

IN THE UNITED STATES DISTRICT COURT
OF WESTERN PENNSYLVANIA

Transcript of CONTINUED SENTENCING HEARING held on
August 3, 2018
United States District Court, Pittsburgh, Pennsylvania
BEFORE: HONORABLE REGGIE WALTON, DISTRICT JUDGE

APPEARANCES:

For USA: Brendan T. Conway, Esq.
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1 P R O C E E D I N G S

2 (August 3, 2018, 2:00 p.m. In open court.)

3 THE COURT: Good afternoon.

4 THE DEPUTY CLERK: Now is the date and time
5 scheduled for the continuation of the sentencing in the
6 matter of United States of America versus Lance Yarbough
7 at Criminal No. 14-270.8 Counsel for the government and for
9 Mr. Yarbough kindly enter your appearances on the
10 record.11 MR. CONWAY: Brendan Conway for the United
12 States.13 MR. LIVINGSTON: Patrick Livingston for
14 Mr. Yarbough, Your Honor.

15 THE COURT: Good afternoon.

16 We had almost completed the sentencing so
17 obviously the prior rulings other than the initial
18 pronouncement of what the sentence would be remains in
19 place, but has counsel been able to figure out exactly
20 how much time he has been on those two convictions that
21 were relevant conduct in this case?22 MR. LIVINGSTON: I think Paragraph 34 of the
23 presentence report indicates, Judge, on the state
24 sentence it was 34 months.

25 THE COURT: Which paragraph?

1 MR. LIVINGSTON: Paragraph 34.

2 THE COURT: There was some issue as to whether
3 it was 88 months?

4 MR. LIVINGSTON: Yes. I think what the
5 dispute is whether or not when you calculate that, you
6 calculate the good time credit on the federal sentence.

7 We would contend that you calculate it as a
8 60-month sentence. I think the government's position
9 was you would calculate it as something less counting
10 for the good time credit.

11 At the appropriate time I would like to be
12 heard on that.

13 If this is the appropriate time, I would say
14 he served a 60-month sentence. The fact that I think
15 it's under Section 3624 of the Federal Criminal Code
16 there's an administrative credit to be given I don't
17 think plays any part in the decision.

18 He actually was sentenced to and served a
19 60-month sentence. There was an exercise of
20 administrative discretion that released him a few months
21 early from that.

22 In my eyes the adjustment is 60 months for the
23 federal sentence and 34 months for the state sentence.

24 I think I have that right. That's at
25 Paragraph 34 of the presentence report. There was a

1 360-day credit plus --

2 THE COURT: So, you are saying 94 months?

3 MR. LIVINGSTON: Should be 94 months total,
4 right.

5 MR. CONWAY: Your Honor, first of all, that
6 would, of course, give him double time for good credit,
7 which is completely inappropriate.

8 I have done the calculation and if I can take
9 you through it.

10 On Paragraph 34, Mr. Yarbough was sentenced on
11 October 20 of 2009.

12 He was paroled on August 9 of 2011, so that by
13 my calculation is 22 months, short of two years, 22
14 months.

15 MR. LIVINGSTON: Two months short of three
16 years.

17 MR. CONWAY: 2009 to 2010 and 2011 is two
18 years.

19 MR. LIVINGSTON: Plus the credit for time
20 served.

21 MR. CONWAY: No. He went to prison on October
22 20 of 2009.

23 MR. LIVINGSTON: He actually went to prison on
24 October 20 of 2008.

25 MR. CONWAY: The parole says -- the document

1 says 2009 but I think Mr. Livingston is correct, it was
2 2008 that he went to jail.

3 MR. LIVINGSTON: And the 360-day credit would
4 be afforded because he was in county custody awaiting
5 sentencing on the state matter from October of 2008
6 until October of 2009. So, that's where we get the 34
7 months.

8 It would be from October of 2008 to October of
9 2009, then from October of 2009 until October of 2010,
10 and then from October of 2010 until August of 2011,
11 counting for a couple days there, that's 34 months.

12 THE COURT: Okay.

13 MR. CONWAY: Well --

14 MR. LIVINGSTON: I should also say, Judge,
15 that was a two-and-a-half to five-year sentence. So he
16 actually served -- by serving 34 months, he served four
17 months extra over and above what the minimum sentence
18 was.

19 Pennsylvania system is you are sentenced to a
20 minimum and a maximum and you must serve the minimum
21 before you are eligible for parole.

22 In Mr. Yarbough's case he served the minimum
23 plus. So it would have been 30 to 60, two and a half to
24 five, and he actually served 34.

25 THE COURT: Okay.

1 MR. CONWAY: So we agree that he served 34
2 months on the sentence reflected in Paragraph 34 and if
3 we go to Paragraph 36, he, of course, began his sentence
4 on October of 2013 when he was arrested -- I'm sorry,
5 October of 2012 when he was arrested and then he
6 finished that in March of 2017. So that adds 54 months.

7 So, when we add the 54 months to the 34
8 months, that's how we came to 88 months that I
9 previously told you.

10 THE COURT: But he was sentenced to 60 months
11 but he only did less time because of good time.

12 MR. CONWAY: Right. If you were to give him
13 good time again, essentially by double crediting him,
14 then he would essentially get double the credit for his
15 good time that he served in jail. That's where the
16 issue is.

17 So, he has already gotten that credit for not
18 being a problem in jail. So, if you were to essentially
19 reduce his sentence by the entire 60 months of the
20 sentence here, you would be giving him double credit for
21 the good time that he has served in jail.

22 MR. LIVINGSTON: I think the matter is of
23 statutory construction, Judge.

24 5K2.23, which is the adjustment that you are
25 considering, says that you consider the term of

1 imprisonment, and the term that he was actually
2 sentenced to was 60 months. To the extent there is sort
3 of a policy issue that Mr. Conway suggests he is getting
4 double credit, I don't see it.

5 I see if you don't give him the 60 months, you
6 are sort of creating -- you are making a ruling that
7 creates a disincentive, that takes away an individual's
8 incentive to comply with the rules and regulations of
9 the prison. That's what the whole purpose of 3624 is.

10 But in any event, there was an administrative
11 decision, not a judicial decision, not a court decision,
12 to cut that sentence short, but for all practical
13 purposes and for all legal purposes, he served a
14 60-month sentence.

15 THE COURT: Okay. We've had this matter under
16 advisement for quite a while. I struggled with what the
17 appropriate sentence is because on one hand, the conduct
18 that Mr. Yarbough engaged in is very serious and this is
19 not the first time he has been involved in drug
20 distribution-related conduct. This is the third
21 conviction of this nature and it's a problem obviously
22 because drugs, especially these type of drugs, not only
23 destroy lives but they destroy communities.

24 I have seen it happen in the town I grew up.
25 It has been unfortunately affected by the drug problem

1 and the community is not what it used to be as a result
2 of that.

3 The people that engage in that have to realize
4 there are consequences if you are going to line your
5 pocket with money at the expense of other people, and
6 this is his sixth conviction as an adult and he has
7 several convictions in reference to guns. So, I don't
8 take what he did lightly and think as a result of that,
9 obviously punishment has to be imposed and a message has
10 to be sent to those who are going to do this that there
11 is a price to pay.

12 On the other hand, the system has to be fair
13 and I have to look at what other individuals who were
14 involved in this conspiracy, what their penalties were
15 as a result of their circumstances and several of the
16 individuals, including his brother, actually had a
17 greater involvement than his and played a greater role
18 in this conspiracy than he did.

19 The most significant sentence was Ms. Morgan
20 who received a 250-month sentence.

21 Mr. Thompson who was the leader of the
22 organization before he got arrested, as I recall, was
23 sentenced to 144 months; and his brother who became the
24 head of the organization after Mr. Thompson was
25 incarcerated was sentenced to 180 months.

1 Now, admittedly Mr. Thompson and Mr. Yarbough,
2 Donte Yarbough pled guilty and obviously they get a
3 credit for having acknowledged their culpability in
4 having to save the government the effort of going
5 through the process of preparing this case for trial.

6 Obviously, that's an important factor to take
7 into account but then the question becomes how much of a
8 discount is warranted as compared to what sentence he
9 receives having exercised his Constitutional right to go
10 to trial.

11 Obviously, the statute that governs the
12 factors I have to consider in deciding what the
13 appropriate sentence is says that you should avoid
14 unwarranted disparity, and I think to give a guideline
15 sentence would be totally disparate from what others who
16 are involved in this conspiracy received by way of a
17 sentence.

18 I also think it's important while I don't in
19 any way mitigate what Mr. Yarbough did, the fact that he
20 was only in the community for a portion of the time when
21 this conspiracy was operational. That's not to in any
22 way give him a pass for what he did, but I think it is
23 something I should consider in how much sentence he
24 should receive when compared to other individuals who
25 were involved in the conspiracy, involved for a greater

1 period of time than he was involved, and occupied a
2 position at a higher level than he did.

3 I think it is, as the drafters of the
4 guidelines appreciate, appropriate to take into account
5 a prior sentence and the time the person served in
6 reference to that sentence in assessing whether a
7 downward departure is appropriate, and I do conclude the
8 downward departure is appropriate because, as I say, to
9 give a guideline sentence on top of what he has already
10 done I think would be totally inappropriate and unduly
11 harsh despite the fact the punishment is appropriate.

12 I have to sentence him to, as I understand,
13 120 months. It's the mandatory minimum. I have no
14 option and I would agree with Mr. Livingston --

15 MR. CONWAY: Your Honor, may I address -- I
16 don't want to interrupt you, but I wanted to address one
17 point before you actually impose a sentence. I just
18 want to make sure I have an opportunity to address you
19 before you did that. I didn't want to interrupt you, so
20 I apologize.

21 THE COURT: Go ahead.

22 MR. CONWAY: The one point that I want to
23 address, I'm not sure I made it patently clear thus far,
24 is the notion that there is an incremental culpability
25 associated with Mr. Lance Yarbough that isn't determined

1 in any other case. That's the fact that during relevant
2 conduct here for the gun case, for the first drug case
3 that is considered relevant conduct here he was on bond
4 while he committed the crime you are now sentencing him
5 for.

6 Now, under the sentencing guidelines, that
7 would, if that was a federal case, result in a
8 three-level increase in this defendant's offense
9 category score which would result in a now guideline
10 range of 360 months to life.

11 So, in addition, this defendant committed
12 those crimes while he would have been on parole and
13 after convictions for those relevant conduct crimes,
14 which, if they weren't relevant conduct, and of course
15 they are, but if they were not, would have increased his
16 Criminal History Category score which would have also
17 resulted in him facing 360 months to life in prison.

18 He has essentially gotten a very large break
19 here under the sentencing guidelines by classifying all
20 this as relevant conduct and to basically wipe out and
21 decrease his sentence by the entirety of the amount that
22 he's already served in prison would fail to account for
23 the increased culpability of this particular defendant
24 who committed violations while on bond, while literally
25 a month after his release from a state sentence, neither

1 of which are accounted for under the sentencing
2 guidelines but ought to be accounted for in terms of
3 determining the level of departure that you are
4 obviously prepared to make.

5 So, for example, the sentencing guidelines
6 here, the low end is 292 months. If the three levels
7 were to be increased, he would be looking at a low end
8 of 360 months.

9 If we were to reduce it by the entire 88
10 months, he would be looking at 272 months.

11 So, the amount of departure here is important
12 and to depart all the way down and basically give him
13 day-for-day credit for the time he already served
14 without accounting for the fact that he did this while
15 on bond, while shortly after release would fail to
16 account for the increased culpability reflected in the
17 sentencing guidelines and in Congress.

18 In addition, if you were to go back and
19 calculate this, you would also have to realize, again if
20 these were federal cases, he would have to have a
21 supervised release violation because he would have
22 presumably been released and then committed these
23 violations while on supervised release.

24 So, all of these factors haven't been
25 discussed by you thus far but should militate against

1 sort of the amount of departure that you are prepared to
2 employ here.

3 MR. LIVINGSTON: Your Honor, if I may. There
4 are two points.

5 First of all, I believe that in the
6 presentence report, the presentence report does take
7 into consideration the fact that he was on parole at the
8 time that this happened and that affected his criminal
9 history score in the present case in addition to that.

10 So with that in mind, Mr. Conway's argument
11 with regard to being on parole should not carry any
12 significant weight.

13 With regard to the bond, I think it's really
14 important to stress that Judge Schwab had the possessory
15 case, the second case in the threesome that we have been
16 talking about, and in that case, he actually had a range
17 I believe it was something like 72 months was at the
18 bottom of the range. I can't remember exactly what it
19 was and he had the criminal history matter in
20 consideration and gave him the five years.

21 The bottom line of it is, Judge, that was at
22 that time, it was old and it didn't play a significant
23 part in that sentence and it shouldn't play a
24 significant part in this one.

25 THE COURT: Well, I mean I understand the

1 position the United States takes but it just seems to me
2 at bottom, I have to look at what other individuals
3 involved in this conspiracy, what their punishment was
4 and having worked in the system before guidelines
5 existed and having seen the disparity that existed as a
6 result of that, I'm mindful of the fact that when you
7 give disparate sentences, I think it does adversely
8 affect the system.

9 I can't overlook the individuals involved in
10 the conspiracy for the entire life of the conspiracy,
11 obviously there were things they were doing during the
12 course of the conspiracy they could have been charged if
13 that conduct had been detected as Mr. Yarbough's conduct
14 was but it wasn't.

15 So, I mean, I understand there is a difference
16 in his situation as a result of his circumstances but I
17 just can't come to grips with giving the type of
18 sentence I'm being asked to give by the government
19 considering how disparate that would be from what the
20 sentences of the other individuals involved in this
21 conspiracy received who had greater culpability than
22 what he had as far as the length of the involvement of
23 the conspiracy and the role they played in the
24 conspiracy.

25 Even with the sentence that I'm going to give,

1 he is doing the second most longest sentence of anybody
2 who was involved in this conspiracy. I think he did
3 suffer a consequence for having been arrested in these
4 other cases because I think it's conceivable if it had
5 not occurred, it's possible he wouldn't be doing the
6 amount of sentence that he has to do when you consider
7 the sentence I will give coupled with the time he has
8 already served.

9 I do think the appropriate calculation is to
10 use the amount of time that he actually was sentenced to
11 in assessing how much of a departure is appropriate.

12 While I understand the government's position,
13 I just think that comparing what other people received
14 in their role as compared to his role, which, again, I
15 don't mitigate, the appropriate sentence in this case
16 would be the 120-month sentence taken into account the
17 time that he has already served and him receiving credit
18 for any time he already served in reference to the time
19 he has been detained following the completion of those
20 other sentences.

21 So, my sentence will be 120 months in this
22 case.

23 As far as supervised release is concerned, the
24 law does require that he serve five years at least and I
25 will sentence him to a period of five years supervised

1 release. The conditions of supervised release is that
2 upon his release, he will have to immediately report to
3 the probation department within 72 hours.

4 I assume he will live in this area. He says
5 he plans on returning to his family home. So he will
6 report to the probation office here to let the office
7 know he is back in the community. He needs to be
8 supervised.

9 I will require that he not commit any further
10 criminal offenses whether it be federal, state, or
11 local.

12 Also, that he not possess any type of
13 firearms, any ammunition or any other type of
14 destructive device or dangerous weapons.

15 Also, that he will have to permit his
16 residence and any other property he owns, any vehicles,
17 any papers in businesses and places of employment to be
18 subject to a search by the probation department at a
19 reasonable time and in a reasonable manner and based
20 upon reasonable suspicion in light of the conduct he is
21 involved in to see if he is complying with the
22 conditions of his supervised release.

23 I will also require he be tested periodically
24 to see if he is using drugs and also that he will have
25 to participate in drug treatment if it's felt drug

1 treatment is still something that needs to be imposed,
2 and to the extent he is able to contribute financially
3 to that treatment, I'll require that he do that.

4 Also, I will require that he cannot in any way
5 purchase any type of illegal drugs and obviously can't
6 use illegal drugs.

7 Also, I require he participate in the United
8 States Probation Office's Workforce Development Program
9 and also that he provide a sample of his DNA so if he is
10 involved in further crime, that can be used to identify
11 him.

12 I would conclude he does not have the capacity
13 to pay a fine but he does have to pay \$100 to the court
14 as a special assessment, and if he works while he is
15 incarcerated, a portion of his salary will have to be
16 deducted to pay that.

17 I also will recommend that he receive drug
18 treatment while he is incarcerated and he participate in
19 the Bureau of Prisons Work Program if he is able to get
20 in that program.

21 He indicates a desire to be at a facility
22 where he can learn carpentry and drywall work and if
23 there is such a facility where he can serve his sentence
24 and that's an appropriated classified facility, I would
25 recommend he be permitted to serve his sentence at such

1 a facility and also he be permitted to serve his
2 sentence as close to the Western District of
3 Pennsylvania as possible so he can maintain contact with
4 his family, particularly his son.

5 Mr. Yarbough, you have 14 days from today's
6 date to appeal your conviction and answer to the Third
7 Circuit appeals.

8 If you cannot afford to pay for a lawyer to
9 represent you or cannot for the record pay for papers
10 filed with that court, those expenses will be paid free
11 of charge by the government.

12 MR. LIVINGSTON: If I may. I appreciate the
13 recommendation that he be kept in custody locally. To
14 the extent that might be in conflict with the drywall --

15 THE COURT: That's fine.

16 MR. LIVINGSTON: We understand he would
17 probably ask the Court to give a little bit of a higher
18 recommendation.

19 THE COURT: I'll indicate if there is no
20 facility in close proximity to this district where he
21 can participate in that training, that he be sent to a
22 facility where that training is available.

23 MR. LIVINGSTON: Thank you.

24 May I just for the record preserve all
25 objections?

1 THE COURT: Yes.

2 MR. LIVINGSTON: Thank you.

3 THE COURT: Government, anything else?

4 MR. CONWAY: Just, Your Honor, I know at least
5 the Third Circuit requires us to make certain points
6 with regard to our objections to the sentence and I do
7 that now respectfully.

8 THE COURT: Very well.

9 MR. CONWAY: In terms of an objection,
10 obviously the variance here is extraordinary, perhaps
11 the largest I have ever seen, a 14-year variance between
12 the Advisory Sentencing Guideline Range and the
13 ultimately imposed sentence which, of course, is the
14 mandatory minimum which creates, of course, no incentive
15 at all for defendants to plead guilty prior to trial.
16 So, we certainly object on that ground.

17 We would object because the variance here, to
18 the extent it's based upon the fact that he served time
19 on related offenses, of course fails to take into
20 account the fact that he was on bond and on parole for
21 numerous cases that are reflected in the Presentence
22 Investigation Report.

23 In addition, to the extent it includes credit
24 for good time that he has served with regard to the
25 federal case, that, of course, is essentially giving him

1 double credit for good time which is inappropriate in
2 our view under the circumstances here.

3 To the extent the variance is based upon
4 disparity in sentencing, of course, the sentencing
5 guidelines are designed to provide for lack of
6 disparity. So, to the extent you are varying, you are
7 actually undermining the intent of the sentencing
8 guidelines and in Congress insisting upon you consider
9 the lack of disparity in determining an appropriate
10 sentence. The sentence here -- of course, the analysis
11 is a nation-wide analysis which you have failed in our
12 view to recognize and implement.

13 To the extent the variance is based upon
14 sentences of individuals associated with this
15 conspiracy, the defense has failed to present a record
16 to justify the variance, particularly in an amount
17 that's been provided here.

18 The reasons for the sentences imposed in the
19 other cases as a basis for variances were not
20 established on the record. There was no comparison
21 between the reasons for the variances in those cases and
22 the circumstances of Mr. Yarbough in this particular
23 case.

24 So, if one wants to support a variance
25 argument based upon disparity, they have to show these

1 sentences are comparing apples to apples and when we
2 don't have the apples to compare them to Mr. Yarbough,
3 you can't compare apples to apples. That's essentially
4 the situation here because we don't know the
5 individuals' circumstances that led to the sentences
6 imposed in these various cases because the defense
7 failed to present a record, they failed to present a
8 record to establish the reasons for these variances.

9 So, for those reasons, Your Honor, and for the
10 other reasons we articulated, we object to this
11 sentence.

12 MR. LIVINGSTON: Your Honor, I'm not going to
13 respond to that. I understand Mr. Conway is just trying
14 to preserve the record. To the extent, I would do the
15 same. Our objection is a double jeopardy objection and
16 the calculation of the weight, and in so preserving
17 those objections, I would incorporate all of the things
18 we submitted in writing.

19 THE COURT: Well, I have made the best
20 decision I could. I don't think anybody could accuse me
21 of being a lenient sentencer, that's surely not my
22 reputation, but I do believe in fairness; and like I
23 say, the sentence he received, including that he did
24 serve 94 months, means that his sentence, effectively
25 considering the relevant conduct, is a 214-month

1 sentence.

2 You compare to that what other individuals who
3 were involved in the conspiracy received considering the
4 fact they were involved in the conspiracy during the
5 entire life of the conspiracy and in reference to
6 several of those, including his brother, received
7 significantly higher to his. Mr. Thompson was a good
8 example. He was running this organization before Donte
9 Yarbough took over, and he received a 144-month
10 sentence.

11 I consider all the factors, and I felt it
12 would be an unwarranted disparity to sentence him to the
13 amount of time that the government is asking.

14 I understand why the government is making that
15 request. In some respects, maybe there is a
16 justification for it, but I do believe that fairness and
17 avoiding unwarranted disparity justifies the degree of
18 departure and variance that I imposed.

19 I don't know how much more time Mr. Yarbough
20 will have to be detained but I plan on being around for
21 a long time and if he doesn't do what he is supposed to
22 do when he gets out, I'll make sure a lot more time,
23 maybe the rest of his life be spent in prison.

24 So, it's up to him to change his conduct, try
25 to be a father to this kid he has, and try to be a

1 useful citizen in society rather than someone who has
2 been taking from society as has been his history.

3 So, I appreciate the position taken by both
4 parties but that is what I think is the fair and
5 appropriate sentence.

6 Anything else?

7 MR. CONWAY: No.

8 MR. LIVINGSTON: No, Judge.

9 (Whereupon, the above sentencing hearing was
10 concluded at 2:30 p.m.)

11 - - -
12

13 I hereby certify by my original signature
14 herein, that the foregoing is a correct transcript, to
15 the best of my ability, from the record of proceedings
16 in the above-entitled matter.

17

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19 S/ Karen M. Earley

20 Karen M. Earley

21 Certified Realtime Reporter

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