

An extraordinary thing happened in the case of *United States v. Edward Vrdolyak* 593 F.3d 676 (7th Cir.2010). A semblance of justice prevailed. For those who do not read the papers or recently returned from a trip to Mars, former Chicago alderman Edward Vrdolyak pleaded guilty to arranging a \$1.5 million kickback in a real estate development scheme, although the scheme was interrupted before the kickback could be paid. He was sentenced by Judge Milton Shadur to five years probation and 2500 hours of community service. The sentence was overturned by the 7th Circuit in an opinion by Judge Richard Posner, which described the sentence as a "slap on the wrist." The case remanded for re-sentencing, but before a different judge because Judge Posner saw Judge Shadur as having "irrevocably committed himself to a noncustodial sentence." Judge David Hamilton dissented, arguing that Judge Shadur's sentence was entirely reasonable and should have been affirmed.

The case was re-assigned in the district court to Judge Matthew Kennelly. Even with the Posner opinion hanging over him and the government strongly arguing for 41 months imprisonment, on October 15, 2010, Judge Kennelly re-sentenced Vrdolyak to 10 months incarceration, plus five months work release and five more months of home detention. It appears that the government will not appeal again.

Since *Booker, Gall*, and their progeny, district court judges have gained considerable authority in the imposition of criminal sentences. And because of this loosening of the straight jacket of the Sentencing Guidelines, defense counsel are no longer potted plants. Now we now have a genuine opportunity to try to convince district judges to exercise their authority to impose truly reasonable sentences under 18 U.S.C. §3553(a) . However, most of us have had mixed results, depending primarily on which judge our clients have drawn.

The Vrdolyak case is instructive on how to obtain a more favorable result now, even in

face of opposition like Judge Posner's opinion. First, however, the case warrants closer examination. The sentencing record is voluminous, and includes multiple sentencing memoranda by both sides with many attachments, an extended sentencing hearing, and even post sentencing "offers of proof."

The majority 7th Circuit opinion summarizes the facts of the case as follows:

The Chicago Medical School...wanted to sell a property in Chicago that it owned consisting of a lot with a building on it. Stuart Levine was a trustee of the medical school and the chairman of the board's real estate committee, and he agreed with the defendant (Vrdolyak) to use his position as a trustee to steer the sale of the property to a buyer of the defendant's choice. The defendant lined up Smithfield Properties to be the favored buyer in exchange for a \$1.5 million fee that Smithfield agreed to pay him, and he in turn agreed to give Levine half the fee. The medical school was not told about this corrupt arrangement.

The opinion describes Judge Shadur's disposition of the case as follows:

Edward Vrdolyak pleaded guilty to conspiracy to commit mail and wire fraud and agreed in the plea agreement that the intended loss was between \$1 million and \$2.5 million. He was sentenced to five years of probation, with a community-service obligation but no confinement, and to pay a \$50,000 fine (a modest amount, because the defendant had a high income and a net worth in excess of \$1 million if his large loans to members of his family are included).

In a hint as to where he is going, the Judge Posner denigrates the \$50,000 fine, but neglects to mention that the community service component consisted of 2500 hours of community service.

Distilled from the various pleadings, the facts appear to be that Vrdolyak and Levine decided to bring to fruition the sale of the building. Vrdolyak located Smithfield Properties, which initially offered \$9.5 million. Two other interested parties, the Farley Group and Loyola University, offered more. Vrdolyak contacted Smithfield and told them to substantially increase their offer. Levine then arranged for a meeting of the Chicago Medical School ("CMS") board on June 5, 2003, to approve the sale of the building. Judge Shadur found that each interested

party was told to present their "best offer" before the June 5 board meeting. The final offers were: 1) Smithfield Properties, \$15 million; the Farley Group, \$15 million, but with CMS to pay a 4% commission to Farley's broker, rendering it effectively a \$14.4 million offer; and 3) Loyola University, \$15.5 million, but subject to Loyola University board approval (there was no indication that the Loyola board had even discussed the project).

Finally, there was the Smithfield kickback to Vrdolyak, which could be construed to mean that Smithfield would have been willing to pay more. But defense counsel represented, without apparent refutation, that the kickback payment was to be made only after the redevelopment had been completed by Smithfield and after Smithfield had made its profit. Therefore, how much, if anything, Smithfield was willing to pay up front was not self-evident. The government argued that a week after the June 5 meeting, the Farley Group increased its offer to \$16 million. Judge Shadur dismissed that offer, stating, "by pointing to that after-the-fact submission the government has simply attempted to add to its earlier reliance on the uncommunicated asserted mindset of the Farley Group as of the June 5 CMS board meeting. That effort - a kind of post hoc, ergo propter hoc contention - carries no persuasiveness."

Judge Posner found that Farley and Loyola would have paid more, based on communications made after the June 5 meeting. There was no disputing that all parties had been told to make their "best" offer by June 5, or that the entire CMS board, not just Stuart Levine, voted to accept the Smithfield offer on June 5. Judge Posner did acknowledge that "whether in an honest bidding process the school would have obtained more than \$15 million from Farley or Loyola or perhaps from some other potential buyer cannot be determined with certainty..."

Judge Shadur based his guidelines calculation and then his sentence on the finding that there was no loss because Vrdolyak was trying to get the highest price for the school, so that he

and Levine would get the highest kickback. But Judge Shadur added that even if there had been a \$500,000 loss, he would have imposed the same sentence. In his dissent, Judge Hamilton concluded that even though a loss amount could not be reliably determined, Judge Shadur should have based an intended loss amount on the \$1.5 million gain to the defendant, which Judge Posner also posits as an alternative means of calculating the loss. But Judge Hamilton concludes that that error resulted in only a two point reduction in Vrdolyak's guidelines, which constituted harmless error.

Judge Hamilton went on to describe Judge Shadur's sentencing process. It is a bit lengthy, but worth reading:

At the end of the lengthy sentencing hearing in this case, the district judge addressed the factors and purposes under section 3553(a). He explained how and why he had concluded that a sentence of five years' probation (which was above the guideline range he had calculated), plus 2500 hours of community service and a fine, was sufficient but not greater than necessary to serve those purposes. The defendant committed a serious crime, but there were a number of factors that the district court could and did consider in mitigation. The defendant is 71 years old, had no prior criminal record, and posed little risk of repeat offenses. He had given up his law license. The crime of fraud did not involve violence, and there was no element of public corruption. The defendant had agreed to help a friend by committing the crime, but was not the instigator of the crime and did not actually benefit from it. The district court was also impressed by the a surprising volume of information showing the defendant's character was very different from his public image in the media. That information showed generosity with time, money, and influence to help people in need, especially where the defendant had no moral or other obligation to help them and where he received no publicity or recognition for his kindness. That is not the entire picture, of course, but those are all factors that could reasonably lead the district court to exercise its discretion under section 3553(a) to impose the sentence that it did.

So why was Judge Posner so unhappy with the sentence, if Judge Shadur was as thorough as Judge Hamilton describes. To find the answer, you have to listen to the oral argument. It quickly becomes apparent that Judge Posner had concluded Judge Shadur was determined before the sentencing hearing "to give a particular sentence," namely probation. He then asks

rhetorically, "What significance does a sentence of probation have? It's nothing...It deprecates the significance of the crime," adding that, after all, Vrdolyak was "not an illiterate drug pusher."

Judge Posner then attacked Judge Shadur's §3553(a) analysis, particularly his reliance on the letters in support. These are the letters Judge Hamilton describes above, and about which Judge Hamilton further wrote, "the letters that impressed the court the most were those addressing private actions that were not designed to help the defendant himself, in his private or public life," such as letters that "described several instances in which the defendant intervened to enable needy people to obtain life-saving medical care that was not otherwise available to them." Judge Posner nevertheless called the letters "ridiculous." He said, "anyone who is prominent can gin up a lot of letters." He then asked, "How can the government check up" on the letters? "Are they going to go to someone who writes a letter and quiz the person? That would be very intimidating behavior. I don't think there is any way they can verify the letters." Where do I start in responding to that. In my experience, the only question is whether the F.B.I. would be knocking on the doors of the letter writers within hours or within days of the government learning of the letters. In how many cases have we been unable to get witnesses to come forward, at sentencing or at trial, out of fear of government retaliation? While Judge Posner can admirably opine on the major issues of the day such the collapse of the national economy or the threat posed by global terrorism, his level of naivete with respect to how the real world works with real people is not exactly a secret, but it is hard to find a better example than this. Moreover, he can be perceived as harboring a certain bias, having written that it is his role as a judge to free markets (in civil cases) and to imprison criminals.

Finally, the majority opinion states, "And in fairness to the government, which is entitled to the same consideration as other litigants, the resentencing should be by a different judge."

The opinion adds that Judge Shadur "repeatedly expressed his anger with the government's lawyers over matters that did not warrant anger...." And the majority (Judges Posner and Manion) criticizes Judge Shadur for announcing near the outset of the sentencing hearing his inclination to impose a non-custodial sentence. Judge Hamilton, a recently elevated district court judge, responded to this criticism, stating that it:

fails to acknowledge how much work the parties and the district court had put into the sentencing decision before the hearing itself....Having done such extensive preparation, it would have been unusual for the judge not to have had a good idea how he intended to sentence the defendant, and why, at the beginning of the sentencing hearing.

Second, the fact that the judge signaled his informed inclinations early in the hearing does not call for criticism. Most lawyers appreciate knowing more rather than less about the judge's thinking while there is still an opportunity to persuade the court.

For the re-sentencing before Judge Kennelly, both parties filed new sentencing memoranda, essentially reiterating their prior positions. The government asked for the high end of the 32-41 month Sentencing Guideline range, and the defense suggested that probation would still be appropriate. Judge Kennelly heard 90 minutes of argument in the morning. He then came back in mid-afternoon and imposed a sentence of 10 months incarceration, plus 5 months work release, to be followed by 5 months of home detention. A fine of \$250,000 was imposed. No community service was ordered. Vrdolyak had already performed much of the 2500 hours ordered by Judge Shadur, although there was some public controversy over Vrdolyak assisting with a charity benefit held at the upscale Gibson's restaurant as a part of that community service.

The press reported that Judge Kennelly stated in imposing sentence that, "Mr. Vrdolyak is someone who has acted in a venal way...as a criminal, but he has also acted to help out powerless people....time and again." In short, Judge Kennelly, like Judge Shadur, balanced the defendant's criminal conduct and the mitigating factors presented by defense counsel.

So how is a criminal defense lawyer to deal with the Judge Posners that we face? He clearly accorded Judge Shadur's findings of fact no deference. Rather, working from the government's take on the facts, Judge Posner decided *do novo* how he would have sentenced Vrdolyak if he were the district judge. He then wrote an opinion skewing the facts to support that sentence (namely, a substantial period of incarceration). Finally, to insure that the sentence dictated by the court of appeals opinion would be imposed on remand, he ordered that a new district judge be assigned.

The clearest lesson from this case is that defense counsel has to strive mightily to convince the judge to see the defendant as a whole person, who has done at least one bad thing, but who also has done good things in his life, and who has real potential to rejoin society as a productive member. Too often our clients are sentenced almost entirely on the basis of the crime they have just committed. In this case, both Judge Shadur and Judge Kennelly sentenced a whole person who had committed a crime, whereas Judge Posner reviewed the appeal of only the "criminal."

Judge Kennelly may have gotten the balance better than either the 7th Circuit or Judge Shadur. While Judge Posner focused almost exclusively on the offense, Judge Shadur may have given too little heed to the requirement that judges "avoid unwarranted disparities among defendants...who have been guilty of similar conduct." How often does a defendant receive probation for a \$1.5 million fraud scheme? That is not to say that Judge Shadur was not acting within his discretion. Judge Hamilton's dissent is very persuasive. But if we are honest we must recognize a legitimate concern about a public perception of a high and mighty defendant having gotten off a bit too easily.

Nevertheless, it is clear that both Judge Shadur and Judge Kennelly dispensed

individualized justice. The district judges were able to address the whole person before them. And this was because defense counsel had arranged for, *inter alia*, some 48 letters to be written to the court which described the defendant's good works, for most of which he received no public credit or personal benefit. We do not all have clients with that potential, but almost all clients have mitigating factors in their cases and mitigating aspects to their backgrounds. This case shows why it is so important for defense counsel to identify those positive attributes and to get them before the court, with a legal argument showing how under §3553(a) they justify a sentence well below the low end of the applicable guideline range.

This case hearteningly demonstrates that there are receptive district court judges out there.