

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

UNITED STATES OF AMERICA

Plaintiff,

v.

CARLTON N. LUCK,

Defendant.

CRIMINAL NO. 3:04-CR-00047-006

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

The Defendant, Carlton Luck, is before the Court for resentencing. At the Defendant's resentencing hearing, I heard argument from the parties regarding the appropriate sentence of imprisonment. After carefully considering the arguments presented at the hearing, the pre-sentence investigation report, the sentencing memoranda, and the factors set forth in 18 U.S.C. § 3553(a), I imposed a sentence of, among other things, 288 months imprisonment. Because this sentence is lower than the advisory Guidelines range of 360 months to life, I write separately from the judgment order to explain the reasons why such a sentence was warranted in Luck's case.

I. BACKGROUND

Luck was originally convicted after a jury trial of one count of conspiracy to possess with intent to distribute 50 grams or more of crack cocaine, one count of brandishing a firearm during or in relation to a drug trafficking crime, and two counts of aiding and abetting the distribution of crack cocaine. On February 20, 2009, I granted Luck's motion to vacate all of his convictions other than the conspiracy conviction. I also vacated Luck's sentence on the conspiracy count

and ordered that the presentence investigation report be updated and amended. Luck is now before the Court for resentencing on his conviction for conspiracy to possess with intent to distribute 50 grams or more of crack cocaine.

The presentence report calculated Luck's sentencing guidelines, using the 2008 sentencing guideline manual, as follows: a base offense level of 32, based on 360 grams of cocaine base, and a two-level upward adjustment for possession of a dangerous weapon. Probation then applied the career offender guideline¹ to increase the total offense level to 37 and Luck's criminal history category to VI. *See* U.S.S.G. § 4B1.1. The presentence report noted that Luck faced a mandatory minimum term of imprisonment of 20 years, based on his conviction under 21 U.S.C. § 841(b)(1)(A) and an enhancement applied under 21 U.S.C. § 851(a). I found that the presentence report correctly calculated the applicable guidelines in this case; however, I imposed a sentence below the guidelines range for the reasons discussed below.

II. DISCUSSION

The sentencing guidelines are advisory. *Gall v. United States*, 128 S. Ct. 586, 594 (2007). While they “should be the starting point and the initial benchmark” for calculating a sentence, they “are not the only consideration” that a district court should entertain at sentencing. *Id.* at 596. After giving both the defendant and the Government an opportunity to argue for an appropriate sentence, a district judge should consider the factors set forth in 18 U.S.C. § 3553(a). *Id.* Section 3553(a) implores a court to “impose a sentence sufficient, but not greater than necessary,” to comply with the four different purposes of punishment: deterrence, rehabilitation of the Defendant, retribution (“to reflect the seriousness of the offense, to promote respect for the

¹ Luck challenged his classification as a career offender under the guidelines; however, I determined at the sentencing hearing that Luck does in fact qualify as a career offender based on at least two prior convictions for either a crime of violence or a controlled substance offense.

law, and to provide just punishment for the offense”), and incapacitation (“to protect the public from further crimes of the defendant.”). 18 U.S.C. § 3553(a)(2). In making such a determination, a district court must also consider, among other things, “the nature and circumstances of the offense and the history and characteristics of the defendant,” the kinds of sentences available, the advisory Guidelines range, and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C. §§ 3553(a)(1)-(6). A court “may not presume that the Guidelines range is reasonable” and “must make an individualized assessment based on the facts presented” at sentencing. *Gall*, 128 S. Ct. at 596-97.

In objections to the presentence report, a sentencing memorandum, and at the sentencing hearing, counsel for Luck argued that the Court should calculate the guidelines range based on the guideline for powder cocaine rather than crack cocaine. Luck argued that because the U.S. Department of Justice has recently instituted a policy to oppose the powder/crack disparity in sentencing, and to suggest that courts impose sentences for crack cocaine offenses based on the powder cocaine guidelines, the Court should reject the current crack cocaine guidelines, and instead apply the guideline for the same weight of powder cocaine.

The Supreme Court has recently affirmed that “district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.” *Spears v. United States*, 129 S.Ct. 840, 843-44 (U.S. 2009). In *Spears*, the Court upheld the district court’s rejection of the crack guidelines and the imposition of a sentence based on a 20:1 ratio between crack and powder. *Id.* at 844. The Court noted that a district court may adopt its own crack to powder ratio in order to reach a sentence that comports with the sentencing factors enumerated in 18 U.S.C. § 3553(a). *Id.*

In April 2009, the United States Department of Justice announced that it would ask courts to use a 1:1 ratio between powder and crack cocaine in sentencing criminal defendants. In addition, it appears that Congress is poised to revise the statutory penalty scheme to eliminate the crack/powder disparity. These decisions were based on numerous considerations that are well documented in case law, Congressional testimony, and reports of the U.S. Sentencing Commission, and which I will not reiterate here. *See, e.g.*, Lanny A. Breuer, Assistant Attorney General for the Criminal Division of the U.S. Department of Justice, Testimony before the U.S. Senate (April 29, 2009), <http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf>; *Kimbrough v. United States*, 128 S.Ct. 558, 568 (discussing Sentencing Commission reports detailing problems with the crack/powder disparity). I concur that the crack/powder disparity in sentencing is difficult to justify and results in disproportionate sentences for defendants who are responsible for comparable conduct.

If Luck were to be sentenced based on a 1:1 ratio of crack to powder, that is, based on 360 grams of powder cocaine, his guideline range would be calculated as follows: the base offense level would be 22, and Luck would still receive the two-level upward adjustment for possession of a dangerous weapon, for a total offense level of 24. Applying the career offender guideline, the total offense level would be increased to 34², and the criminal history category would remain at VI. This results in a sentence range of 262-327 months.

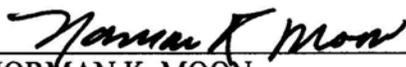
I sentenced Luck to a term of imprisonment below the advisory guidelines range because I believe the current crack/powder disparity in the guidelines serves no legitimate sentencing purpose, and the crack guidelines in this case called for a sentence that was in excess of what

² The offense levels under the career offender guideline are based on the statutory maximum penalty for the instant offense. Based on 360 grams of powder cocaine, and a sentence enhancement under 18 U.S.C. § 851, the statutory maximum penalty would be 30 years. This corresponds to an offense level of 34. *See* U.S.S.G. § 4B1.1.

was necessary to address the sentencing factors set forth in 18 U.S.C. § 3553(a). A sentence of 288 months would be within the guideline range for an identical powder cocaine offense. I also note that Luck has made significant efforts to educate and rehabilitate himself while incarcerated, having completed numerous academic classes, drug treatment, and other rehabilitative programs. Therefore, I think that a sentence of 288 months is sufficient, but not greater than necessary, to serve the sentencing goals of deterrence, rehabilitation, incapacitation, and retribution.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion to all counsel of record.

Entered this ____ day of August, 2009.



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE