

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
 v.) CR-03-6-B-W
)
 DONALD ANDREWS,)
)
 Defendant.)

PRESENTENCE ORDER

I. STATEMENT OF FACTS

Donald Andrews pleaded guilty on August 4, 2003 to conspiracy to distribute more than fifty grams of cocaine base and possession with the intent to distribute more than fifty grams of cocaine base, violations of 21 U.S.C. §§ 841(a)(1), 846(b)(1)(A), and 841(b)(1)(A). He was sentenced on February 25, 2004 to 151 months of incarceration. (Docket ## 74, 76). On May 9, 2005, the United States Court of Appeals for the First Circuit vacated the Judgment and remanded the case to this Court for re-sentencing in light of *United States v. Booker*, __U.S.__, 125 S. Ct. 738 (2005). (Docket ## 89, 90).

II. RE-SENTENCING UNDER THE GUIDELINES

A. Criminal History Category: The 2003 Ruling.

Donald Andrews is now 26 years old. His first adult convictions took place on July 8 and July 9, 1997, respectively. He was 18 years old when he was convicted of possession of stolen property and possession of contraband and was sentenced to sixty days incarceration. In the Presentence Investigation Report, he received one criminal history point for the first conviction and two for the second. U.S.S.G. § 4A1.1(b),(c). On March 5, 1998, still 18, he was convicted

of attempted criminal possession of a weapon and was sentenced to thirty months. This conviction added three criminal history points for a subtotal of six. U.S.S.G. § 4A1.1(a).

Mr. Andrews remained out of legal trouble until age 22, when on March 18, 2001, he was convicted in New York City of possession of marijuana. The next summer again in New York City, he was convicted of two additional possession of marijuana charges: on August 20, 2001, he was sentenced to time served and on August 29, 2002, he was again sentenced to time served. Under the Pre-Sentence Investigation Report, he received one additional point for each conviction, totaling three. U.S.S.G. § 4A1.1(c). With a criminal history point level of nine, Mr. Andrews was placed in a Criminal History Category IV and at a total offense level of 31, his sentencing range was from 151 to 188 months.

The marijuana possession charges generated a puzzling question. In New York, the Defendant's possessions of marijuana were Class B misdemeanors, subjecting Mr. Andrews to a period of imprisonment not to exceed three months. N.Y. Penal Law §§ 221.10(1), 70.15(2). In Maine, they would have been civil violations, subjecting him to a forfeiture between \$200.00 and \$400.00 for the first offense and \$400.00 for each subsequent offense. 22 M.R.S.A. § 2383(1). If Mr. Andrews had engaged in the same actions in Maine, he would have had a criminal history point level of six, a criminal history category of III, and a guideline range of 135 to 168 months.¹

By contrast, if Mr. Andrews had been prosecuted under federal law, he would have been subject to a civil penalty for the first two offenses, 21 U.S.C. § 844a(a), but to a term of imprisonment not to exceed one year and a fine of \$1,000.00 for the third conviction. 18 U.S.C.

¹ Mr. Andrews was convicted each time of violating § 221.10, which is denominated criminal possession of marijuana in the fifth degree. It prohibits the knowing and unlawful possession of marijuana in a public place when the marijuana is burning or open to public view. N.Y. Penal Law § 221.10(1). Maine state law decriminalizes the possession of a usable amount of marijuana, defined as 2 ½ ounces or less. 22 M.R.S.A. §§ 2383(1), 2383-B(3). The first time offender is subject to a fine of not less than \$200.00 or more than \$400.00; subsequent offenses within a six year period of the first offense are subject to a forfeiture of \$400.00. 22 M.R.S.A. § 2383(1).

§ 844a(d), 844(a). This would have given him at least another criminal history point, a total of 7, and a criminal history category of IV. There is authority in federal immigration law and in at least one area of federal sentencing law for determining the classification of a state offense by reference to federal law. *See United States v. Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004) (addressing whether a simple assault under New Hampshire state law is an aggravated felony under federal law); *Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005); *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002); *Copeland v. Ashcroft*, 246 F. Supp. 2d 183, 187-88 & n. 5 (W.D.N.Y. 2003), *vacated sua sponte on other grounds*, 2003 U.S. Dist. LEXIS 26217 (W.D.N.Y. 2003); *State v. Byron*, 683 N.W.2d 317, 320 n. 1 (Minn. Ct. App. 2004). At sentencing in 2004, this Court concluded it must use either New York state law or federal law to determine the legal significance of his possession of marijuana convictions and, therefore, sentenced him under criminal history category IV.

B. Subsequent Developments.

On July 7, 2004, after federal sentencing, the Defendant pleaded guilty and was sentenced in New York state court for two felony drug offenses with different dates of offense and different indictment numbers. The Defendant received concurrent sentences of three to six years on each state indictment. If these new convictions and sentences are considered for re-sentencing purposes, the Defendant would receive an additional 6 criminal history points, placing him in criminal history category VI and a Guideline sentence range of 188 to 235. U.S.S.G. § 4A1.1(a). If these new convictions and sentences are considered for re-sentencing and the marijuana convictions are not, the Defendant would have a criminal history category V and a Guideline range of sentence from 168 to 210.

C. *Pearce and Wasman.*

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled in part on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989), the United States Supreme Court addressed a case in which a defendant, following a successful appeal, received a harsher sentence on remand.

Pearce held that:

neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities."

Id. at 723. *Pearce* expressed the concern, however, that a re-sentenced defendant not receive a higher sentence due to "vindictiveness," which it said must "play no part" in the new sentence.

Id. at 725. *Pearce* stated that if a defendant receives a higher sentence after successful appeal, the reasons must "be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726.

Expanding upon *Pearce*, in *Blackledge v. Perry*, 417 U.S. 21, 27 (1974), the Supreme Court stated that "(t)he lesson that emerges... is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of 'vindictiveness'." Further, "to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort..." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1977). In *United States v. Goodwin*, 457 U.S. 368, 374 (1982), the Supreme Court explained that *Pearce* created a "presumption of vindictiveness" when the defendant receives a harsher sentence after a successful appeal, but, quoting *Blackledge*, stated that the presumption must be limited only to circumstances "where a reasonable likelihood of vindictiveness exists." *Id.* at 375 (quoting *Blackledge*, 417 U.S. at 27); *see also United States v. Pimienta-Redondo*, 874 F.2d 9, 12-13 (1st Cir. 1989). The First Circuit

summarized the *Pearce* concern: it is not that enlarged sentences are forbidden, but “only that such sentences may not be fueled by vindictiveness.” *Johnson v. Vose*, 927 F.2d 10, 11 (1st Cir. 1991).

In *Wasman v. United States*, 468 U.S. 559, 570-71 (1984), the United States Supreme Court addressed whether a sentencing judge could constitutionally impose a higher sentence based a criminal conviction between the original sentencing and a sentencing after retrial. *Wasman* stated that the higher sentence following successful appeal was sufficient to engage the *Pearce* presumption; however, it went on to say that “(c)onsideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate.” *Id.* at 569-70. *Wasman* said:

Here, the judge’s justification is plain even from the record of petitioner’s first sentencing proceeding; the judge informed the parties that, although he did not consider pending *charges* when sentencing a defendant, he always took into account prior criminal *convictions*. This, of course, was proper; indeed, failure to do so would have been inappropriate.

Id. at 570; see *United States v. Schmeltzer*, 20 F.3d 610, 613 (5th Cir. 1994), *cert. denied sub. nom.*, *Schmeltzer v. United States*, 513 U.S. 1041 (1994); *Hurlburt v. Cunningham*, 996 F.2d 1273, 1275 (1st Cir. 1993); *United States v. Adams*, 771 F.2d 783, 789 (3d Cir. 1985), *cert. denied*, 474 U.S. 1013 (1985). The *Wasman* holding applies here. This Court did not consider the pending New York charges at its original sentencing of the Defendant; however, those charges have now become convictions and, consistent with *Wasman*, this Court concludes it is proper to consider the Defendant’s July 7, 2004 New York convictions at his re-sentencing.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 30th day of June, 2005.

Defendant

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