

10-5047-cr

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

DANIEL FREEMAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

Appellant Daniel Freeman appeals from a final judgment disposing of all charges against him entered by the United States District Court for the Southern District of New York on December 9, 2010. *United States v. Freeman*, 10-CR-766 (CM). A. 97. Freeman filed a timely notice of appeal on December 13, 2010. A. 103. The district court had jurisdiction pursuant to 18 U.S.C. § § 3231 and 3238. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether this case should be remanded for resentencing because the district court's sentence was based on clearly erroneous factual findings and assumptions about the national security implications of defendant's conduct that were unsupported by the record?

STATEMENT OF THE CASE

Daniel Freeman appeals the district court's sentence as procedurally unreasonable because it was imposed based on assumptions about the offense conduct and the national security implications thereof not reasonably inferable from the limited record of the case.

On August 26, 2010, Freeman was charged by information with One Count of Accepting Illegal Gratuities in violation of 18 U.S.C. § 666(a)(1)(B) and One Count of Money Laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). A. 6. Freeman waived indictment and pled guilty to both counts the same day. A. 2.

Freeman pled guilty pursuant to a *Pimentel* letter that calculated the applicable Guideline range to be 51 to 63 months based on an offense level of 24 and a Criminal History Category of I. The parties subsequently agreed with the Probation Office that the applicable Guidelines range was in fact 41 to 51 months, based on a calculated offense level of 22 and a Criminal History Category of I. A. 37, 76.

The Presentence Investigation established that Freeman was a first-time non-violent offender with multiple family responsibilities, and the Presentence Report recommended a sentence of 12 months and one day as sufficient to “address the sentencing objectives of punishment and general deterrence.” Presentence Report (“PSR”) at 22.

On December 9, 2010, the district court sentenced Freeman to 41 months of imprisonment—the low end of the applicable Guideline range.

Freeman now appeals the district court’s sentence as procedurally unreasonable because it was based on assumptions about Freeman’s conduct not reasonably inferable from the limited record developed in the case and on the court’s stated desire to “send a message around the world.” A. 87, 89.

STATEMENT OF FACTS

In 2004, Daniel Freeman accepted an offer for a position at Kellogg, Brown, and Root (“KBR”), an engineering, procurement, and construction company providing contract services to the United States government’s operations in Afghanistan. Through KBR’s contract with the United States Army’s Logistics Civil Augmentation Program, KBR provided logistical support to the United States Army in Afghanistan. In addition, KBR entered into sub-contracts with other entities to assist in the fulfillment of its contracted duties. A. 6.

Freeman began working as a senior sub-contracts supervisor for KBR in Afghanistan in or about September 2004. In this position, Freeman evaluated bids from both local and international corporate applicants for KBR’s sub-contracts. Following his evaluations, Freeman awarded the sub-contracts and oversaw their administration. A. 6-7. The record developed in this case contains no information from which to infer the extent of Freeman’s discretion in awarding sub-contracts,

the steps an applicant company was required to follow in order to obtain clearance from the United States military before entering the military base, or the effect of Freeman's actions on the United States troops on the base.

In August 2010, Freeman was charged with, and pled guilty to, the actions forming the basis for this case—accepting approximately \$200,000 in gratuities from representatives of companies who had been awarded sub-contracts from January 2007 through May 2009. Although at sentencing the district court erroneously characterized the payments as “bribes,” the payments were not “bribes” to compel or encourage a particular course of action, but were “gratuities” reflecting thanks for actions already taken. *See* PSR at 7; A. 85-86.

At the plea hearing, Freeman stated that he had transferred most of this money out of Afghanistan to the United States through wire transfers and money orders in amounts intended to avoid cash transaction reporting requirements. A. 7-10, 27. The transcript of his plea hearing contains no information about the extent of Freeman's responsibilities or the limits of his authority in Afghanistan. A. 14-34.

In his Presentence Interview, Freeman stated that he had worked since the age of 13, and had always helped his family and friends. PSR at 11-12. His work history contains a wide range of positions, including three administrative-level positions in Afghanistan between 2004 and 2010. PSR at 13. In addition, Freeman

informed the Probation Officer that he had been approved for a position as a sub-contract administrator in Djibouti in June 2010, but had declined the position in order to take responsibility and face prosecution in the instant offense. PSR at 13. During the course of the district court proceedings, until his incarceration in March of 2011, Freeman was employed as a sanitation helper in the Town of Hempstead, earning \$10 per hour. PSR at 13.

Senior Probation Officer Selwyn F. Foderingham, Jr.'s Presentence Report recommended a sentence of 12 months and one day, characterizing Freeman's offense as a "lapse in judgment" for which Freeman had expressed remorse and about which he had been "cooperative and candid." PSR at 21-22. The Presentence Report further found that the recommended sentence would **"sufficiently address the sentencing objectives of punishment and general deterrence."** PSR at 22 (emphasis supplied). Again, the Presentence Report contains no information about the details of Freeman's responsibilities in Afghanistan or the extent of Freeman's authority to allow sub-contractors or their representatives onto the military base.

In anticipation of sentencing, both the defense and the government submitted sentencing memoranda to the district court. The defense memorandum focused on the aberrational nature of Freeman's conduct and his otherwise law-abiding life as a model citizen, and asked the court to impose a sentence of a year and a day—the

sentence recommended by the Presentence Report. A. 37-50. Letters from Freeman's family and friends attested to his upstanding and selfless character and to his remorse. A. 51-72. Freeman wrote to the district court that he was "ashamed, embarrassed and regretful" for his "poor judgment." A. 73-74.

The government's memorandum focused on the need for a sentence to provide both specific deterrence and general deterrence. A. 75-78. The government wrote that "Freeman's readiness to accept responsibility for his conduct weigh[ed] heavily in his favor with regard to the need for specific deterrence." A. 77. However, the government then emphasized the need for general deterrence, speculating that:

Freeman's conduct . . . had the potential to jeopardize the Army's mission in Afghanistan. There are many other men and women employed in war zones such as Afghanistan and Iraq who **likely** face similar temptations to accept corrupt payments in connection with their official responsibilities providing services to the United States armed forces, and it is **likely** that many of them, through employment training programs or otherwise, will become aware of the sentence imposed on Freeman. It is therefore important that the sentence reflect the seriousness of the offense and provide adequate general deterrence, because it is essential that contractors acting on behalf of the United States government conduct themselves ethically and honestly.

A. 77-78 (emphasis supplied).

At sentencing, the district court maintained an erroneous understanding of Freeman's conduct, as demonstrated by the following exchange:

COURT: [W]hen people get bribed, it's generally to get them either to do something or to turn a blind eye to something. **Do we know why Mr. Freeman was being offered and accepting bribes in Afghanistan?**

GOV'T: Well, your Honor, what's laid out in the information and **the charge he pled guilty to was actually accepting gratuities, which I'm sure your Honor is aware is slightly different from a bribe, rather than a payment made with an explicit quid pro quo, it's more like a reward, a thank you.**

COURT: A reward or thank you for doing something. For what, for steering business in a particular direction? It's not a reward or a thank you because you're in my country right now.

GOV'T: That's absolutely correct. The allegation and what Mr. Freeman has admitted was that one of his responsibilities in Afghanistan was to award and oversee work that was subcontracted out to local and also foreign subcontractors, and it was representatives of those subcontractors that paid him this money.

A. 85-86.

Without any support in the record for its statements, the district court then admonished Freeman after he apologized to the court for his crime:

You were working in a war zone. **I have to assume that everything that is done other there has some impact on the lives of American soldiers and Marines, men and women who are making tremendous sacrifices on behalf of our country. I'm going to have to assume that.** And you're making a profit off that, you're taking a cut . . . Whoever gave you the money, they didn't give you the money just to thank you for being there, they gave you the money for steering business their way. And I don't know any of the details about the enterprises to which you steered business. Are they the kind that do quality work? Are they the kind that expose our troops to risk? Are

they getting money from the Taliban with one hand and giving money to KBR on the other hand? It's a murky, dangerous area of the world, it's a murky, dangerous situation . . .

A. Sent Trans 87-88 (emphasis supplied).

The court then noted that it had been concerned with the need for general deterrence “before I ever read anything that [the government] submitted to me.”

A. 88. Indeed, the court emphasized that:

[O]ne of the things I have to take into account in fashioning a sentence is how necessary is it to send a message to other people who are in your situation. And the answer is it is very necessary to send a message loud and clear that this kind of behavior will not be tolerated, will be punished, and will be punished severely, not with a slap on the wrist.

* * *

I take the Sentencing Commission's recommendation extremely seriously because I believe that given the seriousness of this crime committed in a time of war, in a war zone, and the need to send a message around the world this is what is going to happen in an American courtroom when you come home after taking baksheesh from the locals to steer business their way.

A. 88-89.

The court imposed a sentence of 41 months' imprisonment and two years of supervised release. Freeman self-surrendered to the custody of the Bureau of Prisons on March 7, 2011 as ordered, and is currently serving that sentence.

SUMMARY OF THE ARGUMENT

The case should be remanded for resentencing because the district court's procedurally unreasonable sentence was based on clearly erroneous factual findings and assumptions about the national security implications of Freeman's conduct not reasonably inferable from the record.¹

ARGUMENT

The case should be remanded for resentencing because the district court's procedurally unreasonable sentence was based on clearly erroneous factual findings and assumptions about the national security implications of Freeman's conduct not reasonably inferable from the record.

A challenged sentence is reviewed for procedural reasonableness under an abuse of discretion standard. *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010) (citing *United States v. Cavera*, 550 F.3d 180, 188 (2d Cir. 2008)). This Court reviews "legal questions de novo, and we review the district court's factual determinations under a clear error standard." *United States v. Friedberg*, 558 F.3d 131, 133 (2d Cir.2009). "In assessing procedural reasonableness, we review, *inter alia*, whether the district court correctly calculated the applicable Guidelines range and whether it relied on any clearly erroneous factual findings."

¹ Because the sentence imposed is within the calculated Guideline range agreed upon by the parties, the substantive reasonableness of the sentence is not challenged herein.

United States v. Sabhnani, 599 F.3d 215, 250 (2d Cir. 2010) (citing *Cavera*, 550 F.3d at 190; *Friedberg*, 558 F.3d at 133).

Although “a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines, . . . the presumption is not binding.” *Rita v. United States*, 551 U.S. 338, 347, 127 S.Ct. 2456, 2462-63 (2007). *See also Rita*, 551 U.S. at 366, 127 S.Ct. at 2474 (Stevens, J., concurring) (“*presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable”) (emphasis in original).

“A sentencing judge has very wide latitude to decide the proper degree of punishment for an **individual offender** and a particular crime.” *United States v. Cavera*, 550 F.3d 180, 188 (2d Cir. 2008) (citations omitted) (emphasis supplied).

“The Court shall impose a sentence sufficient, but not greater than necessary, . . . [and] shall consider—

1. The nature and circumstances of the offense and the history and characteristics of the defendant;
2. The need for the sentence imposed—
 - a. To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - b. To afford adequate deterrence to criminal conduct;

- c. To protect the public from further crimes of the defendant;
 - d. To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
3. The kinds of sentences available;
 4. The kinds of sentence and the sentencing range established . . . [by the Sentencing Guidelines];
 5. Any pertinent policy statement . . .
 6. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 7. The need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (some minor alterations not noted).

Considering the defendant and his offense in terms of the 18 U.S.C. § 3553(a) factors, the sentencing judge “must make an **individualized assessment based on the facts presented.**” *Gall v. United States*, 552 U.S. 38, 50, 128 S.Ct. 586, 597 (2007) (emphasis supplied). Thus, “[a] **district court commits procedural error . . . if it . . . rests its sentence on a clearly erroneous finding of fact.**” *United States v. Cavera*, 550 F.3d 180, 188-189 (2d Cir. 2008) (citing *Gall*, 552 U.S. at 51) (emphasis supplied).

Even if the Court finds that the district court’s assumptions were not corrected by the parties at sentencing, “a plain error that affects substantial rights

may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). *See also United States v. Brennan*, 395 F.3d 59, 71 (2d Cir. 2005) (referencing *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004)).

To establish plain error, appellant must show not only that the error occurred and was plain . . . but also that it affected substantial rights . . . [I]f appellant satisfies these three requirements, correcting the error is within our discretion, which we should not exercise . . . unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Brennan, 395 F.3d at 71 (referencing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770 (1993)).

In the present case, the district court's sentence was procedurally unreasonable because it rested on clearly erroneous findings of fact and unsupported assumptions about the national security implications of Freeman's conduct. At sentencing, the court explained that it had considered all of the sentencing factors pursuant to 18 U.S.C. § 3553(a), but believed the nature of the offense and the need to send a message of general deterrence were the most important considerations. A. 90.

The sentencing transcript indicates that the district court's sentence was based in large part on the court's assumptions about Freeman's conduct and on speculation that it might have endangered the United States military forces in Afghanistan. However, as demonstrated in the records of the plea hearing and the sentencing, neither the precise nature of Freeman's conduct nor the necessity for a

harsh sentence to send a general deterrence message were ever established on the record.

At his plea hearing, Freeman told the court² that he was guilty because:

From 2007 to 2009 I accepted illegal payments from Afghanistan-owned subcontractors applying for United States contracts in Afghanistan. The payments were made to me in cash, over \$5,000, and I instructed and directed other people to bring the money back to the United States. They didn't have any knowledge of how I got the money. And I did it that way to conceal how I received the money.

A. 27.

In response to the court's questions, Freeman also admitted that he had committed the charged acts as an agent of an entity operating in Afghanistan, that the entity had received more than \$10,000 in federal funds in one year, that the contracts had been worth more than \$5,000, and that he had received the money as a reward for awarding the sub-contracts. A. 27-29. Neither the extent of Freeman's discretion and authority, the precise nature of Freeman's work for KBR, nor its relationship to the needs of the United States military was raised by any of the parties.

At sentencing, the district court demonstrated an erroneous belief that Freeman had pled guilty to taking bribes—payments intended to influence future

² The plea hearing occurred in front of a magistrate judge. The transcript of the hearing was subsequently provided to the sentencing judge by the government.

conduct—rather than accepting gratuities—payments to express thanks for action already taken:

COURT: Do we know why Mr. Freeman was being offered and accepting bribes in Afghanistan?

GOV'T: Well, your Honor, what's laid out in the information and the charge he pled guilty to was actually accepting gratuities, which I'm sure your Honor is aware is slightly different from a bribe, rather than a payment made with an explicit quid pro quo, it's more like a reward, a thank you.

* * *

The allegation and what Mr. Freeman has admitted was that one of his responsibilities in Afghanistan was to award and oversee work that was subcontracted out to local and also foreign subcontractors, and it was representatives of those subcontractors that paid him this money.

A. 85-86.

In imposing sentence, the court emphasized that its sentence was driven in significant part by the assumption that the above-described conduct had posed a danger to the United States armed forces:

You were working in a war zone. **I have to assume that everything that is done other there has some impact on the lives of American soldiers and Marines, men and women who are making tremendous sacrifices on behalf of our country. I'm going to have to assume that.** And you're making a profit off that, you're taking a cut . . .

A. 87 (emphasis supplied).

The court then emphasized its interpretation of Freeman's crime and the potential for endangering United States troops that the court assumed:

Whoever gave you the money, they didn't give you the money just to thank you for being there, they gave you the money for steering business their way. **And I don't know any of the details about the enterprises to which you steered business.** Are they the kind that do quality work? **Are they the kind that expose our troops to risk? Are they getting money from the Taliban with one hand and giving money to KBR on the other hand? It's a murky, dangerous area of the world, it's a murky, dangerous situation . . .**

A. 87-88 (emphasis supplied).

That the court found it necessary to ask these speculative rhetorical questions indicates again how little information was present in the record from which the impact of Freeman's conduct could be deduced. Both the defense and the government agreed only that Freeman had accepted gratuities, not bribes—i.e. monies paid after the fact rather than with the intent to influence action still to be taken.

If the details of Freeman's conduct had been explored on the record, it would have emerged that Freeman's conduct could not have endangered the troops. Even if a sub-contractor was preliminarily approved, that sub-contractor would then be required to receive clearance from the United States military—not from KBR or its employees—before entering the military base. Because Freeman was not a member of the military, he played no part in determining which sub-contractors received the required clearance from the United States military.

Moreover, even contractors who had been preliminarily awarded a sub-contract before receiving military clearance would not be allowed to enter the base or begin work until each and every employee who was going to working on the project received clearance. If the sub-contracting company did not receive clearance from the military, the military would notify KBR and the sub-contract would have to be terminated prior to the start of any work.

Because none of these facts were brought out during the brief proceedings in this case, the clear limitations of Freeman's authority were not established. To the contrary, the court sentenced Freeman based on unsupported assumptions that his actions had endangered the United States troops in Afghanistan, and that it was possible that Freeman had approved companies who were "the kind that expose our troops to risk" or who were "getting money from the Taliban with one hand and giving money to KBR on the other hand." A. 88. As set forth above, however, those assumptions were factually erroneous and unsupported by the record.

Because the court's view of the "nature and circumstances of the offense," was factually incorrect and based on assumptions not supported by the record developed in the case, the court's sentence was procedurally unreasonable. The case should be remanded for resentencing at which a full hearing on the nature of Freeman's responsibilities and authority in Afghanistan should be held.

In addition to aggravating the perceived nature of the offense, the court's assumptions unreasonably increased the perceived need to send a message of general deterrence. The court explained that its 41-month sentence, more than three times higher than the 12 months and one day recommended by Senior Probation Officer Selwyn F. Foderingham, Jr., was based on the court's desire to send a message of general deterrence. A. 90. The court informed Freeman that:

[I]t is very necessary to send a message loud and clear that this kind of behavior will not be tolerated, will be punished, and will be punished severely, not with a slap on the wrist. . . . I take the Sentencing Commission's recommendation extremely seriously because I believe that given the seriousness of this crime committed in a time of war, in a war zone, and the need to send a message around the world this is what is going to happen in an American courtroom when you come home after taking baksheesh from the locals to steer business their way.

A. 88-89.

Because the court's perception of Freeman's conduct was inaccurate, the court's impression of the amplified need to send a strong message of general deterrence was likewise erroneous. Therefore, the case should be remanded for resentencing and a full hearing on the facts of Freeman's authority and responsibilities should be held.

Moreover, even if the Court finds that the district court's assumptions were not challenged at the sentencing hearing by either party, this Court has discretion to determine that plain errors occurred and affected Mr. Freeman's substantial

rights to be sentenced based on the facts of his individual conduct. Therefore, the case should be remanded for resentencing unless this Court reduces Freeman's sentence in the interests of justice to reflect the facts of the offense conduct.

CONCLUSION

The Court should vacate the sentence imposed by the district court and remand this case for resentencing because the district court's sentence was procedurally unreasonable.

Dated: April 1, 2011
New York, New York

Respectfully Submitted,

s/ John C. Meringolo

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,050 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

s/ John C. Meringolo

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