

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America

Respondent/Plaintiff

vs.

John Constantine Golfis

Appellant/Defendant

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Criminal Case No.: 09-MJ-00108-RHK

**APPELLANT'S
BRIEF**

Pursuant to 18 U.S.C. § 3402 and Rule 58(g)(2)(B), FED. R. CRIM. P., the Appellant/Defendant John Constantine Golfis ("Golfis") hereby submits this, his Brief in Support of his appeal from a final criminal judgment.

Imposition of the maximum sentence in the context of a plea agreement is overly harsh and does not serve the interests of justice. Further the sentence orders monthly restitution which exceeds Defendant's net monthly cash flow by a factor of three. Golfis therefore respectfully requests that this Court vacate the judgment and sentence imposed by the Court below, and remand the matter for re-sentencing.

I. FACTUAL BACKGROUND

Golfis was charged with a single violation of failure to pay child support on March 26, 2009, a misdemeanor in violation of 28 U.S.C. § 228(a)(1) and (c)(1). *See* Information (ECF Doc. #1, filed 3/26/09). Golfis reached a plea agreement with the United States which required him to pay \$1,000 per month to reduce his outstanding child support obligation, imposed a period of five years of supervised release, and permitted the Probation Office to increase his monthly payments if they determined he was able to pay more. *See* Plea Agreement (ECF Doc. #10, filed 4/30/09). The Plea Agreement set forth certain financial disclosure requirements. *Id.*

Sentencing took place on August 12, 2009, before Magistrate Judge Franklin L. Noel. All parties agreed that the sentencing guidelines do not apply because the underlying offense is a Class B misdemeanor. *See* Transcript of Sentencing, at 3, ll. 17-18 (ECF Doc. #19, filed 8/17/09). At sentencing, Magistrate Judge Noel determined that Golfis had not fully complied with the financial disclosure requirements of the plea agreement. *Id.*, at 7, ll. 6-10. For that reason, and in light of Golfis' prior criminal record, Magistrate Judge Noel imposed the maximum possible sentence on Golfis. *Id.*, at 7, ll. 11-16.

Final judgment was entered on August 14, 2009. *See* Judgment (ECF Doc. # 17, filed 8/14/09). This appeal followed on August 19, 2009. *See* Notice of Appeal (ECF Doc. # 20, filed 8/19/09).¹

I. STANDARD OF REVIEW

All sentences, "whether inside or outside the Guidelines range, [are reviewed] under a deferential abuse of discretion standard." *United States v. Pepper*, 518 F.3d 949, 951 (8th Cir.), *cert. denied*, 129 S.Ct. 138 (2008) (citing *Gall v. United States*, 128 S.Ct. 586, 597 (2007)). The first question is whether the district court committed a significant procedural error. *Id.* Such errors might include "failing to consider the § 3553(a) factors... or failing to adequately explain the chosen sentence...." *Gall*, 128 S.Ct. at 597. Any factual findings are reviewed under a "clear error" standard, but application of sentencing factors is reviewed *de novo*. *United States v. Blankenship*, 552 F.3d 703, 704 (8th Cir. 2009).

II. GOLFIS' SENTENCE WAS EXTREME AND SHOULD BE VACATED

Imposition of the maximum sentence in response to a pre-sentence probation violation violates common sense, interferes with the orderly administration of justice, and

¹ After this appeal was commenced, an Amended Judgment was entered by the court below on August 27, 2009, *see* ECF Doc. #23. There are no textual changes from the original judgment, and all substantive issues remain subject to appeal.

violates applicable law governing sentencing. A maximum sentence under these facts is an abuse of discretion.

A. The Sentence Violates 18 U.S.C. § 3553(a).

The court below did not properly consider the sentencing factors established in 18 U.S.C. § 3553(a). That statute provides as follows:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—

The court shall impose a sentence **sufficient, but not greater than necessary**, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

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

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

18 U.S.C. § 3553(a) (emphasis supplied). The sentence imposed violates nearly all of the provisions outlined in § 3553(a).

Firstly, the sentence undermines the very purpose of the substantive statute - creating an incentive for the payment of child support. Golfis entered a plea agreement in which he agreed to pay \$1,000 a month or more, depending on his income, while under supervision for a period of five years. This agreement would have facilitated repayment

of some percentage of the outstanding child support. Instead, the court below imposed a sentence of six months' imprisonment, with no supervised release. Golfis is not paying child support while in prison, and his economic ability to do so will be less favorable after his release than it was before his incarceration.

The sentence imposed by the Court below also makes it more difficult for the government to enforce the relevant statute. The sentence as imposed puts Golfis under an obligation to make restitution, but once released he will not be supervised or otherwise monitored. After Golfis' release the government will lack the authority to monitor his steps to make restitution. The government's remedy will be to initiate a new investigation, file an additional criminal charge, and repeat the steps which it has already taken.

Second, the sentence is undoubtedly "greater than necessary" under the terms of § 3553(a). Golfis entered into a plea agreement and voluntarily pled guilty. Imposition of the maximum sentence in response to violation of a plea agreement gives Golfis no credit for his initial decision to cooperate. Nor does it give Golfis any incentive to cooperate in the future. A maximum sentence should be reserved for situations where the Defendant has willfully resisted every effort at cooperation, not in the present case where some (but not full) cooperation occurred.

Giving Golfis an incentive to cooperate in the future is necessary under the facts of this case. There is nearly \$400,000 in back child support remaining to be paid. *See* Final Judgment, at 3 (ECF Doc. #17, filed 8/14/09). Golfis and the government will

undoubtedly be in contact with each other in the future about restitution and repayment of this amount. Golfis may well conclude that, if any violation of the plea agreement results in the maximum sentence, there is no point in attempting to comply at all. Instead of achieving justice, the maximum sentence imposed by the court below will drive Golfis into the underground economy, or back into prison, or both. For that reason, the maximum sentence violates all four elements of § 3553(a)(2): it does not promote respect for the law, it does not deter future criminal activity, and it does not protect the public from future wrong-doing.²

Golfis did not fully comply with the pre-sentence probation requirements, and undoubtedly he needed to suffer a consequence for his failure to do so. However, imposition of the maximum sentence is simply greater than necessary under 18 U.S.C. § 3553(a).

For these reasons, Golfis moves that the Court vacate the sentence imposed by the trial court, and remand the case for re-sentencing to properly account for the sentencing factors established in 18 U.S.C. § 3553(a).

² This analysis might be different for a 10 or 15-year sentence, where incarceration itself would prevent future criminal acts. But a six month maximum sentence is the worst of both worlds -- it teaches the defendant that cooperation is pointless, and then a short time later releases him unsupervised into society.

B. The Sentence Contains Fatal Errors of Fact Regarding Golfis' Finances.

The court below badly miscalculated Golfis' financial situation when ordering restitution. Magistrate Judge Noel ordered as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of \$5,000 due immediately, balance due . . . in accordance [with subpart] D below; . . .

D ☒ **Payment in equal monthly installments of \$5,000.00 over a period of 78 months, to commence 30 days after release from imprisonment.**

Final Judgment, at 4 (ECF Doc. #23) (emphasis added).

The court below has mistakenly assessed Golfis' ability to pay. \$5,000 per month is over three times more than Golfis' estimated net monthly cash flow. *See* Presentence Investigation Report, §§ 34-35, at 22-23 (net monthly cash flow estimated at \$1,580). \$5,000 a month also exceeds the total gross income that Golfis and wife jointly reported in 2006, 2007, and 2008. *Id.*, ¶ 36, at 24 (joint total gross income from 2006-08 averages \$3,195.75 - calculated from annual adjusted gross income).

For this reason, Golfis hereby moves that the sentence and judgment of the trial court be vacated, and the matter be remanded for re-calculation of monthly restitution payments reasonable under the circumstances.

III. GOLFIS MOVES FOR RELEASE FROM CUSTODY PENDING RE-SENTENCING

Golfis now vividly understands now what the consequences of non-cooperation on financial disclosure are. As of this writing Golfis has already served one-sixth of the maximum possible sentence.

Any further procedural delays in this matter run the risk of making this appeal moot – Golfis could well serve over half of an excessive sentence by the time remand and re-sentencing have occurred. Further incarceration pending re-sentencing, after an appellate determination that the initial sentence was too harsh, would be unjust and inappropriate.

For that reason, if the Court remands this matter for re-sentencing Golfis respectfully requests that it also order his immediate release from custody pending re-sentencing.

CONCLUSION

A maximum sentence in response to a plea bargain makes no sense in a child support case - it deters defendant's cooperation and prevents him from attempting the necessary restitution.

Golfis therefore respectfully requests that this Court vacate the sentence and judgment in this matter, remand it to the court below for re-sentencing, and order his release from custody pending re-sentencing.

Respectfully submitted,

GREGORY A. ABBOTT, ESQ.

Dated: September 15, 2009

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