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SECOND CIRCUIT REVIEW

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More Fallout From 'Apprendi'

IN THIS month's column, we discuss another significant Second Circuit decision interpreting the United States Supreme Court's landmark decision two years ago in *Apprendi v. New Jersey*, 530 US 466 (2000).

In *Apprendi*, the Supreme Court announced that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In *United States v. Doe* (2d Cir. July 17, 2002), the Second Circuit, in a unanimous decision written by Judge Fred Parker, vacated a criminal sentence of over 20 years in prison based on an indictment that failed to charge drug quantity with the degree of specificity required by *Apprendi* and its Second Circuit progeny. The court, using plain error analysis to review Mr. Doe's *Apprendi*-based argument, found that "the imposition of a sentence above the statutory maximum for an offense involving an indeterminate



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quantity of drugs based on drug quantities not found beyond a reasonable doubt requires correction to avoid unfairness and damage to the integrity and public reputation of judicial proceedings." *Doe*, 2002 WL 1565162, at *1.

Facts

The facts of *Doe* are convoluted and highlight the thorny legal analysis now required by *Apprendi*. In 1996, Mr. Doe was arrested by the United States Customs Service for his involvement in a conspiracy to import and distribute cocaine in the United States. He was indicted in a two-count indictment after a confidential informant told government agents that Mr. Doe had paid off an airport customs inspector to help facilitate the importation of drugs. "While the indictment did not specify a drug quantity in the text of the [indictment], one of the code sections listed parenthetically following the text" — specifically, 21 USC

§960(b) (1)(B)(ii), punishable by a 10-year (minimum)-to-life term of imprisonment — "designated the quantity-specific punishment for the importation of five kilograms or more of cocaine." *Doe*, 2002 WL 1565162, at *1.

In February 1997, after a series of proffer sessions with the government, Mr. Doe entered into a cooperation agreement, agreeing to plead guilty to the first count of the indictment. Mr. Doe "acknowledged that he had a right to trial and surrendered his trial rights" in formal plea proceedings before a Magistrate Judge. *Id.* at *2. Having determined that he was acting voluntarily and with a complete understanding of his rights, the Magistrate Judge recommended acceptance of Mr. Doe's guilty plea. "At no time was the quantity of drugs involved discussed by either party." *Id.* Later, Mr. Doe testified for the government and against his co-conspirator, although there was some controversy regarding the value of his testimony. The probation department recommended that he be held accountable for importing "65 kilograms of cocaine, generating a total offense level of 36 and a [sentence] range from 188 to 235 months." *Id.*

In June 1999, after securing Mr. Doe's testimony against his co-conspirator, the government asked

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that Mr. Doe be held accountable for importing additional quantities of drugs — over 150 kilograms of cocaine and two kilograms of heroin — and thereby revised upward its earlier sentencing recommendation to a range of 262 to 325 months. In June 2000, Mr. Doe was sentenced to 262 months imprisonment, more than the 20-year maximum for unquantified drug offenses. At the sentencing hearing, there was “[n]o mention of, or challenge to, the drug quantities supporting the sentence.” Id. at *3.

Plain Error Analysis

Because Mr. Doe did not object to the inclusion of the drug quantities at sentencing, under Second Circuit precedent, Doe’s challenge to his sentence was subject to plain error review. To establish plain error, the court must find (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) if all those tests are satisfied, a basis for concluding whether to exercise its discretion to correct the error. The plain error should be corrected only if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” Id.

In this case, the court considered separately under the plain error standard both of Mr. Doe’s claims — first, the failure to include in the indictment specific allegations of drug quantity and, second, the failure to prove to a jury or ultimate trier of fact beyond a reasonable doubt the drug quantities used to compute the sentence.

In connection with the indictment, the court first found that the failure to include a specific charge of drug

quantity constituted plain error. The court reaffirmed the circuit’s long-standing refusal to allow an element of the offense to be charged by statutory citation alone, especially where, as here, the omission of this element could not be inferred with certainty from the text of the indictment. Id. at *7.

Although finding plain error in the indictment, the court did not find that the error violated Mr. Doe’s substantial rights. Id. at *7-9. The court held that as a result of specific statements in Mr. Doe’s cooperation agreement and specific statements made at the plea hearing, he clearly had notice of the quantity-based penalty provisions to which he was subject prior to his guilty plea.

The court’s analysis, however, was quite different in reviewing the requirement that drug quantity should have been submitted to a jury for a finding beyond a reasonable doubt. The court held that this defect constituted plain error, affected substantive rights, and ultimately required that Mr. Doe’s sentence be vacated.

Because Mr. Doe pled guilty to the crimes charged in his indictment, drug quantity was not found beyond a reasonable doubt by a jury. Moreover, at the time of his sentence, courts, including the Second Circuit, treated drug quantity as a sentencing factor to be found by preponderance of the evidence — a standard that is now constitutionally infirm under *Apprendi*. Finally, nothing in Mr. Doe’s plea allocution “settled the issue of drug quantity” so as to avoid a finding of error on appeal. Id. at *10.

Having found plain error, the

Second Circuit concluded that the failure to correct, unlike the error in Mr. Doe’s indictment, “would seriously affect the fairness and public reputation of judicial proceedings.” Id. at *11. In reaching this conclusion, the court distinguished a May 2002 decision of the United States Supreme Court, *U.S. v. Cotton*, 122 SCt 1781 (2002), where the Court reversed a Fourth Circuit decision applying plain error analysis to a drug quantity issue. In *Cotton*, the Supreme Court found the evidence of drug quantity that had been presented at trial to be both “overwhelming” and “essentially uncontroverted,” and concluded that, in such circumstances, the enhanced sentence would not threaten the “fairness, integrity, and public reputation of judicial proceedings” so as to require action to correct plain error.

In *Doe*, the Second Circuit found that the evidence against Mr. Doe was not sufficient “to meet *Cotton*’s deservedly high standards.” Id. at *12. The court vacated the sentence and remanded the case back to the district judge with instructions to re-sentence Mr. Doe to a term of imprisonment not exceeding 20 years.

The court explained, “*Apprendi* and its progeny place a new burden on the government to treat as elements of a crime anything that may extend a defendant’s sentence beyond a statutory maximum sentence.” Id. at *11. Thus, “[t]o allow a sentence even 22 months beyond the statutory maximum to remain in place in the face of ... [demonstrates] a disregard for constitutionally-derived protections given to a defendant by *Apprendi* ...” Id.