific information regarding the amount of cocaine he distributed to Drake. Clearly, Cosmos was in no way denying his criminal actions but actually assisted agents by providing them with his

pre-trial statements. Later, it appears the Government offered a plea agreement; however, that agreement included a waiver of Cosmos's right to appeal legal issues concerning the applicable sentencing guideline range and any issues concerning its determination. Such was not acceptable to Cosmos.

In a July 11, 2012, affidavit filed by Cosmos and his attorney in support of his waiver of a trial by jury, Cosmos fully admitted that "there [was] a factual basis for the charges" but that there still existed "...substantive preserved legal issues for appeal concerning the admissibility of evidence exist, as well as, potential issues for appeal concerning the sentencing guidelines which cannot be determined until a presentence report is prepared and objections filed and considered" (see Docket Document Number 768). Cosmos has never contested his factual guilt, only his legal guilt as distinguished by the Eleventh Circuit, *U.S. v. Wright*, 117 F.3d 1265, 1997. Based on the proposed plea agreement's inclusion of the mandatory waiver of appeal, Cosmos chose to proceed to trial in order to preserve his appeal rights, not to force the Government to carry its burden at trial. Cosmos waived his right to a speedy trial and consented to a trial by the United States District Judge. By consenting to a bench trial, Cosmos saved the Government time and money, albeit not at the same level as if he had pled guilty. No jury had to be chosen, charged, instructed, or paid. Cosmos came as close as he could to accepting the Government's plea agreement without sacrificing his right to challenge the legality and admissibility of certain evidence later on appeal. It was only because the proposed plea agreement took away his ability to challenge such legal issues that Cosmos saw no choice but to face trial. In facing trial he chose the most convenient, efficient, and cost effective trial... a bench trial.

While true that Cosmos made no statement to the probation officer regarding his conduct, as stated above, acceptance of responsibility *will* also be based upon *pre-trial* conduct. Not only was Cosmos cooperative with arresting agents immediately upon his arrest, but he was cooperative after his arrest as well. On January 13, 2012, Cosmos was released on a bond in the instant federal matter. Following his trial, on August 12, 2012, Cosmos, then a convicted drug dealer, was detained. However, the presentence investigation report clearly indicates in paragraph 5 that Cosmos "complied with all Court ordered conditions of release between January 13, 2012, and August 12, 2012." As such, Cosmos's pre-trial conduct is also indicative of clearly demonstrating acceptance of responsibility.

In summary, Cosmos clearly demonstrated acceptance of responsibility for his criminal conduct although he exercised his constitutional right to a trial. The acceptance of responsibility can be determined based on Cosmos's pre-trial statements and conduct, according to USSG § 3E1.1, Application Note 2. Based on this, Cosmos should receive a two-level decrease for acceptance of responsibility. Therefore, Cosmos's total offense level should be 32 rather than 34, and the resulting guideline sentencing range should be 121 to 151 months.

2. Drug Quantities

There is no way to reduce the attributable drug quantity in this case. The Base Offense Level of 32 could have well been merely a starting point in this case, yet the Probation Officer (and presumably the Government) has chosen to accept the safest and most conservative calculable drug quantity as to Cosmos. As it happens, the Base Offense Level in this case is the minimum Base Level allowable based on the offense of conviction. It is reminded that Count 1 indicates a minimum attributable drug quantity of 5 kilograms or more of cocaine hydrochloride, 28 grams or more of cocaine base, and a quantity of marihuana. By statute, assuming even the minimum drug amounts of 5 kilograms of cocaine hydrochloride and 28 grams of cocaine base, the marihuana equivalent in this case is 1,099,988 grams, or 1,099.988 kilograms of marijuana (5 kilograms, or 5,000 grams, of cocaine hydrochloride x 200 grams of marihuana per gram of cocaine hydrochloride + 28 grams of cocaine base x 3571 grams of marihuana per gram of cocaine base [see 2D1.1 Application Note 10(D), "Drug Equivalency Tables"]). As such, because 1,099.988 kilograms of marijuana is within the range which warrants a Base Offense Level of 32 (see 2D1.1(a)(5) and (c)(4)), the calculation of the attributable drug quantities in this

case, even considering Relevant Conduct, has no impact on the statutorily-imposed minimum Base Offense Level.

Given the information included in the PSR, the probation officer chose an odd method to calculate attributable drug quantities. He cites that he is attributing the only drugs found at Cosmos's residence during the search of his home plus the drugs found at Drake's residence plus the drugs Cosmos was en route to purchase from "Killer" when he was stopped by Pembroke police officers. This writer feels that this method is an extremely conservative method to calculate the quantities of drugs attributable to Cosmos. This writer believes that had this case been assigned to any other Statesboro, Savannah, or Brunswick Division Article III judge, a more liberal method would have been used to calculate attributable drug quantities. Specifically, Cosmos's Base Offense Level could have easily been 34 based simply on statements made by Drake which were corroborated by Cosmos. Drake testified at trial that Cosmos was a source of cocaine supply that supplied him with .5 kilograms of cocaine on a weekly basis (see PSR Paragraph 22). Cosmos himself admitted that Drake was *one of* his biggest customers to whom he supplied .5 kilograms of cocaine on a weekly basis (see PSR Paragraph 21). Those statements alone indicate that approximately 32 kilograms of cocaine hydrochloride was sold to Drake by Cosmos during the approximate 15-month period indicated in the PSR (see also Paragraph 21). Using only those statements without regard to any other drug quantities seized (assuming the drugs seized were a product of the drug sales admitted to by Cosmos) Cosmos would be facing a Base Offense Level of 34 (see 2D1.1(a)(5) and (c)(3)).

It is the opinion of this writer that there is no realistically arguable objection to the Base Offense Level of 32. The Probation Office has used a very conservative attributable drug quantity (which happens to be the lowest allowable under the guidelines based on the statutory stipulations) which permits Cosmos to escape a sentencing imprisonment range of 188-235 months under the Guidelines. Such an increase would have meant an additional 37 to 47 months' imprisonment if sentenced under a Guideline scheme.

3. The Firearm

It is this writer's opinion that there is no easily winnable objection to the firearm enhancement at U.S.S.G. § 2D1.1(b)(1). There is a plethora of case law wherein a defendant is linked to gun which was merely in close proximity to drugs. In this case, although no drugs were seized in Cosmos's bedroom (where the gun was found), a \$10,000 designer watch was found in the bedroom, and three different drug types as well as a large amount of cash was found throughout the residence.

However, this case may be separated from those other cases. In the instant matter, while true that the firearm was in the residence where drugs happened to be stored, an argument could be made that it is *clearly improbable* that the gun's purpose was to protect Cosmos and his drugs/drug-money. That connection must be present for the enhancement to apply. However, in this case, the probation officer speculates that the firearm's mere presence in the home suggests that the weapon was a tool of a drug dealer's trade. Such does not reconcile with the events leading to Cosmos's arrest. If a drug dealer possesses a firearm, it only makes sense that the firearm would be better warranted in a large drug deal rather than smaller .5 kilogram and smaller transactions. However, when the defendant was arrested on July 1, 2011, as he was en route to Macon from Savannah to purchase 3 kilograms of cocaine from a person he only knew as "Killer," Cosmos did not have a firearm with him. He left the firearm in his bedroom. In *U.S. v. Timmons*, 283 F.3d 1246 (11th Circuit 2002), in evaluating a conviction of 924(c), the Court held that "The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs [as in the storage of drugs in Cosmos's residence] is not a sufficient basis for imposing this particular...sentence. Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity." Similarly, there is no defined connection of a firearm and drugs in the Cosmos case. If evidence is not presented that Cosmos

possessed the firearm during conduct associated with drug trafficking activities, the enhancement should be rejected (see also *U.S. v. Stallings*, 463 F.3d 1218 (11th Circuit 2006)).

It is noteworthy that no witness has made any statements suggesting that Cosmos ever possessed a firearm in the course of the drug trade. Further, there is no indication that drug sales were ever conducted at Cosmos's residence, much less in the bedroom where the firearm was found. See *U.S. v. Hansley*, 54 F.3d 709, 716 (11th Cir.1995 holding that the government is required to prove that the firearm was present during the drug-trafficking offense; *U.S. v. Trujillo*, 146 F.3d 838, 847 (11th Cir.1998 holding the same).

It is this writer's opinion that the defendant should argue to the Court that the mere possession of the firearm in his bedroom is not sufficient to warrant an enhancement as the firearm was not used in or otherwise connected to the trafficking of drugs.

The preceding is submitted as a cursory review and should not be solely relied upon in making objections to the presentence report.

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