

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United States v. James E. Carey

United States v. James E. Carey, 2 Fed.Sent.R. 176 (7th Cir. 1990) · No. No. 89-1826 · Decided January 12, 1990

SUMMARY

The Seventh Circuit held that a district court's downward departure from the Federal Sentencing Guidelines for a check-kiting scheme was unreasonable where the court relied on (1) voluntary restitution, which was already accounted for by the acceptance-of-responsibility reduction, (2) the defendant's age and physical condition without making the required findings of "elderly and infirm" or "extraordinary physical impairment," and (3) a finding of "single act of aberrant behavior" that was clearly erroneous for a planned, fifteen-month scheme. The court also emphasized that the district court violated 18 U.S.C. § 3553(c) by failing to state its reasons for departure in open court at sentencing. The sentence was vacated and remanded for resentencing consistent with the Guidelines.

CASE DETAILS

COURT	United States Court of Appeals for the Seventh Circuit
WRITING FOR THE COURT	Flaum; Cummings; Kanne
JURISDICTION	Federal
DECIDED	January 12, 1990
DOCKET	No. 89-1826
DISPOSITION	vacated
PROCEDURAL POSTURE	Appeal by the government of the district court's downward departure from the Federal Sentencing Guidelines.
STANDARD OF REVIEW	Reasonableness under 18 U.S.C. § 3742(e); the court reviews the district court's departure to determine whether it was reasonable in light of the factors dictated by the Guidelines and the district court's explanations.
PRECEDENTIAL VALUE	Published
PARTIES	United States of America v. James E. Carey

TOPICS

- criminal procedure
- appellate procedure

PRACTICE AREAS

Criminal

Sentencing

QUESTIONS PRESENTED

1. Whether the district court properly relied on the defendant's payment of restitution as a basis for downward departure when restitution was adequately considered by the Sentencing Commission and the court did not find unusual circumstances.
2. Whether the district court properly relied on the defendant's age and physical condition as a basis for downward departure when the court did not make the required findings of elderly and infirm or extraordinary physical impairment.
3. Whether the district court properly relied on the defendant's conduct as a single act of aberrant behavior when the offense involved extensive planning and a fifteen-month duration.
4. Whether the district court's failure to state reasons for departure at the sentencing hearing violates the open court requirement of 18 U.S.C. § 3553(c).

HOLDINGS

1. The district court's reliance on restitution for a downward departure was unreasonable because restitution was adequately considered by the Commission in formulating the Guidelines (as a factor for acceptance of responsibility), and the court did not find that unusual circumstances made the factor present to a degree substantially in excess of that ordinarily involved.
2. The district court's reliance on age and physical condition was unreasonable because the court did not make the required findings that the defendant was elderly and infirm and that alternative punishment would be equally efficient, or that the defendant suffered from an extraordinary physical impairment.
3. The district court's finding that the defendant's conduct constituted a single act of aberrant behavior was clearly erroneous because the offense involved extensive planning and hundreds of overt acts over a fifteen-month period, not a spontaneous or thoughtless act.

KEY QUOTATIONS

"The Guidelines permit a departure from the applicable sentencing range where the court finds 'an aggravating or mitigating circumstance of the kind or to a degree not adequately considered by the Commission in formulating the Guidelines.'" (at 321)

"A single act of aberrant behavior, however, generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable." (at 323)

"We share in the district court's apparent concern over any harshness the Guidelines create in the case at bar. ... Nevertheless, the Guidelines seek to end the disparity in sentencing, and in doing so, mandate that departures be the exception and occur only when truly justified." (at 324)

FACTUAL BACKGROUND

The defendant, James E. Carey, was president of North Side Trucking Company. For at least fifteen months, he engaged in a check-kiting scheme involving two bank accounts, concealing overdrafts by depositing checks between accounts. The scheme ended when Indiana National Bank discovered insufficient funds totaling \$219,000. Carey was indicted for bank fraud, pleaded guilty, and entered a plea agreement. At sentencing, the district court departed downward from the guideline range of 12-18 months to one month imprisonment, citing four factors: the defendant's age (62), his physical condition (brain tumor surgery), restitution paid prior to indictment, and the offense as a single act of aberrant behavior.

PROCEDURAL HISTORY

The defendant pleaded guilty to bank fraud. The district court calculated the guideline range as 12-18 months but departed downward and imposed a sentence of one month imprisonment, two years supervised release, restitution, community service, and other conditions. The court did not state reasons at sentencing but later filed a memorandum nunc pro tunc citing four factors. The government appealed.

DISPOSITION

vacated

REMAND INSTRUCTIONS

Resentencing in conformity with this opinion and the Guidelines. The district court may consider making findings under §5K2.0 for restitution, or under §5H1.1 and §5H1.4 for age and physical condition, if supported by the facts.

CASES CITED

- United States v. Jordan, 890 F.2d 968 (7th Cir. 1989)
- United States v. Perez, 871 F.2d 45 (6th Cir. 1989)
- United States v. Miller, 874 F.2d 466 (7th Cir. 1989)
- United States v. Russell, 870 F.2d 18 (1st Cir. 1989)

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