

The standard of appellate review is high: was there an abuse of discretion?

Implicit in the trial judge's findings and the state supreme court's affirmation is a certain discounting of the weight afforded to expert psychological testimony, even when called for by statute, admitted by the judge, and spared rebuttal by the opposing party (in this instance, the state). When defendants in Montana are charged with violation of the conditions of their probation, a Revocation Hearing is held before a judge and the standard of proof is a preponderance of the evidence. Once a violation is found (in the present case, the defendant came to admit to five violations), the trial judge is given great latitude in sentencing, (Mont. Code Ann. § 46-18-203).

Because the defendant raised the issue of his mental illness in the sentencing procedure, the judge allowed expert testimony concerning the defendant's volitional capacity and his treatment needs into evidence (Mont. Code Ann. § 46-14-311). The expert testified that the defendant was mentally ill and volitionally compromised and would best be served by being remanded to the state's mental hospital, an option available to the judge in his sentencing discretion. The trial judge weighed the expert testimony, concluded that the defendant had a modicum of volition in his violation of probation and sentenced him to serve his full probationary term (four years) in state prison, as permitted as a statutory exercise of judicial discretion (Mont. Code Ann. § 46-14-312). A wavering of certainty by the expert on the volitional question was cited by the judge, as were the uncertain benefits of psychological treatment and the potential dangerousness of the defendant.

In 1979, Montana abrogated the insanity defense and replaced it with a statutory procedure that requires a trial judge to make findings of fact concerning a defendant's volitional capacity and ability to appreciate the criminality of his acts. The judge is given discretion in making these findings. The exercise of this discretion is a familiar aspect of judicial decision-making. The statutes call for it, and the standard of review for claimed judicial errors is set high against the defendant.

In a state unimpressed by the insanity defense, it is not a surprising outcome; indeed, it is a near certainty that an appellate court would not find "an abuse of discretion" when a trial judge discounted the substance of a psychological expert's opinions and remanded a probation violator to prison.

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Mental Illness and Sentencing Length in Supervised Release Revocation

The Sixth Circuit Affirmed the District Court's Finding that a Defendant's Mental Illness and Need for Treatment Justifies Exceeding the Federal Guidelines for Sentencing Upon Revocation of a Supervised Release

Facts of the Case

In *U.S. v. Mackie*, 173 Fed. Appx. 427 (6th Cir. 2006), defendant-appellant Felton Mackie pled guilty to charges of bank robbery and was placed on 24 months of supervised release following completion of a 46-month sentence. He subsequently committed several violations of the terms of his release, including state convictions for stealing money and trespassing, leaving the Eastern District of Michigan without permission, failing to report to his probation officer for several months, and failing to notify his probation officer of several arrests. The district court imposed a 24-month prison sentence, well in excess of the federal guideline sentence of 5 to 11 months.

The district court record noted that the violations took place in the context of the defendant's not obtaining treatment for his mental illness, as directed by terms of his supervised release. In imposing sentence exceeding the guidelines, the district court stated that \$500 a month was "not enough money to live on. It's not even enough to get the medications. He needs meds and he needs them badly." The court mentioned the defendant's history of homelessness and inability to follow through on recommended care, noting that when on medications the defendant does well. The court said "I don't like to put people in prison for a mental illness, but he has violated and he is a danger to himself as well as society." The court concluded by expressing fear that the defendant may

be hurt and that his illness creates “a dangerous situation.”

Mackie appealed the sentence, claiming that under the facts in his case, exceeding the guidelines was “unreasonable” (the appellate standard of review for appeal of departures from the sentencing guidelines) and that the sentencing judge did not properly consider the factors stated in 18 U.S.C. § 3553(a) as a basis for sentencing. These factors include consideration of the guidelines, the nature of the offense, the need to deter criminal conduct and protect the public, and the need to provide the defendant with appropriate treatment.

Ruling

The United States Court of Appeals for the Sixth Circuit determined that the district court did “in a general way” consider all the relevant factors in imposing the 24-month sentence and affirmed the sentence.

Reasoning

In their decision, the court of appeals indicated:

We agree the circumstances seem tragic that a mentally ill person, who violates the terms of his supervised release, must go to prison to protect himself and the public rather than being able to receive adequate care outside prison walls. However, in this case there seemed to be no practical alternative to provide proper care for Mackie.

The court cited its decision in *U.S. v. Johnson*, 403 F.3d 813 (6th Cir. 2005), as “strong precedent” for their decision to affirm the district court. In *Johnson*, the court held that a prison sentence well above guidelines for a drug offender who violated terms of his supervised release was not “plainly unreasonable” (the Sixth Circuit’s review standard) nor unreasonable (the general standard of review for sentencing guideline departures). The court concluded the intent to give the “defendant a sentence to help him gain maximum benefit from a drug treatment program was not unreasonable.”

Discussion

This case raises questions regarding the court’s use of a defendant’s mental illness and the need for treatment of such illness in imposing a criminal sentence. The court of appeals found benign purpose in imposing a sentence substantially greater than that recommended by the sentencing guidelines. Normally, upward departures on sentencing are punitively motivated and are implemented when aggravating cir-

cumstances were present in the commission of the offense. However, the federal statute relating to sentencing guidelines, 18 U.S.C. § 3553, includes the “factors” that are to be taken into consideration in sentencing. Included in those factors is the defendant’s need for treatment. In the case of sentencing following violations of the terms of a supervised release, the guidelines are merely advisory, and so the sentencing judge is given great discretion in selecting and weighing which factors warrant an upward departure from the guidelines. In the present case, the trial judge and the appeals court found that mental illness and the attendant need for treatment made reasonable the excessive sentence imposed. Therefore, at first glance, the sentence does not appear to be unduly punitive, as the motivation is benevolence, falling under the broad legal doctrine of *parens patriae* (the state’s responsibility to act in the best interests of her most vulnerable citizens). However, a review of the detailed explanation provided by the court for imposing a sentence outside the recommended guidelines reveals language that mirrors that used in civil commitment hearings.

It is troubling to note that although the sentencing was apparently motivated and justified by the same criteria utilized in involuntary civil commitment proceedings, the defendant was not afforded the familiar procedural and due process protections afforded in civil commitments. Therefore, though the court’s intent may be distinctly nonpunitive and relies on need for treatment as a basis for a deprivation of liberty, the defendant is not afforded the fundamental constitutional protections associated with civil commitment proceedings. Thus, the criminal sentencing functions as a *de facto* civil commitment hearing, but one where the defendant has few procedural rights.

For example, the evidentiary burden in a civil commitment is on the state, with a standard of proof of clear and convincing evidence. In the case described, the evidentiary standard rests at the discretion of the judge and is subject only to a “plainly unreasonable” standard of appellate review. It is worrisome to realize that under the guise of a need for mental health treatment, a defendant may be subject to substantial upward departures in postrelease sentencing while not being afforded the usual procedural safeguards that attend a civil commitment proceeding.

The ruling appears to reflect the court's concern with what it perceives to be the inadequate civil system of care for the mentally ill. This raises troubling questions of the creation of a slippery slope for the care and management of the mentally ill within the legal system—namely, the use of discretionary criminal sentencing to accomplish a *de facto* civil commitment.

The case and decision stand in stark contrast to concerns recently expressed by mental health professionals at the perception of increasing pressures by overwhelmed government systems to utilize jails and prisons as quasi-mental health facilities. The court's decision here seems consistent with other recent court decisions that allow the introduction of a defendant's mental illness to be used as an aggravating condition, as for example in the capital sentencing phase of a trial (for example, *People v. Smith*, 107 P.3d 229 (Cal. 2005)). Such a use of mental illness could appear to raise 14th amendment equal protection issues.

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Criminal Responsibility and Intent

Tenth Circuit Overruled District Court Finding That Insanity Defense Is Not Available for General-Intent Crime, and Expert Testimony Was Relevant

In *U.S. v. Allen*, 449 F.3d 1121 (10th Cir. 2006), the U.S. Court of Appeals for the Tenth Circuit reversed the decision of the U.S. District Court for the Eastern District of Oklahoma and held that evidence of insanity could be admitted at trial for a general-intent crime.

Facts of the Case

Bobby Scott Allen was indicted on a single count of felon in possession of a firearm. Allen had a

lengthy history of mental illness and was evaluated for competency and criminal responsibility by a psychologist employed by the United States Bureau of Prisons. The psychologist initially opined that the defendant was mentally ill but both competent and responsible. Prosecution, defense, and the magistrate judge all agreed that the report was not clear, and they jointly asked the psychologist to prepare a supplemental report to address competency and criminal responsibility. After conducting additional interviews with Allen and his family, the psychologist submitted a revised report, opining that Allen was competent to stand trial but unable to appreciate the wrongfulness of his alleged offense. In view of this opinion the parties entered into a stipulation asking the court to find Allen not guilty by reason of insanity. The court held a hearing on the stipulation at which time the judge expressed doubt about following the recommendation. He eventually rejected the proposed stipulation, and cited *U.S. v. Brown*, 326 F.3d 1143 (10th Cir. 2003), to hold that “psychological evidence is limited to specific-intent crimes.”

At trial, the prosecution moved to exclude the psychologist's testimony, citing *Brown*, saying, “Any testimony regarding a defendant's state of mind to negate a specific *mens rea* would be irrelevant in a general intent crime.” The court granted the prosecution motion without permitting the defendant to respond. In a subsequent motion to reconsider, defense counsel contended that *Brown* was irrelevant to the case since the issue in *Brown* (to which the state of mind testimony was directed) was intent, not insanity.

The trial judge disallowed the testimony of the psychologist, explaining that individuals who have prior convictions do not always realize that when they purchase a firearm they have broken the law. Thus, the judge compared the insanity defense with the phrase, “ignorance of the law is no excuse.” He went on to list additional reasons for barring evidence of insanity, quoting from *Brown*: “Evidence of a defendant's impaired volitional control or inability to reflect on the consequences of his conduct is not admissible.” He also cited the Insanity Defense Reform Act, 18 U.S.C. § 17, as “barring the introduction of evidence of a defendant's mental disease or defect to demonstrate that a defendant lacked substantial capacity to control his actions or reflect upon the consequences or nature of his action.”