UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CASE NO. 93-CR-20023-DT
HON. LAWRENCE P. ZATKOFF

v.

JOHN A. RAPANOS,

Defendant.

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OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on March 15, 2005

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on the imposition of sentence in *United States v. Rapanos*, Case No. 93-CR-20023, and is on remand from the Court of Appeals for the Sixth Circuit. *See United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003). This Court originally scheduled a sentencing hearing in this matter for Wednesday, August 18, 2004; however, due to (a) the U.S. Supreme Court's ruling in *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), (b) the Sixth Circuit's subsequent opinions in *U.S. v. Montgomery*, 2004 WL 1562904 (6th Cir. July 13, 2004), *vacated on grant of reh'g en banc* July 19, 2004, *appeal dismissed* July 23, 2004, and *U.S. v. Koch*, 383 F.3d 436 (6th Cir. 2004) (*en banc*), (c) the disagreement among the federal circuits regarding the continued constitutional validity of the United States Sentencing Guidelines (the "Guidelines"), and

On March 15, 2005, this Court held the second sentencing hearing in this matter. For the reasons set forth below, this Court sentences Defendant to three years of probation and a fine of $185,100 and concludes that the Defendant has satisfied the terms of his sentence.

II. DISCUSSION

A. Background

On March 7, 1995, Defendant John A. Rapanos was convicted by jury of the following counts contained in the Third Superseding Indictment:

Count I 33 USC § 1311(a), and 18 USC § 2[1]

Count IV 33 USC § 1311(a), and 18 USC § 2[2]

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[1]Count I of the Third Superseding Indictment alleged the following:

> From approximately December of 1988, to at least November of 1989, the precise times unknown to the grand jury, in the Eastern District of Michigan, Northern Division, JOHN A. RAPANOS, defendant herein, did knowingly cause the discharge of pollutants as defined in 33 U.S.C. section 1362(6) into waters of the United States, that is into wetlands located in Williams Township, Bay County, Michigan, without a permit issued under 33 U.S.C. section 1344, in violation of 33 U.S.C. section 1311(a) and 18 U.S.C. section 2.

See July 27, 1994, Third Superseding Indictment.

[2]Count IV of the Third Superseding Indictment alleged the following:

> From approximately December of 1989, to at least late October of 1991, the precise times unknown to the grand jury, in the Eastern District of Michigan, Northern Division, JOHN A. RAPANOS, defendant herein, did knowingly cause the discharge of pollutants as defined in 33 U.S.C. section 1362(6) into waters of the United States, that is into wetlands located in Williams Township, Bay County, Michigan, without a permit issued under 33 U.S.C. section 1344, in violation of 33 U.S.C. section 1311(a) and 18 U.S.C. section 2.

See July 27, 1994, Third Superseding Indictment.

On December 2, 1998, the Court held a sentencing hearing.[3] Applying the 1994 United States Sentencing Guidelines, as it was then required to do, the Court determined that the Defendant had a Total Offense Level of eight (8), and a Criminal History Category of I. Pursuant to this determination, the Court sentenced the Defendant to three years probation, and imposed a fine of $185,100. The Court's rationale was explained on the record and in an Opinion and Order issued on April 13, 1998.

As explained in the Court's April 13, 1998, Opinion and Order, the Defendant's conviction under 33 U.S.C. § 1311(a) carried a base offense level of six **(+6)** pursuant to U.S.S.G. § 2Q1.3(a). Furthermore, at sentencing, and as indicated in the Court's April 13, 1998, Opinion and Order, the Court imposed a six-level **(+6)** enhancement pursuant to U.S.S.G. § 2Q1.3(b)(1)(A) ("[T]he offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment . . . ."), but decreased this six-level enhancement two-levels **(-2)** pursuant to U.S.S.G. § 2Q1.3 n.4. In addition, the Court imposed a four-level **(+4)** enhancement pursuant to U.S.S.G. § 2Q1.3(b)(4) ("[T]he offense involved a discharge without a permit or in violation of a permit . . . ."), but also decreased this enhancement two-levels **(-2)** pursuant to U.S.S.G. § 2Q1.3 n. 7. Furthermore, in its April 13, 1998, Opinion and Order, the Court determined that a two-level reduction **(-2)** for acceptance of responsibility was appropriate pursuant to U.S.S.G. § 3E1.1 n.2. And lastly, at sentencing, the Court went beyond the two two-level departures provided for by

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[3]The delay between the Defendant's March 7, 1995, conviction and his December 2, 1998, sentencing is explained as follows. On August 3, 1995, following the Defendant's conviction on Counts I and IV of the Third Superseding Indictment, the Court granted the Defendant's motion for a new trial. *See United States v. Rapanos*, 895 F. Supp. 165 (E.D. Mich. 1995). The Government appealed, and on May 28, 1997, the Sixth Circuit reversed this Court's decision and remanded for sentencing. *See United States v. Rapanos*, 115 F.3d 367 (6th Cir. 1997).

U.S.S.G. § 2Q1.3 nn. 4 & 7 discussed in the Court's April 13, 1998, Opinion and Order, and departed downward one additional level (-1) under U.S.S.G. § 2Q1.3 n.4 and one additional level (-1) under U.S.S.G. § 2Q1.3 n.7. Based upon a Total Offense Level of eight (+8) and Criminal History Category of I, the Defendant had a sentencing guidelines range of zero to six months. The Court sentenced the Defendant on the low end of the guidelines range, and did not impose a term of imprisonment. The Government appealed.

On December 15, 2000, the Sixth Circuit reversed the sentence imposed by this Court. *See United States v. Rapanos*, 235 F.3d 256 (6th Cir. 2000). The Sixth Circuit remanded the matter for re-sentencing with instructions not to apply the two-level reduction for acceptance of responsibility provided for by U.S.S.G. § 3E1.1 n.2, nor the two one-level downward departures applied by the Court at the sentencing hearing. For all practical purposes, prior to the U.S. Supreme Court's determination that the Sentencing Guidelines are advisory rather than mandatory, this matter was before the Court on the Sixth Circuit's specific instructions as stated in *United States v. Rapanos*, 235 F.3d 256 (6th Cir. 2000), i.e, "for resentencing based on total offense level of twelve." *See Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003) (citing *Rapanos*, 235 F.3d at 261).[4]

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[4]The delay between the Sixth Circuit's decision in *United States v. Rapanos*, 235 F.3d 256 (6th Cir. 2000), and this Court's re-sentencing may be explained as follows. After the Sixth Circuit reversed the sentence imposed by this Court, the Defendant filed a petition for *writ of certiorari* with the United States Supreme Court. On June 25, 2001, the Supreme Court granted the Defendant's petition, and remanded the matter for reconsideration in light of the Supreme Court's then-recent decision in *Solid Waste Agency of No. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). On remand, and after considering the Supreme Court's decision in *Solid Waste*, this Court found that, as a matter of law, the wetlands on Defendant's property were not directly adjacent to navigable waters, and, therefore, that the Government could not regulate the Defendant's property. Accordingly, the Court set aside the Defendant's conviction and dismissed the Government's case. *See United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002). The Government appealed, and on August 5, 2003, the Sixth Circuit reversed this Court's decision, reinstated the Defendant's conviction, and again remanded for re-sentencing.

B. Analysis

In light of the U.S. Supreme Court's decision in *Booker*, the Guidelines are advisory rather than mandatory, but a sentencing court must consider the applicable sentencing range pursuant to the Guidelines (as well as all of the other considerations listed in 18 U.S.C. §3553(a)) in determining the appropriate sentence for a defendant. See *Booker*, 2005 WL 50108 at *27. As noted above, the Sixth Circuit has indicated that under the Guidelines, the Defendant's Total Offense Level is twelve (12). *See Rapanos*, 339 F.3d at 454. Based upon a Total Offense Level of twelve (12) a Criminal History Category of I, the applicable sentencing range for the Defendant under the Guidelines would be ten to sixteen months.

Before imposing sentence, the Court notes that in determining the appropriate sentence for the Defendant, the Court has considered the following, as required by 18 U.S.C. §3553(a):

(1) the nature and circumstances of the offense and the history and characteristics of the Defendant;

(2) the need for the sentence to: (a) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; (b) afford adequate deterrence to criminal conduct; (c) protect the public from future crimes of the Defendant; and (d) 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 sentences and the applicable sentencing range pursuant to the Sentencing Guidelines, as noted above;

See United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003). The Defendant filed another petition for *writ of certiorari*, but on April 5, 2004, the Supreme Court denied the Defendant's petition, and on May 24, 2004, denied a petition for rehearing. The matter is now before this Court.

(5) the policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. §994(a)(2) that are currently in effect and pertinent to the Defendant's conduct, including any amendments thereto by act of Congress or incorporation into the Sentencing Guidelines by the Sentencing Commission;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been guilty of similar conduct; and

(7) the need to provide restitution to the victims of the offenses pursuant to which the Defendant is being sentenced.

Lastly, the Court notes that on December 2, 1998, the Court sentenced the Defendant to three years probation and imposed a fine of $185,100, and that the Defendant has satisfied both of these penalties.

C. Sentence

After taking into account all of the foregoing, the Court concludes that the punishment set forth in the Guidelines is not appropriate for the offenses committed by the Defendant in this case and that a term of imprisonment would be unjustified. Therefore, it is the decision of this Court that no term of imprisonment be imposed in this case, and the Court reiterates its prior sentence for the Defendant, i.e., three years of probation and a fine of $185,100.

In imposing a sentence that is less than the minimum term under the Guidelines, the Court took into account many factors, including the following, set forth in order of increasing significance. First, the Guidelines range of ten to sixteen months is based, in part, upon this Court's previous factual finding that the Defendant's actions resulted in an "ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment" which required the Court to apply the six-level enhancement of U.S.S.G. § 2Q1.3(b)(1)(A). *See* April 13, 1998, Opinion and

Order pp. 4-5 (quoting U.S.S.G. § 2Q1.3(b)(1)(A)). The facts required to make this finding, however, were not specifically found by the jury since they were not necessary to convict the Defendant on either Count I or Count IV of the Third Superseding Indictment. The factual finding necessary to apply U.S.S.G. § 2Q1.3(b)(1)(A) was simply an "additional finding" made by this Court based on a preponderance standard.

The result of that "additional finding" is an increase of the Defendant's maximum sentence under the Guidelines from six months to sixteen months. Therefore, the application of the six-level enhancement of U.S.S.G. § 2Q1.3(b)(1)(A), were the U.S. Sentencing Guidelines still mandatory, would have violated the Defendant's rights under the Sixth Amendment and the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of prior convictions, 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."), a rule the Supreme Court recognized again in *Blakely*.[5] Although the Supreme Court in *Booker* did not adopt the *Blakely* rule with respect to the Guidelines by, in effect, engrafting the Sixth Amendment onto the Guidelines, the Supreme Court in *Booker* did expressly reaffirm the *Apprendi* rule. *See Booker*, 2005 WL 50108 at *15. Therefore, it would be inappropriate in this case for the Court to use its "additional finding" when imposing the Defendant's sentence. The Court is particularly troubled by the fact that using the "additional finding" and applying the Guidelines would result in (a) a maximum sentence three times that justified by the jury's findings (i.e., the maximum sentence based on the jury's findings alone would be six months, whereas the maximum sentence under the applicable guideline range would be 16

[5]The Supreme Court in *Blakely* addressed only the sentencing guidelines of the State of Washington.

months), and (b) a minimum sentence that is nearly twice the maximum sentence justified by the jury's findings (i.e., the minimum sentence under the applicable guideline range would be 10 months whereas the maximum sentence based on the jury's findings would be six months).

Second, the Defendant has already successfully completed the three-year term of probation and paid the $185,100 fine imposed by this Court on December 2, 1998. The Court finds that, after having presided over the trial and proceedings in this matter and having had an opportunity to observe the conduct of the Defendant in connection with the same, together with the Defendant's compliance with the sentence previously imposed on him, those penalties will adequately deter Defendant from future criminal conduct and protect the public from future crimes of the Defendant.

Third, and again having presided over the trial and all of the proceedings in this matter, including the actions of all parties involved, the Court considers the three-year term of probation and $185,100 fine to be penalties that provide just punishment for the offenses for which Defendant has been convicted, promote respect for the law and reflect the seriousness of the offenses for which Defendant was convicted. This is especially true in light of the Court's review of the sentences imposed on defendants (1) in environmental cases in Michigan state courts, and (2) involved in certain catastrophic environmental incidents around the country.

In Michigan, environmental defendants have rarely been sentenced to prison for their crimes. Aldo Quadrini and Gaspere Vitale were sentenced to one year of probation and ordered to pay $5,000 in fines and to fully restore damaged wetlands. The two Macomb County developers were prosecuted by the Michigan Department of Environmental Quality ("DEQ") after they clear-cut, plowed, and destroyed 8 acres of forested wetlands in New Baltimore. The violations occurred between 1995 and 1999. Despite repeated warnings, the defendants continued cutting and chipping

trees, removing stumps, and bulldozing the site.

In another case involving corporate environmental pollution, the Department of Justice ("DOJ") prosecuted BP Oil for discharging pollutants into the Delaware River in violation of the Clean Water Act. Over a six-year period from 1979 to 1986, BP discharged a variety of pollutants, including oil and grease into the river. These pollutants depleted the oxygen supply in the water, making it impossible for fish to survive and reproduce. In addition, hydrocarbons present in the pollution have the potential to become concentrated in fish. BP's violations represented a major contribution to the pollution of the river. In addition, the violations were committed knowingly and over a period of years. Nevertheless, the DOJ only prosecuted BP Oil civilly. Ultimately, BP Oil was fined and merely told to clean up its facility.

Perhaps the most notorious American environmental disaster of the 20th Century was the *Exxon Valdez* oil spill of 1989. When the *Exxon Valdez* struck Bligh Reef in Alaska's Prince William Sound, it dumped 10.8 million gallons of crude oil in the water and created a huge oil slick killing tens of thousands of animals. The oil reached 1,300 miles of coastline and killed approximately 250,000 birds, 2,800 sea otters, 300 seals, and 250 bald eagles. In addition, the disaster crippled the local fishing industry.

Joseph Hazelwood was the captain of the *Exxon Valdez*. It was later determined that Captain Hazelwood was drunk the night of the spill, and that his negligence caused the accident. Captain Hazelwood was convicted of negligence. He was sentenced to serve 1,000 hours of community service over five years, with no prison time or fine. Captain Hazelwood's relatively light sentence is illustrative considering he was the man largely responsible for the greatest oil spill in U.S. history.

As the foregoing examples demonstrate, imposing upon the Defendant a sentence of

probation and the $185,000 fine most fairly reflects the intention and purpose of 18 U.S.C. §3553(a), including the desire for (a) proportionality in sentencing, (b) increased uniformity and reduced unwarranted disparity in sentencing, (c) the penalty to reflect the seriousness of the offense, and (d) just punishment. Like the many defendants who were charged with environmental violations and sentenced for similar conduct in Michigan, the sentence imposed on Defendant includes a fine and probation.

The Defendant's sentence also takes into account the substance dumped into the environment and/or used to fill land and the harm to the public and environment as a result. For example, Defendant in this case moved sand from one part of his property to another, the result of which did not involve any contamination of the environment or any harm to humans or wildlife. Moreover, no public funds were required to remedy any act taken by Defendant. The Court contrasts the instant case with cases like Exxon and BP Products, where oil and other pollutants were dumped into open waterways, resulting in (a) the death of significant numbers of fish, birds and other wildlife, (b) the contamination of water utilized by humans, fish, birds and other wildlife on a daily and ongoing basis, (c) the disruption of public utilities, (d) the evacuation of communities, and (e) the need for public monies to fund clean-up efforts. In the instant case, none of those concerns are present.

Accordingly, for all of the reasons set forth herein, the Court concludes that a sentence of imprisonment is not justified or appropriate for this Defendant, notwithstanding the recommended sentence of 10-16 months pursuant to the Guidelines.

IV. CONCLUSION

Accordingly, and as set forth above, it is HEREBY ORDERED that the Defendant is sentenced to three years probation and a fine of $185,100 is imposed. Since these penalties have been satisfied with respect to the obligations owed by the Defendant arising out of his conviction in *United States v. Rapanos*, Case No. 93-20023 (E.D. Mich.), the Court considers the Defendant's obligations to have been fulfilled, and HEREBY ORDERS that this matter is CONCLUDED.

IT IS SO ORDERED.

s/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Date: MARCH 15, 2005

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