



UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007

CHAMBERS OF
HAROLD BAER, JR.
DISTRICT JUDGE

March 19, 2001

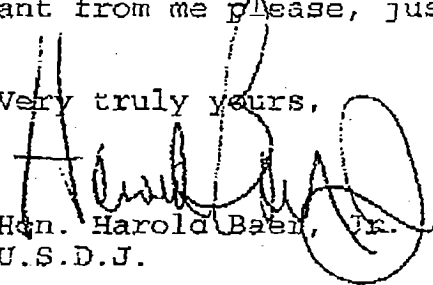
TEL (212) 805-0184
FAX (212) 805-7901

Timothy B. McGrath, Esq.
Staff Director
US Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

Dear Mr. McGrath:

Thank you for your letter of March 13. In keeping with your timetable, I am forwarding to you a copy of my decision signed today. It provides most of my thoughts on the proposed amendments to §2L1.2. I hope it is helpful and if there is any further information or testimony you want from me please, just call.

Very truly yours,


Hon. Harold Baer, Jr.
U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES,

-v.-

DARLING PAULINO-DUARTE,

Defendant.

OPINION & ORDER

00 CR 686 (HB)

Hon. Harold Baer, Jr., District Judge:

Defendant Darling Paulino-Duarte ("Paulino-Duarte") pled guilty on September 6, 2000 to illegal reentry in violation of 8 U.S.C. § 1326. For the reasons set forth below, Paulino-Duarte will be sentenced pursuant to offense level twenty-one and criminal history category IV.

I. BACKGROUND

Paulino-Duarte was born in the Dominican Republic on November 1, 1974. The youngest of three children, Paulino-Duarte grew up in a financially distressed family and had what he described as a "tough" childhood. According to INS records, Paulino-Duarte left the Dominican Republic in 1988, entered the United States through New York on a three month visa, and remained in New York after the visa expired. In 1994, Paulino-Duarte started using and became addicted to marijuana and cocaine. Since then, he has used marijuana on a daily basis, getting high approximately three times a day, and has used cocaine regularly, though not on a daily basis.

The first of Paulino-Duarte's five prior convictions, all drug related, dates from his arrest in April, 1996 when Paulino-Duarte was found in possession of a small quantity of cocaine. Six months later in October of the same year, Paulino-Duarte was arrested for attempting to sell a

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single tin foil of cocaine to an undercover police officer. Five months later, on March 24, 1997, Paulino-Duarte was once again arrested for attempting to sell one bag of crack. Not long thereafter, Paulino-Duarte's run of bad luck continued with an arrest on May 10, 1997 for possession of marijuana. For these four offenses, in total Paulino-Duarte served approximately one year in jail, from June 23, 1997 until May 19, 1998, when he was deported back to the Dominican Republic. The longest of the four sentences was one to three years imprisonment. He was a mere street seller, the lowest level on the narcotics distribution chain, and none of Paulino-Duarte's convictions concerned significant quantities of drugs. In each case, Paulino-Duarte was convicted for possessing or attempting to sell drugs from the same location, West 163rd Street in Manhattan. As mentioned above, during this time Paulino-Duarte was a regular and dependent addict, abusing marijuana and cocaine in an effort to escape depression and loneliness. Paulino-Duarte apparently has no family in the United States.

Paulino-Duarte returned to the United States on January 11, 2000 near Tijuana, Mexico and made his way back to New York soon thereafter. Paulino-Duarte entered the United States without having obtained the express consent of the U.S. Attorney General, as is required of foreign nationals previously deported. The indictment for illegal reentry followed from a February 23, 2000 arrest for possession of marijuana in public view, whatever that indicates, this time on 191st street in Manhattan.

In total, between April, 1996 and February, 2000 Paulino-Duarte committed three misdemeanors and two felonies for which he served one year in prison. Although Paulino-Duarte was sentenced to one to three years imprisonment for each of the two felony convictions, the sentences were run concurrently. The longest sentence for any of Paulino-Duarte's three

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misdemeanors was twenty days. None of Paulino-Duarte's convictions involved violence.

Pursuant to the United States Sentencing Guidelines (the "Guidelines"), the court's role is to calculate the total offense level and criminal history category and sentence within that framework. Here, Paulino-Duarte's conduct -- illegally reentering the United States subsequent to his deportation without the prior consent of the Attorney General -- carries a base offense level of eight, pursuant to §2L1.2(a). Because he had been deported subsequent to the conviction for what qualifies, believe it or not, as an aggravated felony, Paulino-Duarte is subject to a sixteen level enhancement pursuant to §2L1.2(b)(1)(A). The Probation Office recommends a three point reduction for acceptance of responsibility pursuant to Guidelines §§ 3E1.1(a) and (b), resulting in a total offense level of twenty-one.

The Probation Office calculated Paulino-Duarte's criminal history category at level V by adding the point values for each of his five prior convictions -- three points for the misdemeanors, three points each for the two felonies, and two points added because Paulino-Duarte committed the instant offense while on parole -- which yielded a point total of eleven, and consequently a criminal history category of V (10-13 points).

Pursuant to the Guidelines sentencing table, the prescribed prison sentence for a defendant with a total offense level of twenty-one and a criminal history category of V is between seventy and eighty-seven months. The Probation Department, therefore, recommends a sentence of seventy months with three years supervised release and a \$100 special assessment.

II. DISCUSSION

Section 4A1.3 of the Guidelines grants sentencing courts the discretion to depart where the criminal history calculation overstates the seriousness of a defendant's criminal record. See

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United States v. Rivers, 50 F.3d 1126, 1130 (2d Cir. 1995) ("We agree with the other circuits that section 4A1.3 manifests the [Sentencing] Commission's view that a sentencing judge should exercise discretion whenever the judge concludes that the consequences of the mathematical prior-history calculation . . . either underrepresent or overrepresent the seriousness of a defendant's prior record."). In such situations, the sentencing court may make a so-called "horizontal departure," whereby the judge "mov[es] horizontally across the Guidelines Sentencing Table from" one criminal history category to another. United States v. Mishoe, 2001 U.S. App. LEXIS 3352, *7 (2nd Cir. 2001).¹

Courts must enumerate specific reasons justifying departures. See United States v. Butler, 954 F.2d 114, 121 (2d Cir. 1992). "[D]epartures are to be made on the basis of individualized consideration of the circumstances of a defendant's case, rather than a general 'rule.'" See Mishoe, U.S. App. LEXIS 3352, at *11-12; Koon v. United States 518 U.S. 81, 100 (1996) ("[w]hat the district court must determine is whether the misconduct that occurred in the particular instance suffices to make the case atypical.").

In Mishoe, to guide courts in their "individualized considerations" of defendants' criminal histories, former Chief Judge Newman identified some, but not all, of the factors that a sentencing court may consider in assessing whether a horizontal departure is warranted: (1) the

¹ Guidelines § 4A1.3 states in part: There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

amount of drugs involved in defendant's prior offenses; (2) defendant's role in those offenses; (3) the sentences previously imposed; (4) the amount of time previously served compared to the sentencing range called for by placement in the recommended criminal history category. See U.S. App. LEXIS 3352, at *16-17 ("Such factors might include ...").

In my "individualized consideration" of Paulino-Duarte's particular circumstances, I will apply, in turn, each of the four factors identified in Mishoe to the facts of this case. First, although Paulino-Duarte has five prior narcotics convictions, each were for minute quantities of drugs. Paulino-Duarte's two felony convictions arose from the attempted sale of one tin foil of cocaine (while we have no specific information about the quantity of cocaine here, the DEA indicates that a tin foil of cocaine generally contains one gram of the controlled substance) and one bag of crack; the misdemeanors were as well for minute quantities of cocaine (slightly less than 2 grams on one occasion, and approximately half a gram on another) and one conviction for possession of marijuana in public view, presumably for his personal use. See United States v. Leviner, 31 F. Supp. 2d 23, 29-30 (D. Mass. 1998) (placing defendant with several minor convictions in criminal history category V would "do violence to the purposes of the Sentencing Guidelines . . . by creat[ing] a new form of disparity, treating offenders that are completely different in a like way").

Second, while Paulino-Duarte was the only person implicated in his five offenses, his role was that of a street level drug pusher. In Mishoe, the Second Circuit recently held that there is not a "special rule for [criminal history category] determinations whereby prior offenses involving street-level sales of narcotics generally (perhaps always) permit a horizontal departure," and that "departures are to be made on the basis of individualized consideration."

U.S. App. LEXIS 3352, at *11-12. In holding that there is no "generalized exception" for street-level drug sales, however, Mishoe did not foreclose this court's contemplation of Paulino-Duarte's minor role in narcotics distribution as part of an "individualized determination."² Paulino-Duarte, who has not been convicted of a violent crime and who was never more than a bit player selling small amounts of narcotics from a piece of pavement on 163rd Street, does not resemble the typical category V defendant as envisaged by the Sentencing Commission. C.f. United States v. Chambers, 2001 U.S. Dist. LEXIS 894, at *7 (S.D.N.Y. 2001) (Judge Sweet horizontally departed because, inter alia, the prior narcotics conviction was for selling drugs from the same location as the instant offense such that "enhancement of recent prior offenses would unjustly penalize [defendant] twice for participation in the same scheme or course of conduct"). There are only six criminal history categories, and criminal history category V is just short of the one reserved for career criminals. Paulino-Duarte's relatively short and far from illustrious career as a minor street level pusher hardly puts him in the company of violent offenders, drug kingpins and perpetrators of far more serious offenses. Only rarely does law enforcement reach and convict the distributor and the like who are insulated from prosecution by droves of Duartes. Perhaps equally relevant here, as Judge Scheindlin noted in United States v. Dejesus, 1999 U.S. Dist. LEXIS 11365 (S.D.N.Y. 1999):

² "[T]he fact that prior small sentences cannot be disregarded and cannot justify routine horizontal departures for all street-sellers does not mean that the relationship between a particular defendant's [criminal history category] sentencing range and the time he served on his prior sentences, in combination with other factors (all assessed on an individualized basis), might not warrant a departure." Id. at *17-18. While I am mindful of Mishoe's limitations on a court's consideration of defendant's status as a street-level drug seller, this is a case where Paulino-Duarte's role in narcotics distribution is one of several concerns appropriate in an individualized determination of whether a horizontal departure is warranted.

A high criminal history category demonstrates that there is little reason to believe that previous punishment has had any impact on the defendant and that he is unlikely to be rehabilitated. . . . A lengthy sentence required by a higher criminal history category will lessen, not increase, the likelihood of rehabilitation. Thus, I conclude that because most of his earlier crimes were non-violent and because he has not served any significant terms of incarceration, his Criminal History Category is better represented by Criminal History Category IV.

Id. at *10-11; see Leviner, 31 F. Supp. 2d at 32 (criminal history category should take account of whether a prior conviction was for a violent or non-violent crime); United States v. Footman, 66 F. Supp. 2d 83, 99 (D. Mass. 1999) (same).

Third, although Paulino-Duarte has five prior convictions, they resulted in a total jail time of one year. Only the two felonies, the sentences for which (1-3 years) ran concurrently, exceeded twenty days. Paulino-Duarte's three misdemeanor convictions resulted in sentences of conditional discharge, twenty days imprisonment, and time served. See United States v. Francis, 2001 U.S. Dist. LEXIS 631 (S.D.N.Y. 2001) ("this court agrees that the addition of one point for a minor offense for which Defendant received a sentence of time served may overstate the seriousness of Defendant's criminal history . . . "). Each of Paulino-Duarte's misdemeanor convictions counts for one criminal history point, and collectively represent three of Paulino-Duarte's eleven criminal history points. Since criminal history category V requires a minimum of ten points, but for his misdemeanor sentences of conditional discharge and time served Paulino-Duarte would fall within criminal history category IV.

Fourth, there is a significant disparity between the "amount of time previously served compared to the sentencing range called for by placement" in criminal history category V. See Mishoe, U.S. App. LEXIS 3352, at *17. Paulino-Duarte actually served eleven months in prison.

If sentenced under criminal history category V Duarte would serve seventy to eighty-seven months in prison, roughly seven to eight times the combined length served for his prior convictions.³

In sum, the factors identified in Mishog as applied to the facts of the present case clearly indicate the propriety of horizontally departing from criminal history category V to category IV. This conclusion is further supported by my determination that a longer incarceration of Paulino-Duarte is unlikely to reduce the risk of recidivism. In Mishoe, the Second Circuit emphasized the Guidelines' core concern with deterrence. Mishoe at *18 ("[o]bviously, a major reason for imposing an especially long sentence upon those who have committed prior offenses is to

³ I noted with interest the publication of a proposed amendment to the Guidelines that takes into account the seriousness of a defendant's prior aggravated felony conviction in calculating the sentence enhancements for previously deported defendants. See 66 FR 18, at 7961 (January 26, 2001). Currently, Guidelines § 2L1.2(b)(1)(A) provides a 16 level enhancement to the base offense level for a defendant previously deported subsequent to a conviction for an aggravated felony. The consequence of the current rule, which "neither distinguishes among the many types of aggravated felonies for purposes of triggering the 16-level enhancement, nor provides for smaller increases for less serious aggravated felonies," is that "[s]ec. 2L1.2 often results in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction." See 66 FR 18, at 7961 ("Synopsis of Proposed Amendment"). In recognition of the inequities wrought by the current rule, the Sentencing Commission proposes an amendment whereby the number of levels by which the sentence is enhanced turns upon the amount of time the previously deported defendant actually served in prison for the aggravated offense. Under the current rule, Paulino-Duarte's total offense level (including the 16 level enhancement) is 21, resulting in a sentencing range of 57-71 months under criminal history category IV and 70-87 months under criminal history category V. By contrast, under the proposed rule, Paulino-Duarte's total offense level would be 11 (including an enhancement of 6 levels because Paulino-Duarte "actually served a period of imprisonment of less than two years"), resulting in a sentencing range of 18-24 months under criminal history category IV and 24-37 months under criminal history category V. In other words, under the proposed rule, a sentence of even 57 months (the sentence in this case) is significantly "disproportionate to the seriousness" of Paulino-Duarte's criminal history. Here it resulted in more than twice what the sentence would be under the proposed changes, and that with my downward departure taken into consideration.

achieve a deterrent effect that the prior punishments failed to achieve"); see United States v. Leviner, 31 F. Supp. 2d 23, 29-30 (D. Mass. 1998) (the Guidelines take account of criminal history because it "was found to be a strong predictor of recidivism and a good measure of culpability"). With respect to narcotics cases, Mishoe instructs that the Guidelines include street sellers as well as kingpins, and that horizontal departures may not be warranted even for street sellers if a longer sentence is necessary to deter future offenses.

Here, however, Paulino-Duarte was not charged with narcotics offenses, but with illegal reentry. Because, as in most such offenses, the wrong is unrelated to the defendant's prior convictions, a sentence pursuant to illegal reentry may not be an appropriate means to deter future drug sales, to say nothing of a defendant's addiction. The only cognizable deterrence value of sentences like this is to deter Paulino-Duarte from again illegally reentering the United States. Sentencing under criminal history category IV is more than sufficient to fulfill this purpose, added to which is the fact that this defendant will likely be deported promptly after serving his jail time.

Moreover, in this particular case, the most effective way to distance Paulino-Duarte from drugs and reduce the likelihood of future drug offenses is rehabilitation through treatment for Paulino-Duarte's addiction. I direct that the defendant be incarcerated at an institution with a drug rehabilitation program and I adopt the Probation Department's recommendation that following his sentence Paulino-Duarte be required to participate in a substance abuse program. I take seriously Paulino-Duarte's statement to the Probation Department that "he made sacrifices to come to the U.S. for a better way of life and 'drugs have destroyed' everything for him." (Pre-Sentence Report, ¶ 57.) See United States v. Garrett, 1996 U.S. App. LEXIS 19054, *3 (4th Cir.

1996) (the court concluded that an eleven-month sentence afforded Garrett with the most effective correctional [drug] treatment and provided deterrence to future crimes"); United States v. Tonva Davis, 763 F. Supp. 645, 653 (D.D.C. 1991) ("The fact that Davis' offenses are attributable to her drug addiction does not absolve her of responsibility for her actions, nor does it obviate the need for punishment. It does, however, suggest that if she can successfully treat that addiction, there is less need to incarcerate her.").⁴

Finally, in Mishoe, the court stated that "if a defendant served no time or only a few months for the prior offenses, a sentence of even three or five years for the current offense might be expected to have the requisite deterrent effect." Id. at *18. Setting aside the fact that in Mishoe the instant offense was the last in a long line of drug offenses – not the case here – the seventy to eighty-seven month prison sentence required by criminal history category V overrepresents the seriousness of Paulino-Duarte's criminal record and I find that the facts here

⁴ I am not departing from criminal history category V because Paulino-Duarte is willing to participate in a drug treatment program, however I note that the Second Circuit has repeatedly held that a defendant's efforts to escape addiction may constitute a complete and independent basis to depart from the Guidelines. See United States v. Williams, 65 F.3d 301 (2nd Cir. 1995) (noting that defendant's "criminality was largely a product of his addiction" and upholding downward departure because of defendant's "subjective willingness" to participate in a drug rehabilitation program); United States v. Majer, 975 F.2d 944, 948 (2nd Cir. 1992) ("though drug dependence is not a reason for a departure, awareness of one's circumstances and the demonstrated willingness to act to achieve rehabilitation, thereby benefitting the individual and society, can remove a case from the heartland of typical cases, thus constituting a valid basis for departure") (internal quotation marks omitted); United States v. Herman, 172 F.3d 205, 207 (2nd Cir. 1997) ("[i]n this circuit, a district court has the discretion to depart downwardly from the applicable Guideline range on the basis of a drug rehabilitation"). Here, I consider the linkage between Paulino-Duarte's addiction and criminal past, and his willingness to escape that vicious circle through treatment, only in the context of analyzing the likelihood of recidivism within an individualized determination of whether criminal history category V overstates the seriousness of his record.

are appropriate for a downward departure to criminal history category IV.

III. THE SENTENCE

An offense level of twenty-one in criminal history category IV yields an applicable Guidelines range of fifty-seven to seventy-one months in custody. Accordingly, Paulino-Duarte is placed in the custody of the Attorney General for a period of fifty-seven months of imprisonment to be followed by one year of supervised release. Paulino-Duarte is to report to the nearest Probation Office within seventy-two hours of his release from custody, and supervision shall be by the probation office in his district of residence.

Let me remind you that there are mandatory and general conditions as well as special conditions of supervised release, including: (1) not committing another federal, state or local crime; (2) not illegally possessing a controlled substance; and (3) not possessing a firearm or other destructive device. The mandatory drug testing condition is suspended due to the imposition of a special condition requiring drug treatment and testing.

In addition, Paulino-Duarte shall be incarcerated in an institution with a drug rehabilitation program and if possible admitted to that program. Further, following his release, Paulino-Duarte shall participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the offender has reverted to the use of drugs or alcohol. You may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third-party payment. Also, Paulino-Duarte shall comply with all INS requests and obey all U.S. immigration laws.

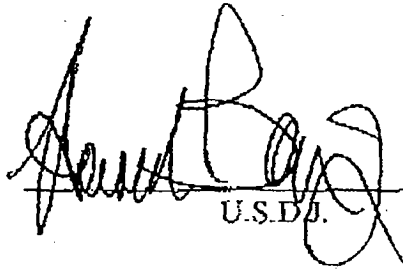
Paulino-Duarte is required to pay a mandatory assessment of \$100, which payment is due

immediately. No fine is imposed. Paulino-Duarte may appeal this sentence.

SO ORDERED

New York, NY

March 19, 2001


U.S.D.J.

