IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA	)	USCA No. 14-1665
	)	
Plaintiff–Appellee,	)	Appeal from the United States
	)	District Court for the Southern
v.	)	District of Indiana,
	)	Indianapolis Division
BRUCE JONES,	)	
	)	USDC No. 1:12-cr-00072
Defendant–Appellant.	)	Tanya Walton Pratt, *Judge*.

RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION TO SUSPEND BRIEFING; VACATE SENTENCE AS TO COUNTS 2, 3, & 4; AND REMAND FOR SENTENCING ON ALL COUNTS

Defendant Bruce Jones, by counsel, objects to the government's motion to suspend briefing, vacate sentence as to counts 2, 3, and 4, and remand for sentencing on all counts. Granting the government's motion will not measurably impact judicial efficiency or clarity of the issues in either case, but will result in substantial prejudice to Jones. Jones requests that this Court deny the government's motion and allow the present appeal to proceed.

Procedural Background

Jones was initially indicted on May 5, 2012. (R.1.) After several changes to the indictment, the government charged Jones with one count of healthcare fraud, 18 U.S.C. § 1347 (2012), and three counts of being a felon in possession of a firearm and ammunition, 18 U.S.C. § 922 (g)(1). (R.49.) At Jones's request and the government's affirmative acquiescence, the district court severed the healthcare-fraud count from the felon-in-possession counts, (R.94), and Jones was tried and convicted of the felon-in-possession charges in October 2013, (R.219–22). He was subsequently sentenced in March 2014, (R.224), and filed his Notice of Appeal the same day, (A.21). This Court set a briefing schedule and Jones filed his opening brief on December 9,

2014. The government's brief is currently due on February 9, 2015. (Order, Dec. 29, 2014, ECF No. 25.) In October 2014, Jones was separately tried and convicted of the healthcare fraud charge. (*See* R.286, 290, 295.) Jones is currently awaiting sentencing on that charge.

This Court Has Jurisdiction to Hear this Appeal

Although the government in its motion frames it as an "open" question, there can be little doubt that this Court has jurisdiction over Jones's pending appeal because the district court sentenced Jones on the felon-in-possession charges and entered judgment more than ten months ago. (A.1); *see also* 28 U.S.C. § 1291 (granting jurisdiction to the court of appeals over all final judgments). It is true that the healthcare count remained pending in the district court after the three felon-in-possession counts that undergird this appeal were taken up to this Court. But that fact does not divest this Court of jurisdiction, as the government suggests. (Gov. Mot. 3, Jan. 13, 2015, ECF No. 26) (framing the issue as an "open jurisdictional question."). Jones's case is not like the case on which the government relies, *see United States v. Kaufman* (*Kaufmann I*), 951 F.2d 793 (7th Cir. 1993), where a mistrial left some counts from that single trial dangling unresolved in the district court, while other counts were immediately appealed to this Court, *id.* at 794-95. This Court held that it lacked jurisdiction over the counts before it because "a defendant may not appeal a single count until final judgment is imposed *upon all the counts that were considered together in a single criminal trial.*" *Id.* at 795 (emphasis added).

Here, the felon-in-possession charges were wholly segregated from the healthcare count, were tried separately and are now subject to separate appeals. *See* (R.94); *see also United States v. Powell*, 24 F.3d 28, 30 (9th Cir. 1994) ("Accordingly, each conviction on severed counts should be separately appealable upon the imposition of sentence."); *see also, e.g.*, *United States v. Jones*, 180 F.3d 261 (5th Cir. 1999) (noting that "[a]dditional counts were severed from the

case and are not relevant to this appeal"); *United States v. Cicco*, 938 F.2d 441, 442 n.1 (3d Cir. 1991) (noting that "the convictions on the other counts are not presently before us. Thus, our present review is limited to the portions of the district court's order granting the defendants' motions with respect to the counts based on 18 U.S.C. § 666."). And although this Court has never explicitly addressed the distinction between mistrials and proper severances, it has recognized the limits of its holding in *Kaufmann I* and that other courts have routinely ruled otherwise. *See United States v. Kaufmann* (*Kaufmann II*), 985 F.2d 884, 891 (7th Cir. 1993) (noting that *Kaufmann I* has not been followed by any sister circuits, and "several circuits have, without addressing the question of appellate jurisdiction, entertained an appeal on one count of a criminal indictment while other counts of the indictment were unresolved."). As a result, this Court in *Kaufmann II* "decline[d] to extend" the decision in *Kaufmann I* any further. *Id.*

The government's reliance on *United States v. Wilson* is similarly misplaced. (Gov. Mot. at 4.) (stating that this Court suspended briefing in "similar circumstances."). In *Wilson*, the government charged the defendant with eight counts of wire fraud and four counts of evading financial reporting requirements. Gov. Mem. 1, *United States v. Wilson*, No. 13-2461 (7th Cir. Aug. 13, 2013). The fraud counts were misjoined with the financial reporting counts, so a magistrate judge severed the two sets of counts pursuant to Federal Rule of Criminal Procedure 8. *Id.* The government tried and convicted the defendant on the financial reporting counts first, and the district court sentenced him. *Id.* at 1–2. Wilson appealed the sentence before the government tried him for the fraud counts. *Id.* at 2. Before the second trial commenced and before the appellant's brief had been filed, this Court asked the parties to provide a memorandum on the issue of whether the appeal should be dismissed because of a lack of a final judgment. *Id.* Both the government and the defendant indicated that there was a final judgment in the financial

reporting trial, and therefore the court had jurisdiction over the appeal. *See id.* 5–6; Appellant Jurisdiction Mem. 4, *United States v. Wilson*, No. 13-2461 (7th Cir. Aug. 13, 2013). The defendant–appellant then requested that the appellate proceedings be suspended or stayed until his fraud charges were resolved in the district court. Appellant Resp. to Docketing Statement and Jurisdiction Mem. 1, *United States v. Wilson*, No. 13-2461 (7th Cir. Aug. 13, 2013). And the *defendant–appellant* ultimately filed a motion to dismiss the appeal due to an intervening plea agreement, Appellant's Mot. to Dismiss Appeal, *United States v. Wilson*, No. 13-2461 (7th Cir. Sept. 26, 2013), which this Court granted, Order, *United States v. Wilson*, No. 13-2461 (7th Cir. Sept. 26, 2013); *cf.* (Gov. Mot. at 4) (stating that the *parties* in *Wilson* requested that the appeal be dismissed).

Were this Court to vacate for resentencing, Jones could suffer substantial prejudice. Although the government's view of prejudice is limited to that arising from delay and incarceration, (Gov. Mot. at 2), the implications for Jones are much more far-reaching. First, Jones identified several sentencing errors that are independent of the healthcare conviction. *Cf.* (Gov. Mot. at 2) (stating that the sentencing issues "overlap considerably"). Specifically, he has asserted that the district court erred in using his prior 1985 conviction for purposes of sentencing in this case, now more than twenty-five years later. If this Court agrees, Jones will be entitled to a new Guidelines calculation that, as noted in the brief, could be substantial. (*See* Jones Br. at 28–32.)[1] The PSR for the healthcare count does not account for this potentially erroneous use of a prior conviction, and instead suggests the exact same guideline range and criminal history

[1] Had the district court not included this prior conviction and kept all other enhancements the same, Jones's sentencing range would have dropped to 41 to 51 months' imprisonment. *See* U.S. Sentencing Guidelines Manual ch. 5, pt. A (2013) (sentencing table) (assuming Jones's offense level would be 22 with a criminal history category of I). And because without the conviction Jones would have been eligible for a collection reduction under the U.S. Sentencing Guidelines Manual § 2K2.1(b)(2)—one that should have been applied in his case—his sentencing range could have been even lower: 0 to 6 months. *See id.* (assuming Jones's offense level would be 6 with a criminal history category of I).

based on the use of that conviction. Furthermore, because the healthcare count PSR employs grouping, (Gov. Mot. at 2), the previous felon-in-possession Guideline range (level 28, criminal history II with a range of 87–108) dwarfs the range that would apply to the healthcare count standing alone (level 16, criminal history I[2] with a range of 21–27 months' imprisonment).[3]

Additionally, Jones has raised substantive law issues in his brief that could have an impact on his sentence. For example, his multiplicity challenge would require vacatur of two of his three convictions. If remand were to occur now, without the benefit of this Court's ruling on the merits of the issue, then the district court would not be able to account for the substantive law issues in the new combined sentence, yet the district court could structure the sentence and support it with reasons in a way that would be virtually unassailable on a second appeal. *See Rita v. United States*, 551 U.S. 338, 350-51 (2007) (on appellate review a within-Guidelines sentence is accorded a presumption of reasonableness). Finally, having identified significant trial-level errors—including one under Federal Rule of Criminal Procedure 11 for improper involvement in the defendant's plea negotiations—the defendant should not have to go back before the same district court judge for sentencing without the protection of this Court's prior consideration of his claims and its instructions to the district court should it indeed find a reversible error. *Cf. United States v. Hemphill*, 748 F.3d 666, 677 (5th Cir. 2014) (finding that the appropriate remedy for a Rule 11 violation is vacatur of the judgment and remand for proceedings before a different district court judge).

[2] It is Jones's position that the Probation Office should not use the 1985 conviction for purposes of sentencing Jones for the healthcare count. Without the three points that the PSR allocated for that conviction, and because Jones has no other prior convictions, his criminal history category should be I.

[3] Although grouping would prevent the district court from imposing a consecutive sentence, Jones should be protected from that eventuality by the requirement in 18 U.S.C. § 3553(a) that district courts sentence defendants to a term of imprisonment sufficient but not greater than necessary to achieve the goals of sentencing. Jones's prior sentence of 100 months' imprisonment, and his advancing age (Jones is 67 years old), strongly imply that a consecutive sentence in this case would be tantamount to a life sentence and, therefore, inappropriate.

Finally, although the government repeatedly urges this Court to stay briefing and vacate Jones's sentence as a matter of efficiency, (Gov. Mot. at 2 & 4), "the court's interest in ensuring a defendant has the right to appeal a sentence when he begins serving it outweighs the government's concerns about piecemeal appellate review." *United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001).

Conclusion

For the foregoing reasons, Jones respectfully requests that this Court deny the government's motion and require the government to move forward in this pending appeal.

Respectfully Submitted,

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Defendant–Appellant

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Certificate of Service

I hereby certify that on January 20, 2015, I electronically filed the foregoing Response with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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