

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA, :
:
    vs. : CR 03-0146
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DWIGHT W. WATSON, :
:
    Defendant. :
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Washington, D. C.  
June 30, 2004  
10:10 a.m.

Transcript of Motions Hearing  
Before the Honorable Thomas Penfield Jackson  
United States District Judge

APPEARANCES:

For the Plaintiff: JAY BRATT, ESQ.

For the Defendant: A.J. KRAMER, ESQ.  
ERICA HASHIMOTO, ESQ.

Probation Office: THERESA GRANT

Court Reporter: JACQUELINE L. WOOD  
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1 P-R-O-C-E-E-D-I-N-G-S

2 THE CLERK: United States of America vs.  
3 Dwight W. Watson, Criminal 03-0146. Mr. Bratt for  
4 the United States. Mr. Kramer and Ms. Hashimoto  
5 for the defendant. Ms. Grant for the probation  
6 office.

7 THE COURT: Good morning, everybody. It  
8 seems to me that we were here only yesterday. It's  
9 been seven days.

10 Mr. Bratt, how do you distinguish this  
11 case from Blakely vs. Washington? Realistically,  
12 how do you distinguish it?

13 MR. BRATT: Your Honor, part of our  
14 argument is that this is not the forum to be  
15 distinguishing it and that this is not the  
16 mechanism by which the Court is to make those  
17 distinctions.

18 THE COURT: Is there any more appropriate  
19 mechanism? This is a, what is it? Rule 35-A?

20 MR. BRATT: 35-A. That's correct, Your  
21 Honor.

22 THE COURT: Which is designed to correct a  
23 sentence which is plainly illegal. The Supreme  
24 Court has told me what I did a week ago today was  
25 plainly illegal.

1           MR. BRATT: Your Honor, the Supreme Court  
2 actually expressly said in footnote 9 of the  
3 decision that the federal sentencing guidelines  
4 were not before it and that it was expressing no  
5 opinion on the federal sentencing guidelines. The  
6 other issue, Your Honor, is the standard under Rule  
7 35.

8           THE COURT: This amendment also applies to  
9 the Federal Government.

10          MR. BRATT: Your Honor, there are two very  
11 important points in considering this Rule 35  
12 motion. One is that the standard, as defined in the  
13 Advisory Committee notes, is that it is error that  
14 is likely to lead to a remand.

15          The defense did not raise this as an  
16 objection to the sentence. They are subject, if it  
17 were to be on collateral review, to a procedural  
18 default analysis under a 2255. Or on direct appeal  
19 they would be subject to plain error. It is not  
20 clear that Mr. Watson would survive a plain error  
21 analysis.

22          Also, Your Honor, it is the law of this  
23 circuit in the Fields decision that Apendi does  
24 not apply to the guideline's enhancements. As a  
25 District Court Judge sitting in the circuit, the

1 Court, until the circuit decides otherwise, is  
2 bound to apply circuit law.

3           It is interesting that in the reply that  
4 the defense filed yesterday, they sort of take the  
5 government to task for they claim ignoring a  
6 provision that's also in the Guideline Committee,  
7 the Advisory Committee notes, in the 1991 Advisory  
8 Committee notes where it says:. But the addition  
9 of the subdivision is not intended to preclude a  
10 defendant from obtaining statutory relief from  
11 plainly illegal sentence.

12           The committee's assumption is that a  
13 defendant detained pursuant to such a sentence  
14 could seek relief under 28 USC, Section 2255, if  
15 the 7 day provision period provided has lapsed or  
16 on direct appeal. Mr. Watson has other avenues to  
17 challenge the sentence. It is for the Circuit  
18 Court to decide.

19           THE COURT: You're saying for me to let  
20 this case run its course all the way and then  
21 require that he file a 2255 motion rather than have  
22 the opportunity to correct a plainly illegal  
23 sentence right now?

24           MR. BRATT: Your Honor, it is not clear  
25 that it is a plainly illegal sentence. Under

1 binding precedent it is not illegal. The Court is  
2 subject to Fields. Under Fields it is not an  
3 illegal sentence.

4 THE COURT: I suppose we could debate  
5 that. But if the Supreme Court says its  
6 unconstitutional, its unconstitutional.

7 MR. BRATT: But the Supreme Court hasn't  
8 said it's unconstitutional and it left open the  
9 question of whether the federal sentencing  
10 guidelines are unconstitutional.

11 THE COURT: That's the one you're going to  
12 be entitled to raise that argument in.

13 MR. BRATT: The other thing, and this is  
14 another reason why this is not the type of thing to  
15 be deciding within 7 days. We have not finalized  
16 all of our arguments on this issue. The  
17 guidelines, unlike the guidelines in Washington --

18 THE COURT: What's to argue?

19 MR. BRATT: They are not statutory. They  
20 are by commission. They are designed to intend to  
21 give judges a broad range of discretion more so  
22 than what the Washington state statute had.

23 THE COURT: That's interesting. The  
24 sentencing guidelines are designed to give judges a  
25 broad range of discretion.

1           MR. BRATT: A broader range of issues to  
2 consider than the Washington state guideline.

3           THE COURT: I'm not persuaded. Is there  
4 anything else you want to put on the record so that  
5 the full record will be there when it gets to the  
6 5th floor?

7           MR. BRATT: I think I've made the  
8 argument, Your Honor, that the guidelines are not  
9 statutes. They're sentencing rules that they have  
10 entrusted to the Commission, the specification of  
11 numerous factors that authorize different  
12 punishments under the guidelines. For that reason,  
13 there's a strong argument that the guidelines do  
14 not implicate the concerns addressed by Apendi.

15           Again, I think the Court, within this  
16 limited 7 day period, should not be making this  
17 decision. There are other avenues of relief for  
18 Mr. Watson.

19           THE COURT: Beg your pardon?

20           MR. BRATT: There are other avenues of  
21 relief for Mr. Watson.

22           THE COURT: That may be so but this is the  
23 last day I can do anything about this sentence; is  
24 that right?

25           MR. BRATT: No, that's not correct. You

1 could be considering it under a 2255.

2 THE COURT: Okay. I could.

3 MR. BRATT: In fact, you could even  
4 convert this to a 2255.

5 THE COURT: I don't think that's  
6 necessary. All right. Mr. Kramer?

7 MR. KRAMER: Your Honor, if Your Honor is  
8 indicating agreement I don't have anything to say  
9 frankly. It was set out in the papers. I could  
10 add more but I won't belabor it. I think there  
11 were 14 points of adjustments.

12 THE COURT: All of which resulted from  
13 findings that I made.

14 MR. KRAMER: Yes. None of which were  
15 presented to the jury.

16 THE COURT: None of which were presented  
17 to the jury. I don't see any distinction between  
18 this case and Blakely at all.

19 MR. KRAMER: I don't either.

20 THE COURT: I've gone through it 3 or 4  
21 times and I cannot find any rational ground to  
22 depart.

23 MR. KRAMER: Justice O'Connor said in  
24 dissent that, if anything, the federal sentencing  
25 guidelines are more binding than the Washington

1 guidelines and therefore it's more applicable.

2 THE COURT: All right. I'm going to  
3 resentence your client. He has a right to be  
4 heard.

5 MR. KRAMER: Could I talk to him for a  
6 second?

7 THE COURT: I would suggest that you do.

8 (Pause)

9 MR. KRAMER: Thank you, Your Honor.

10 THE COURT: In light of the U.S. Supreme  
11 Court decision of June 24, 2004, in Blakely vs.  
12 Washington, and pursuant to the Sentencing Reform  
13 Act of 1984 and the United States Sentencing  
14 Guidelines, it is the judgment of this Court that  
15 the defendant Dwight Ware Watson is committed to  
16 the custody of the U.S. Bureau of Prisons to be  
17 imprisoned for concurrent terms of 16 months on  
18 each count with credit for time served.

19 Upon his release from confinement the  
20 defendant shall be subjected to concurrent terms of  
21 supervised release of 3 years. The terms and  
22 conditions whereof shall be that he shall not  
23 commit any other federal, state or local crimes.  
24 He shall abide by the standard conditions of  
25 supervised release promulgated by the Sentencing



1 Commission and adopted by the Court.

2 He shall not possess a firearm, explosive  
3 device, or other dangerous weapon for any reason.

4 He shall maintain a stable residence and steady  
5 employment, the circumstances of which shall be at  
6 the discretion and direction of the probation  
7 office but subject to review by the Court.

8 He shall make restitution to the United  
9 States in the amount of \$5,168 and 20 cents payable  
10 to the National Park Service during the first year  
11 of supervised release.

12 He shall perform 150 hours of community  
13 service as directed by the probation office. He  
14 shall pay a 100 dollar special assessment on each  
15 count for a total of \$200 within the first year of  
16 supervised release.

17 He shall not use or possess any illegal  
18 drugs or associate with known drug dealers or be  
19 present where illegal drugs or used, sold or  
20 distributed, but mandatory drug testing is waived.

21 I find that in the circumstances the  
22 defendant is without resources to pay a fine for  
23 the cost of confinement and supervised release and  
24 I therefore decline to impose the same as a part of  
25 this sentence, the remainder thereof being in my

1 judgment sufficiently punitive.

2           Mr. Watson, you have the right to appeal  
3 the judgment of this Court to the United States  
4 Court of Appeals for the D.C. Circuit. That appeal  
5 must be filed within 10 days or you will lose the  
6 right to appeal.

7           If you are unable to pay for the cost of  
8 an appeal you may apply for leave to appeal informa  
9 pauperis which, if granted, will result in the  
10 government paying the cost for you. Mr. Kramer or  
11 Ms. Hashimoto will file a notice of appeal for you  
12 if you request that they do so and will assure that  
13 it is filed timely. Mr. Bratt?

14           MR. BRATT: Your Honor, could I just ask  
15 that the Court stay the effect of its ruling today  
16 until this afternoon so that I can at least seek  
17 counsel from our appellate section, just until the  
18 afternoon, Your Honor?

19           THE COURT: Why?

20           MR. BRATT: This is obviously the first  
21 time this has happened. I don't know what steps  
22 they might want to take. I would just ask for a  
23 couple of hours to consult with them. The Court  
24 has now held basically that the federal sentencing  
25 guidelines are unconstitutional. I would like just

1 a couple hours to consult.

2 THE COURT: The guidelines are  
3 unconstitutional? I've held that the sentence that  
4 I imposed under Blakely is unconstitutional.  
5 That's all I have done.

6 MR. BRATT: But the import of your Court's  
7 decision is to rule that at a minimum the  
8 enhancement provisions of the guidelines are  
9 unconstitutional.

10 THE COURT: That may or may not be an  
11 implication to be drawn from what I have ruled.  
12 All I have said is that insofar as the sentence  
13 that I have imposed is concerned, the 14 points  
14 that I added by reason of findings on my part which  
15 were not made by the jury resulted in those 14  
16 points unconstitutionally enhancing the sentence  
17 imposed.

18 MR. BRATT: But I think to have come to  
19 that decision the Court would also have to say that  
20 any other guideline, as virtually all the  
21 guidelines do, or any other enhancement provision  
22 of the guidelines where it is the court that  
23 imposes the enhancement as opposed to the jury.

24 I can think of only one other guideline  
25 section in the whole guideline framework where a

1 jury can make the determination that was true to  
2 the guideline and that's for hate crimes. Aside  
3 from that any other enhancement provision, which is  
4 really the heart of the guidelines, is  
5 unconstitutional. I think the Court has to make  
6 that ruling.

7 THE COURT: I haven't made that ruling.

8 MR. BRATT: I don't see how you cannot  
9 make that ruling.

10 THE COURT: I'm not going to stay the  
11 imposition of the sentence. It's something that  
12 ought to go forward right now and let's get it  
13 resolved.

14 MR. KRAMER: Your Honor, can I just say.  
15 My argument was not that the guidelines were  
16 unconstitutional. Your Honor is exactly right.

17 THE COURT: I understand that.

18 MR. KRAMER: My argument was that under  
19 Blakely the way they were imposed was  
20 unconstitutional in this case. Any other case in  
21 the future the enhancements could be submitted to  
22 the jury and decided that way.

23 THE COURT: They surely could.

24 MR. KRAMER: I just wanted to make that  
25 clear that was not my argument.

1                   THE COURT: I have not called the  
2 guidelines unconstitutional.

3                   MR. KRAMER: Exactly. Thank you.

4                   THE COURT: All right. By my calculation,  
5 Mr. Watson, you will be a free man within a matter  
6 of hours.

7                   MR. KRAMER: I think not, Your Honor.  
8 Let's see. You may be right. He's got about 15  
9 months in. You may be right. Absolutely.

10                  THE COURT: And I assume he has good time  
11 credit.

12                  MR. KRAMER: Yes. Once they calculate it  
13 he may be released. You're absolutely right.

14                  THE COURT: All right. I am prepared to  
15 transfer probation supervision upon appropriate  
16 motion to North Carolina if that's where he intends  
17 to go. I don't know. But that's a decision that  
18 doesn't have to be made right now but you should  
19 think about it.

20                  MR. KRAMER: Yes. We will work that out  
21 with probation and submit an appropriate order or  
22 request to Your Honor.

23                  THE COURT: Okay. Thank you, counsel.  
24 It's going to be interesting.

25                  [Proceedings adjourned at 10:25 a.m.]