

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

UNITED STATES OF AMERICA)
)
v.) Case No. 6:16CR00001-001
)
DEQUAN MONTEZ KELSO,)
)
Defendant.)

SENTENCING MEMORANDUM

COMES NOW the defendant, Dequan Montez Kelso, by counsel, and moves this Honorable Court to impose a sentence of 46 months in this matter, the low end of the Sentencing Guideline. As grounds for this motion, defendant respectfully states as follows:

FACTUAL BACKGROUND

On January 10, 2016, Kelso (a previously convicted felon), then 22 years old, and three other young men broke into TNT Outfitters, a firearmstore, in the middle of the night (around 4:00 a.m.). They stole 56 guns and left the store, dividing their take between them. Less than 24 hours later, they were identified and arrested. Kelso and the others all promptly admitted their involvement in the break-in. Christopher McCoy pled guilty in state court in Appomattox County to breaking and entering and to firearm larceny, receiving a sentence of five years on each charge, with all but six months suspended, and three years supervised probation. Kelso and the other two young men were indicted federally in the present case.

SENTENCING FACTORS

The primary mandate of 18 U.S.C. § 3553(a) is that the District Court shall impose a sentence “sufficient, *but not greater than necessary*, to comply with the purposes” of punishment as set forth in subdivision (a)(2) of the statute. Id. (emphasis added). The four purposes

identified are: retribution (“to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”), deterrence, incapacitation (“to protect the public from further crimes of the defendant”), and rehabilitation (“to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”). In determining a sentence that is sufficient, but not greater than necessary, the Court is directed to consider the following factors in addition to the advisory guidelines: the nature and circumstances of the offense and the history and characteristics of the defendant, the kinds of sentences available, and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. When these factors are considered, the requested sentence of 46 months is sufficient to accomplish the purposes of punishment.

Nature and Circumstances of the Offense

As indicated in the Factual Background, Kelso and three other young men broke into a gun store at 4:00 a.m. and stole 56 guns from the shop, intending to sell the guns. Kelso and both of his co-defendants in this case were prohibited from possessing firearms because of prior felony convictions. Some of the stolen guns were sold before the defendants were apprehended. At this time, 26 of the guns have been recovered.

History and Characteristics of the Defendant

Kelso is now a 23-year-old young man who has lived in Appomattox, Virginia, all his life. He was raised by his unmarried mother, and his father did not play a significant role in his upbringing. He did not graduate from high school, having been sent to an alternative school in 10th grade because of disciplinary issues, and he does not have a GED. Starting at the age of 12, he had involvement with the juvenile court system, primarily for fighting and assault and battery,

but also for drugs and for larceny. He acknowledges a history of marijuana and alcohol use since age 15. As a young “adult” (ages 19 - 20), he has had one prior conviction for breaking and entering and grand larceny and one conviction for receiving stolen goods. He was still on probation at the time of the current offense, which he committed at age 22. Current scientific studies now recognize that neurobiological development of the brain, particularly in the pre-frontal cortex, continues well into the 20s, at least until age 25. Melissa Caulum, Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System, 2007 Wis. L. Rev. 729, 730 (2007); Antoinette Clarke, Bridging the Gap: An Interdisciplinary Approach to Juvenile Justice Policy, 56 DePaul L. Rev. 927, 934 (2007). The pre-frontal cortex is that part of the brain responsible for reasoning, self-control, judgment, and decision-making. Id.

On the positive side, he has worked as a farm laborer, a moving company laborer, and through a temporary agency, at Tri-Tech for a year. He has joint custody of his two children and is involved in their lives. He is engaged to be married and is anxious to “get his life in order and start acting as a man.” He has accepted responsibility for his conduct in the current offense, and has expressed the desire to receive drug treatment and earn his GED while incarcerated.

Kinds of Sentences Available

Under the relevant statutes, the Court may sentence Kelso up to five years on count one (theft of firearms) and up to ten years on count three, followed by a term of supervised release up to three years. The United States Sentencing Guidelines recommend a sentencing range of 46 - 57 months. The Court may also impose a fine up to \$250,000 in addition to or instead of incarceration, and the Court can, in its discretion, impose a period of one to five years probation. Restitution is mandatory.

Avoiding Unwarranted Sentencing Disparity

The guidelines endeavor to consider many of the factors relevant to sentencing people with similar backgrounds for similar crimes. Notably, one person involved in the burglary and theft of firearms was charged in state court rather than federal court; that person received a sentence of five years on each charge (ten years total) with all but *six months* suspended for three years of probation. Presumably, the decision to prosecute him in state court, as well as his sentence, reflects a lack of prior felony offenses as an adult, which differentiates him from Kelso. That difference warrants some disparity; however, a sentence higher than 46 months—more than seven times higher than the state defendant’s active sentence—would be unwarranted and would be greater than necessary.

Sentencing Guidelines

The sentence requested by the defendant is within the guideline recommendation.

Purposes of Punishment

Retribution - The punishment imposed must reflect the seriousness of the offense and provide just punishment for the crime. In determining “just punishment” for a crime and promoting respect for the law, our society considers moral culpability to be a justification for punishment. Research suggests that the moral culpability of a young man at Kelso’s age is not as great as we once assumed. The neurobiological development of the pre-frontal cortex, which is not complete before the mid-20s, is essential to full capacity to control behavior and make morally reasoned decisions with good judgment. Clarke, supra, p. 935. That capacity is the foundation for the “very characteristics that may make one morally culpable.” Caulum, supra, p. 743. Young adults who have not finished with their brain development “do not have the same capacity to control their behavior or make rational decisions as adults. They lack foresight and

are prone to make decisions without careful deliberation, often not fully understanding the consequences of their actions. While they may be able to distinguish right from wrong in an abstract sense, other influences drive them to behave in ways inconsistent with that understanding." Clarke, *supra*, pp. 935-936. One of the circumstances that easily overwhelms and overrides the still-developing pre-frontal cortex is the mob mentality of peer pressure. Kelso and his co-defendants acted together, while under the influence of alcohol and marijuana (other adverse drivers of behavior), to commit a crime that, alone, each would have been far less likely to commit. Clarke and others have actually suggested expanding juvenile court jurisdiction to age 25 because of this neurobiological and psychological evidence. *Id.* at 945. This incomplete neurobiological development of the brain and immaturity of youth warrant a sentence at the low end of the guidelines as sufficient to accomplish the purpose of retribution.

Deterrence/Incapacitation - Deterrence refers both to general deterrence (preventing others from committing crime) and to specific deterrence (keeping this defendant from committing further crimes or making it impossible for him to do so by "incapacitation"). Certainly, confinement for 46 months will incapacitate Kelso from committing another burglary during that time; when such a sentence is served, Kelso will be older and will have had the chance to complete his neurobiological and psychological development.

As for general deterrence, the certainty of punishment is more effective in deterring crime than the length of punishment. In this case in particular, law enforcement acted swiftly to apprehend Kelso and the codefendants, who were arrested within 24 hours of the crime. A sentence lengthier than the low end of the guidelines will not serve the goal of deterrence any better and would be greater than necessary.

Rehabilitation - Congress has recognized that incarceration is not appropriate for the purpose of rehabilitation. 28 U.S.C. § 994(k). Rehabilitation comes in the form of treatment, education, and employment. Even though incarceration is not the ideal or best venue for rehabilitation, 46 months will be ample time for Kelso to complete his GED, receive intensive drug rehabilitation, and pursue some vocational training that can lead to meaningful employment when he returns to society.

CONCLUSION

For the reasons set forth herein, Dequan Montez Kelso respectfully urges this Honorable Court to impose sentence of 46 months, a sentence which is sufficient, but not greater than necessary, to accomplish the goals of punishment.

DEQUAN MONTEZ KELSO

By /s/ Fay F. Spence

Fay F. Spence, Esq., Va. Bar #27906
Assistant Federal Public Defender
210 First St. SW, Suite 400
Roanoke, VA 24011
(540) 777-0880
(540) 777-0890 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2016, I electronically filed the foregoing Motion with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to Andrew Bassford, Assistant United States Attorney, counsel for the United States.

/s/ Fay F. Spence