UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
DEBORAH L. COOK
SENIOR CIRCUIT JUDGE

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February 27, 2024

Julie Zibulsky, Asst. GC for the U.S. Sentencing Commission, sought testimony from me on this topic–basing offense level enhancements on acquitted conduct. I figured I could offer for discussion the viewpoint I expressed in a majority opinion I wrote for the Sixth Circuit Court of Appeals sitting en banc. I believe a copy of the opinion is offered in the materials–*United States v. White*, 551 F.3d 381 (2008).

Overview

In that appeal, our circuit considered the question whether a court that looked to facts that underlie acquitted charges to enhance defendant's offense level offends defendant's 6th Amendment rights? Critical to the majority's conclusion that consideration of those underlying facts passed muster was the virtue of those facts being uncontested. All conceded that shots were fired in the bank and at pursuing officers. The sentencing judge used the getaway driver's aiding-and-abetting in furtherance of the jointly undertaken criminal activity to enhance defendant's offense levels significantly.

Though the original panel expressed misgivings regarding the near doubling of the sentence through such level increases, prior circuit precedent authorized upholding using PSR calculations that relied on evidence proved by a preponderance as offered in trial testimony.

Watts was good law when the 6th circuit decided *White.* And by then the sentencing guidelines were advisory rather than mandatory, which cleared other hurdles for *White*'s reasoning.

***White* majority view**

The *White* majority focused on the important distinction in the proof necessary for *convicting* versus *sentencing*. Likewise, neither the majority nor the dissenting view quarrels with the principle that relevant USCA maximums limit all sentences. That is, so long as the defendant receives a sentence at or below the statutory maximum set by the jury's verdict, the district court does not abridge defendant's right to jury by looking to other facts, including acquitted conduct, when sentencing within that statutory range.

As noted above, the facts underlying acquitted conduct in this *White* case were undisputed. But otherwise, sentencing judges would need to find facts warranting level enhancement by a preponderance—more probable than not—standard.

***White* dissent view**

Some of the policy questions the Commission confronts in evaluating the proposed Amendment, the *White* dissent flags. Foremost, the opinion emphasizes the historical importance of the jury-trial right to our Founding. So too, the recent Supreme Court's *McElrath v. Georgia* holds defendants' protection against double jeopardy inviolate. It highlights jurors' viewing the use of acquitted conduct to increase a sentence as disrespectful of jurors' efforts in serving. And though conceding the increasing use of acquitted conduct by sentencers and the blessing of it by Circuits across the country, the dissent takes a dim view of the trend.

It lays out what it suggests is a better analytical framework with courts sentencing by distinguishing between offenses/offenders that should foreclose any use of acquitted conduct at sentencing. Because I wrote the opinion adopting a view quite different, I don't vouch for the dissenting view. But I bring your attention to it as it may prompt thinking that will lead to *better* evaluation of the various options offered here regarding adopting the proposed Amendment.