UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JUAN GONZALEZ, aka "FERNANDO,"
Defendant.

03 Cr. 41 (DAB)

2004 U.S. Dist. LEXIS 11760

June 25, 2004, Decided
June 28, 2004, Filed

DISPOSITION: Government's request for adjournment granted.

COUNSEL: [*1] For Juan Gonzalez aka Samuel C. Fernando aka Fernando Gonzalez aka "Jose Gonzalez", Defendant(s): David Patton, LEAD ATTORNEY, Federal Defender Services Unit, New York, NY.

JUDGE: DEBORAH A. BATTS, United States District Judge.

OPINION: MEMORANDUM AND ORDER

DEBORAH A. BATTS, United States District Judge

During the most recent conference in this case, held on May 17, 2004, the Court informed the Government that based on its review of Defendant's plea allocution and the Pre-Sentence Report, "the Court does not feel that there is evidence to support the gun increase, and that is why that brings it to an area where the safety valve might be appropriate." (Transcript of May 17, 2004 Proceedings (Tr.) at 3). However, the Court also assured the Government it would have the opportunity to address the safety valve issue prior to sentencing, and the Government acknowledged it "obviously has a lot to say about that issue." (Id. at 2). The Court also informed Defense Counsel that, despite the restrictions imposed by the plea agreement on the Defense's ability to raise sentencing arguments, it "was directing [him] to submit something if you wish." (Id. at 4). [*2]

Subsequently, on June 18, 2004, the Government submitted a letter to the Court, arguing that the Defendant is not eligible for safety valve treatment because he failed to satisfy the second and fifth requirements of 18 U.S.C. § 3553 (f). Specifically, the Government contends that (1) it can offer evidence, in the form of testimony from two cooperating witnesses, that the Defendant "possessed firearms in the course of his drug dealing," and (2) that the Defendant "has not 'truthfully provided to the Government all information and

evidence the Defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan,'" as required by 18 U.S.C. § 3553(f)(5). (Government's Letter to the Court, dated June 18, 2004, at 1-2).

In response, Defense Counsel submitted a letter to the Court on June 22, 2004, contesting the Government's assertion that the two firearms recovered by the Government and attributed to the Defendant were actually possessed "in connection with the offense," noting that the guns were not recovered from the Defendant's apartment at the time of his arrest but instead after [*3] the Defendant himself disclosed their existence to the Government during a subsequent proffer session. (Defendant's Letter to the Court, dated June 22, 2004, at 1). In addition, Defense Counsel argues that the Defendant has already truthfully provided all information concerning the narcotics conspiracy to the Government in a proffer session held shortly after his arrest, during which time he "disclosed his role in the offense and additionally admitted to having engaged in prior drug transactions." (Id. at 2) .

On June 24, 2004, the Court issued an Order stating that the parties' correspondence "raises more questions than it answers and that a further proceeding, whether a hearing or argument, is necessary" prior to sentencing of the Defendant. (Order at 1). The Court thus adjourned sentencing in this case until June 28, 2004 at 2:30pm, "at which time further proceedings, including sentencing if appropriate, shall be held." (Id.).

On the same day that the Court issued its Order, the United States Supreme Court decided Blakely v. Washington, 2004 U.S. LEXIS 4573, No. 02-1632, 2004 WL 1402697, --S.Ct--, slip op. (June 24, 2004), invalidating as violative of the Sixth Amendment [*4] the sentencing of a criminal defendant under the Washington State Sentencing Guidelines to 90 months for second degree kidnapping - 37 months above the standard statutory guideline range for such offense - on the basis of facts to which the Defendant did not admit and which were not proved beyond a reasonable doubt to a jury. The Court extended the rule established in Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2001), that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt," to sentences imposed pursuant to legislatively-enacted sentencing guidelines, declaring that "'the statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 2004 U.S. LEXIS 4573, 2004 WL 1402697, at *4.

Needless to say, Blakely calls into serious question the long-standing practices of federal courts in implementing the United States Sentencing Guidelines, wherein courts, applying a preponderance of the evidence standard of proof, apply offense [*5] level enhancements that result in more severe sentences on the basis of facts which were neither submitted to a jury nor allocuted to by the defendants themselves, or, as the Majority phrased it in Blakely, "based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." Blakely, 2004

U.S. LEXIS 4573, 2004 WL 1402697, at *8. While the majority opinion in Blakely, in a dismissive footnote, denies that Blakely is directed at the Federal Sentencing Guidelines, n1 this Court agrees with Justice O'Connor who, in her dissent, said "the structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction ... If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack." Blakely, 2004 U.S. LEXIS 4573, 2004 WL 1402697, at *16 (O'Connor, J., dissenting). The Court feels that to ignore the handwriting on the wall would be to the peril of the sentencing process.

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n1 See Blakely, 2004 U.S. LEXIS 4573, 2004 WL 14062697, at * 6 n.9 ("The United States, as amicus curiae, urges us to affirm. It notes the differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as Amicus Curiae 25-30. The Federal Guidelines are not before us, and we express no opinion on them.")

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The Government, in light of Blakely, seeks a two-week adjournment of the proceeding currently scheduled for June 28, 2004 at 2:30pm. That adjournment is GRANTED. While the Court is not required to do so, see United States v, Rivera, 96 F.3d 41, 43 (2d Cir. 1996), the Court puts the parties on notice that in light of its stated pre-Blakely concerns, and the holding of Blakely and its future impact, the Court is currently of the mind to sentence the Defendant "solely on the basis of the facts admitted by the defendant" during his guilty plea. Blakely, 2004 U.S. LEXIS 4573, 2004 WL 1402697, at * 4.

The Government shall submit its arguments by July 12, 2004. The Defendant shall respond by July 26, 2004. The sentence is adjourned sine die.

SO ORDERED

DATED: June 25, 2004

Deborah A. Batts

United States District Judge