

established case law, but the weight of an expert witnesses' opinion has also been extensively researched in the psychological literature (Mantle WP, Chenane J: *The Encyclopedia of Criminology and Criminal Justice* (ed 1). Hoboken, NJ: Wiley Publishing, 2014, pp 1–5). While the attorney may do an admirable job highlighting discrepancies and attempting to discredit the witness, the effort is not as impactful as an expert witness to the perception of the jury.

It is interesting that the state of Oregon uses diagnosis to determine dangerousness, given the variability of symptoms among people with the same diagnosis and the limited information that diagnosis provides about functional behavior. This case touched upon a prominent discussion in the field regarding the utility and appropriateness of categorical diagnoses in psychological care (Trull TJ, Durrett CA: Categorical and dimensional models of personality disorder. *Annu Rev Clin Psychol* 1:355–80, 2005). Under Oregon law, offenders with a severe personality disorder, specifically ASPD, warrant harsher sentencing. ASPD requires that the individual diagnosed display entrenched patterns of disregard for and violation of the rights of others. However, it is a common misconception that all people with ASPD are violent and possess the propensity to violence. Due to symptom variability and the potential nonviolent manifestations of the disorder (e.g. impulsivity, failure to obey laws, pattern of irresponsibility), it is possible that a defendant could meet diagnostic criteria for ASPD without posing a violence risk. Diagnoses were not developed to evaluate risk of violence, and lack of diagnosis does not indicate a lack of dangerousness. A functional determination of the dangerous-offender statute through a dimensional approach to an ASPD diagnosis or the assistance of standardized risk measures would allow evaluators to better inform the court who is at highest risk for violence.

Furthermore, the defense expert opined that Mr. Richardson's traumatic past influenced his interactions with others, leading him to misperceive hostility. The link between traumatic early childhood events and ASPD has been well documented in psychological research (Bierer LM, Yehuda R, Schmeidler J, *et al*: Abuse and neglect in childhood: relationship to personality disorder diagnoses. *CNS Spectr* 8: 737–54, 2003). Should the pathway to the disorder be considered when determining whether someone meets criteria for dangerous-offender sen-

tencing? If so, how should the courts determine whose traumatic history warrants a dangerous-offender sentence?

In conclusion, the case demonstrates the vital importance of an expert witness in the courtroom and highlights difficulties within the field of psychology regarding the use of diagnoses to inform risk. Considering evidence-based risk assessment and assessment of functional impairment, rather than diagnosis alone, may better support the intent of sentencing procedures like those in Oregon. A structured risk and impairment assessment would assess different areas of dangerousness and enable the courts to designate dangerous offenders with increased accuracy.

Softening the Insanity Defense

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Significant Lowering of a Sentence Due, in Part, to Mental Illness

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In *United States v. DeRusse*, 859 F.3d 1232 (10th Cir. 2017), the government appealed the sentencing decision of the District Court for the District of Kansas, arguing that the sentence imposed on Joseph DeRusse, a man who struggled with mental illness, was substantively unreasonable in its downward departure from the advisory sentencing range.

Facts of the Case

Mr. DeRusse was 24 years old and had no prior criminal history when he kidnapped his ex-girlfriend (also age 24 at the time of the offense) using a BB gun. He started driving her from her home in Austin, Texas to Kansas. His plan was to persuade her to marry him while keeping her at a bed and breakfast for three weeks. Eight hours after kidnapping her, Mr. DeRusse was apprehended by the police on the highway. He was questioned and quickly admitted to kidnapping the victim.

The presentence investigation report said that Mr. DeRusse enticed his ex-girlfriend to her sister's home by purchasing a new mobile phone, contacting one of her friends, and, while pretending to be a different common friend, claiming there was a surprise for his ex-girlfriend at her sister's apartment. When the victim arrived, he threatened her back in her car with a BB gun, as she did not realize that it was not a real gun at that time. He had her put on a sleeping mask and a neck pillow so that people would think she was sleeping if they looked in the car.

The presentence investigation report indicated that the victim had developed significant psychological issues because of the kidnapping, with diagnoses of "major depressive disorder, anxiety, and posttraumatic stress disorder" (*DeRusse*, p 1234) as a result of the trauma. Specific symptoms described in the report include suicidal ideation, paranoia, stress-related medical problems, nightmares, and insomnia.

A forensic psychologist found that Mr. DeRusse had obsessive compulsive disorder and major depressive disorder, specifically noting "debilitating depression and anxiety; and thought processes characterized by obsessions, suicidal ideation, and unusual perceptions or beliefs" (*DeRusse*, p 1234). The expert's report to the district court said that Mr. DeRusse was doing much better as a result of seeing a psychiatrist and a therapist and taking medications.

Mr. DeRusse spent 73 days in jail before he was released on bond. He pled guilty to a single count of kidnapping. Before sentencing, there were dozens of letters from his friends and family saying how this behavior was out of character for him. There were also letters sent on the victim's behalf indicating that the kidnapping had significantly affected her. The presentence investigation report determined an advisory sentencing range of 108–135 months. The district court departed downward from this range, citing the aberrance of Mr. DeRusse's behavior and that he "was suffering from a mental illness at the time" (*DeRusse*, p 1235) and showed improvement with treatment. The court emphasized that these factors did not justify the offense. The court sentenced Mr. DeRusse to time served (73 days in jail), plus a statutory maximum of a five-year term of supervised release, with various conditions of supervision. The government appealed to the Tenth Circuit, arguing

that the downward departure of the sentence was substantively unreasonable.

Ruling and Reasoning

The Court of Appeals for the Tenth Circuit affirmed the district court's decision and held that the district court judge did not err in the significant lowering of a sentence. The court of appeals said that it would review the decision under a deferential abuse-of-discretion standard and would reverse only if the sentence was "arbitrary, capricious, whimsical, or manifestly unreasonable" (*DeRusse*, p 1236).

The government first argued that Mr. DeRusse's conduct was not aberrant because Mr. DeRusse not only planned his actions over a few days but considered details like purchasing a new phone to help lure the victim and positioning her in specific ways to hide what he was doing. The government's position was that neither downward departure (a modification of the sentencing guideline calculation) nor downward variance (a lower sentence, outside the guidelines, issued at the court's discretion) was appropriate in this case. The court of appeals affirmed the district court's assessment that Mr. DeRusse's behavior was out of character. On the issue of downward departure, the court of appeals held that even if the district court erred in applying the downward departure statute, it would be harmless, because Mr. DeRusse would qualify for the lower sentence based on downward variance.

The other main challenge the government put forward was the reasonableness of the sentencing decision, stating that the district court gave improper weight to Mr. DeRusse's mental illness. The court of appeals determined that the district court did not err in factoring Mr. DeRusse's mental illness in the sentencing. Overall, the court of appeals stated that, while it may not have given the same sentence as the district court, it was not convinced that the district court abused its power in using its discretion for the sentence it chose.

Dissent

In his dissent, Judge Baldock said that a sentence of 73 days was "manifestly unreasonable" given the seriousness of the kidnapping and the sentencing guidelines' recommendation of 108–135 months (*DeRusse*, p 1241). He argued that what made this case difficult was not that different people would provide different sentences, but that

the district court “push[ed] the limits of discretion to the very extreme” (*DeRusse*, p 1243).

Discussion

This case raises the issue of the interest of the defendant versus the interest of the system, along with what is considered fair punishment for those with mental illness. While Judge Baldock departed from the majority opinion in terms of the sentence being manifestly unreasonable, the majority also acknowledged that it might not have reached the same decision for sentencing that the district court did. Mr. DeRusse was able to avoid post-trial incarceration based on his mental illness without invoking the insanity defense. Typically, in insanity defense cases, individuals are placed in the mental health system, and there is intensive oversight of treatment and risk management to reduce the risk and harms of recidivism. In the case of Mr. DeRusse, mental health treatment was made part of his supervised release for five years. The government had argued that he could have received mental health treatment in prison, which would have better corresponded to the seriousness of the offense.

The United States Federal Sentencing Guidelines were created as an eventual product of the Sentencing Reform Act of 1984. The guidelines were initially considered to be mandatory and were created to reduce significant sentencing discrepancies across the United States. In 2005, the Supreme Court decided, in *United States v. Booker*, 543 U.S. 220 (2005), that the original guidelines violated the Sixth Amendment right to trial by jury. It was at that time that the guidelines became no longer mandatory, but rather advisory. After *Booker*, there was a movement toward assessing every convicted person as an individual and allowing for flexibility in sentencing, including upward and downward departures and variances.

Flexibility in sentencing clearly reflects a prioritization of social justice. Rigid guidelines that do not allow for individual considerations, especially for the population of persons with psychiatric disabilities, will necessarily create injustice. However, flexibility has disadvantages as well and highlights the challenge of perfectly balancing the interests of the offender, the victim, and the community at large. How does one truly balance the interests of an offender with a pre-existing mental illness with those of a victim with a new diagnosis of PTSD that is a direct consequence of the offense? Different models of justice provide different answers to the question of what is fair. The government and the dissent were focused on principles of retributive justice, i.e., sufficient punishment of the offender. The majority seems to have taken a therapeutic jurisprudence approach, placing emphasis on increasing therapeutic and rehabilitative consequences of the judicial system while decreasing anti-therapeutic consequences. Restorative justice approaches focus on repairing the harm to the victim, often through some form of mediation, which would not be practical when contact with the victim is prohibited. Neither the retributive nor the therapeutic jurisprudence approaches address the harm to the victim in any significant way.

Although the trial court expressed sincere concern for the victim’s suffering (*DeRusse*, p 1239), it did not address those concerns other than through its expressed hopes for her recovery. The degrees of dissatisfaction expressed by the government, the dissent, and even the majority might well represent an unacknowledged sense of the absence of restorative justice considerations in the traditional sentencing process. Perhaps an opportunity exists for creative dialogue among mental health professionals and jurists to further advance criminal sentencing procedures to address such concerns.