

U.S. v. Greer: Longer Sentences for Malingerers

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Mr. Greer kidnapped an acquaintance at gunpoint and instructed the man to drive him across the Texas border into New Mexico. Upon reaching a motel, he paid for a room with his acquaintance's charge card. After indicating that he had accomplished his goal of being away from family and friends so that he could kill himself, he apologized to his friend and allowed him to leave. The friend immediately called police. Greer was indicted by a federal grand jury for five counts, including kidnapping and possession of a stolen firearm.

He was found incompetent to stand trial, and was ordered to undergo a 1.5-month evaluation. After this period of time, Greer was found to be competent by the district court, based in part on the testimony of Dr. Frederick, a forensic psychologist. Dr. Frederick testified that Greer not only was competent to stand trial, but that he was "feigning psychotic illness."

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During the ensuing trial preparation, Greer's attorney decided to file another motion to evaluate Greer for competency because of "bizarre behavior." Dr. Taylor, a psychiatrist at the Texas Department of Corrections, determined Greer to be incompetent to stand trial. The Government "acquiesced," and Greer was again adjudicated incompetent. He was committed for restoration, and approximately five months later was evaluated for competency by Dr. Conroy, a psychologist. Dr. Conroy noted that a case conference held during Greer's treatment concluded that there was no evidence of psychosis. Dr. Conroy opined that Greer was malingering and had a "personality disorder with antisocial and borderline tendencies that could not be treated."

The district court found Greer competent to stand trial and found that he had feigned mental illness. The trial was interrupted by Greer's unusual behavior. During opening remarks, the district court was informed that Greer had removed his clothing and tried to flush them down the cell toilet. He also was observed to have spit up a small amount of blood. After Greer was returned from a local hospital,

there was testimony that the medical evaluation revealed an oral mucosal abrasion and that such abrasions were commonly "caused by self-inflicted scratches." The district judge found Greer to have made a "deliberate attempt . . . to derail the trial of this case." The judge then reprimanded Greer on the record and instructed him to "get with the program, and stop acting like a fool."

Later the same day, Greer suddenly jumped up from his chair and yelled, "Get it away. Stop!" He had to be subdued and removed from the courtroom, and the proceeding carried on without him for the day. The court found that Greer had "consciously, deliberately, and voluntarily" waived his right to be present during trial. The jury convicted Greer of all counts in his absence.

At sentencing, the district court granted the Government's motion to enhance Greer's sentence for obstruction of justice, which resulted in a two-level offense increase. The district court judge stated that Greer was found to be "a malingerer, that he feigned a mental illness, thereby causing the court and the Bureau of Prisons to waste a considerable amount of time and effort in addressing that particular situation." As a result of the enhancement, Greer received a 210-month sentence, rather than a maximum 185-month sentence. Greer appealed.

Holding of the U.S. Fifth Circuit Court of Appeals

The U.S. Fifth Circuit Court of Appeals held the following¹:

1. The sentencing guidelines providing for a two-level increase in offense level if

a defendant willfully obstructs or attempts to obstruct the administration of justice during investigation, prosecution, or sentencing may be applied to a defendant who feigns incompetence in an effort to delay or avoid trial and punishment.

2. Obstruction of justice enhancement may be applied to a defendant even with a history of psychological problems and diagnosed personality disorders who feigns mental illness in an effort to delay or avoid trial and punishment.

3. The district court did not clearly err in enhancing the defendant's sentence for obstruction of justice based on the finding that the defendant willfully feigned mental illness in a conscious and deliberate effort to obstruct justice and delay proceedings.

Reasoning of the Court

The court of appeals concluded that feigning incompetence required planning and resolve to commit a wrongful behavior. If the defendant is successful, he increases his chances of acquittal and makes it impossible to try him. The court concluded, after an analysis of the *Sentencing Guidelines Manual*, that the section providing for sentencing enhancement did apply to the act of feigning mental illness. The court cited cases in which sentences were enhanced for defendants who willfully disguised handwriting samples. The court reasoned that the "defendant who feigns incompetency essentially provides a false 'sample,'" when lying about his psychiatric condition.

The court rejected Greer's argument that his courtroom behavior and request

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for a competency hearing were being used to conclude that he had obstructed justice. The court held that the district court found that he had obstructed justice because he had feigned mental illness, not because he disrupted the trial or requested a competency hearing. Greer made another argument that applying the enhancements to those who feign mental illness would chill their constitutional right not to be tried if incompetent. The court found this argument to have slightly more merit and agreed that the sentencing guidelines cannot be used to punish a defendant for exercising constitutional rights.

The court, however, distinguished the issue of the defendant exercising his right to a competency hearing from the issue of feigning mental illness. While the defendant does have a right to a hearing if there exists a "*bona fide* doubt" as to his competence, he does not have the right to malingering to increase his chances of being found incompetent. The court stressed that their holding was not "meant to encourage or justify automatically increasing sentences for all defendants who seek a competency hearing and ultimately are found competent." The court further suggested that "counsel should warn" a client that malingering incompetence will result in a sentencing enhancement.

Greer also argued that because there were sufficient doubts about his competence (his history of mental illness and bizarre trial behavior), he could not be punished for creating additional doubt. However, the court reasoned that malingering increases a defendant's chances of being erroneously found incompetent.

Further, Greer's attempts to manipulate the judicial system "reflects on his character and is therefore a relevant consideration at sentencing."

Another argument of Greer was that his diagnoses of antisocial and borderline personality disorders caused him to behave impulsively. Therefore, the district court had the obligation to prove that his act was willfully committed, rather than the result of his personality disorder. The appeals court stated that the need for a finding of willful obstruction adequately protected against the danger of being punished for nonvolitional conduct. "Willful" was noted to mean "conscious, deliberate, voluntary and intentional." The court stated that the "mere fact" that someone suffers from a personality disorder does not make him immune from the sentencing enhancement. The court did acknowledge the difficulty of distinguishing between calculated malingering and incompetence due to a severe personality disorder.

In concluding that the district court did not err in enhancing Greer's sentence, the court noted Greer's "sustained pattern" of malingering and "a quantity of other evidence" supporting malingering. Briefly, this evidence included Greer's stating that he could not recite the alphabet, tell what year it was, name his charges, or give the name of his attorney. When he was told in jail that successful malingering required that he stop urinating and defecating out of a slot in his cell door, and start doing it in his cell, he complied. Greer avoided interactions with medical personnel but often conversed with others. His re-

sponses to a forced choice test suggested malingered psychosis.

Commentary

A central theme of this case is the impact that a diagnosis of malingering can have in the legal system. The assessment of malingering often is difficult, and inaccurate diagnoses can occur. If an inaccurate diagnosis of malingered incompetence is made, a great injustice may be done. The defendant may be unable to assist counsel and may be unjustly convicted. If a defendant successfully fakes incompetence, he simply delays his trial in most cases. During the period of "restoration" in a psychiatric hospital, observation 24 hours per day makes it unlikely that the malingerer will remain undetected.

If the inaccurate diagnosis of malingering occurred in an insanity case, a genuinely ill defendant would be deprived of a potentially valid defense. This could indeed occur, because skeptical juries are very likely to be swayed by even a single examiner who diagnoses malingering. Were a defendant to mangle successfully an insanity defense, he would be likely to be retained in a hospital for a substantial length of time by the judge, even if hospital psychiatrists recommended his release.

Conversely, there are also adverse consequences to an inaccurate diagnosis of a malingerer as mentally ill. The risk of the malingerer's preying on legitimate psychiatric patients is increased when a successful malingerer is given a prolonged hospitalization. There is also the issue of

societal outrage and backlash of public perception when a successfully malingered insanity defense occurs.

An inaccurate diagnosis of malingering by an expert does a major disservice to justice and embarrasses the psychiatrist. The psychiatrist also is at risk of a lawsuit for defamation of character, in addition to malpractice. In ordinary circumstances, our opinions are given simply with reasonable medical certainty. Because of the serious legal implications of malingering, such a diagnosis should not be made unless there is a high degree of certainty.

This raises the question of what should be considered adequate criteria to make a diagnosis of malingering. Extremely improbable symptoms and gross inconsistencies can be important evidence of malingering.² Of course, an admission of malingering, made to the examiner or to another party, is the best indicator. Direct observation of a malingerer behaving rationally when he believes he is not being observed is another good indicator. Psychological testing, particularly the Structured Interview of Reported Symptoms,³ and forced choice testing for faked cognitive deficits offer strong confirmation of malingering.⁴

Traditionally, courts have been reluctant to stigmatize someone as a malingerer. The case of *Miller v. United States Fidelity and Guaranty Co.* illustrates how one court approached labeling a civil plaintiff. "The principle that courts will stigmatize a claimant as a malingerer only upon positive and convincing evidence justifying such a conclusion is so well embedded in our jurisprudence as to preclude the necessity for specific cita-

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tions.”⁵ In the case of Greer, the court did believe there was such “positive and convincing evidence” before concluding that Greer had been malingering. Thus, evaluators should not be discouraged from making a formal diagnosis of malingering if they have sufficient basis for it.

Given the district court’s suggestion that counsel warn defendants about malingering, should giving such a warning be required of the forensic evaluator? A warning that the evaluator may diagnose malingering, with its adverse legal ramifications, might be considered appropriate for a suspected malingerer. As a practical issue, such a warning at the appropriate time and place may give the evaluator more leverage in obtaining valid

data. However, once defendants learn that a confession of malingering can lead to an increased sentence, they are less likely to admit to malingering after a confrontation.

References

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5. Miller v. United States Fidelity and Guaranty Co., 99 So.2d 511 at 516 (La. Ct. App. 1958)