

Chicago Daily Law Bulletin®

Volume 163, No. 106

Serving Chicago's legal community for 162 years

Does tough sentencing really work? Logic behind move lacks sense

You cannot flip through recent federal criminal appellate decisions without being struck by the prevalence of issues surrounding imprisonment. Who goes to prison, how long they go to prison and what happens to them once they are in prison these questions are now receiving the degree of attention they should have commanded years ago.

Take a look at a recent 2nd U.S. Circuit Court of Appeals decision, *U.S. v. Jenkins*, No. 14-4295 (April 17, 2017). Joseph Vincent Jenkins was convicted of possession and transportation of child pornography. He was a 44-year-old man with a criminal history consisting of a single misdemeanor conviction.

Nevertheless, he was sentenced to the statutory maximum for possession: 10 years. His concurrent sentence for transportation was 18.75 years, just under the statutory maximum of 20 years. In addition, the court imposed a term of 25 years of supervised release.

Calling the sentence “shockingly high” for a defendant with no felony record, the 2nd Circuit remanded the case for resentencing.

Or consider *U.S. v. Rivera-Ruperto*, 852 F.3d 1 (1st Cir. 2017). In an effort to stop police corruption in Puerto Rico, the government conducted sham drug deals and paid the defendant, an officer with no criminal record, to provide “security” for what he was told were real transactions. For this, he was sentenced to more than 161 years in prison, which was affirmed by the 1st Circuit.

But Judge Juan Torruella filed an impassioned dissent, contending that the sentence was grossly disproportionate and thus a violation of the Eighth Amendment.

“If Rivera-Ruperto had instead knowingly committed several real rapes, second-degree murders, and/or kidnappings,” Torruella noted, “he would have received a much lower sentence.” Conceding this to be a rare case, he nonetheless insisted that the mere fact

that the sentence was a term of years should not insulate it from Eighth Amendment review.

Bringing the issue closer to home is a series of three dissents filed by Judge Richard A. Posner of the 7th Circuit on three consecutive days in March. In each dissent, Posner took issue with some aspect of sentencing that was upheld by the majority in the case.

On March 15, the court decided *U.S. v. Moore*, 851 F.3d 666 (2017). Norvell Moore was originally convicted of two charges: felon-in-possession and using or carrying a firearm. He received two consecutive 10-year terms, resulting in 20 years in prison.

After several trips to the 7th Circuit, on the final remand he was sentenced only on the felon-in-possession charge. A new judge (who replaced the original judge who had retired) reinstated the 20-year sentence. Moore thus received the same sentence for one-half the number of convictions. The 7th Circuit affirmed.

Posner dissented. He stated that the original appellate decision affirmed the felon-in-possession charge without referring to the 10-year sentence, and he believed that this should ordinarily bind the sentencing judge on remand. Additionally, he criticized the government for arguing on remand for an increased sentence based on three prior convictions — something it could have raised at the original sentencing but did not.

Most significantly, Posner cited John Pfaff's recent work on the decreasing returns society receives for long sentences for violent offenders. (I discussed Pfaff's new book “Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform” in my April 3 column.)

Posner highlighted Pfaff's observation that offenders in their 30s have already “started ‘aging out’ of crime, violent behavior in particular.” In questioning the

CRIMINAL PROCEDURE

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general necessity of long sentences, Posner noted that “Maybe we judges could learn something from these experts.”

The very next day the 7th Circuit decided *Kelly v. Brown*, 851 F.3d 686 (2017). McKinley Kelly was convicted in Indiana of two murders he committed when he was 16 years old. He was sentenced to 110 years in prison. He will not be eligible for parole until 2050, when he will be 70 years old.

Subsequently, the U.S. Supreme Court retroactively forbade mandatory life sentences for juveniles, and the 7th Circuit then

“[He] is entitled to a more informed and compassionate judicial response ...”

extended this to de facto life sentences. Here the 7th Circuit held that the Indiana courts properly imposed the 110-year sentence.

Again, Posner dissented. He referred to a 2015 Department of Justice study that tracked more than 1,300 “serious juvenile offenders.”

The study found that more than 90 percent of the juveniles did not reoffend after their first contact with a court; they literally “grew out” of anti-social behavior. It revealed that the impetuosity and recklessness of youth naturally

subside with the maturity that comes with age.

Posner then observed that findings such as these have led 19 states to ban any use of life-sentence-without-parole on juveniles. Finding that Kelly's sentencing judge gave insufficient consideration to Kelly's youth, Posner supported a remand for resentencing.

The next day Posner filed his third dissent in three days in the case of *U.S. v. Rothbard*, 851 F.3d 699 (2017). Jeffrey Rothbard was convicted of wire fraud. Because he suffers from a rare form of leukemia, the probation service recommended probation and home confinement in lieu of prison. The trial judge rejected this and sentenced him to two years in prison.

Once again, Posner dissented. He found that the federal Bureau of Prisons would not be able to provide the drug Rothbard needs, a drug that costs more than \$100,000 per year.

Once again, Posner turned to statistics. They showed that 13.9 percent of federal inmates receive no medical examination after incarceration. Of those federal inmates taking a prescription medication before incarceration, 20.9 percent did not continue to receive it.

Posner referred to a 2016 Justice Department report showing medical staffing shortages in federal prisons. He then observed that the situation could get worse if the government continues to use the much-criticized federal prisons run by private companies.

In closing, Posner stated, “What is clear is that Jeffrey Rothbard is entitled to a more informed and compassionate judicial response to his physical and mental illnesses than he has received from the district court and this court.”

Indeed, more information and more compassion are needed throughout the entire criminal sentencing system in America. It is encouraging that more judges are beginning to agree.