United States of America
First Circuit Court of Appeals

NO. 19-2140

UNITED STATES OF AMERICA

Appellee,

v.

JOSEPH CROCCO

Defendant/Appellant.

APPEAL FROM NEW HAMPSHIRE DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT, JOSEPH CROCCO

July 21, 2020

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
1st Cir. Bar No. 33963

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On September 25, 2018, Joseph Crocco was found guilty after a jury trial in the United States District Court for the District of New Hampshire, of bank robbery, contrary to 18 U.S.C. § 2113(a).

On October 30, 2019, the court (*Joseph A. DiClerico, Jr.*, J.), sentenced Mr. Crocco to 144 months committed, plus three years of supervised release.

A notice of appeal was filed on November 5, 2019.

STATEMENT OF ISSUES

I. Did the sentencing court err in applying a 2-point sentencing enhancement, when Mr. Crocco was not under a "criminal justice sentence" for a prior crime, pursuant to USSG § 4A1.1?

II. Did the sentencing court err in deeming Mr. Crocco a career offender when his prior conviction was not a "controlled substance offense"?

III. Did the sentencing court err in sentencing Mr. Crocco as a career offender when his prior crime was committed just four months after his 18th birthday?

IV. Did the court unjustly sentence Mr. Crocco when his career offender status was based on antiquated marijuana laws?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Unarmed Bank Robbery

The government alleged that on December 21, 2017, the defendant approached the desk at the Service Credit Union, housed inside the Walmart in Hinsdale, New Hampshire, and handed the teller two notes threatening to explode a fictitious bomb. *Trial Day 2* at 25-28. The unarmed robbery netted the robber $2,709.

At trial, the government alleged Mr. Crocco was identified in video pictures of the robbery, *Trial Day 2* at 116-17, 186, which the government corroborated by the presence of the defendant's belongings in a car stuck in snow near the scene, *Trial Day 2* at 75, 118, 144, 195-96, and by police in Poughkeepsie, New York, Mr. Crocco's hometown, who recognized photos of him. *Trial Day 2* at 152-53, 161-66, 181-85.

II. Criminal History and Sentencing

In 1995, Mr. Crocco was convicted of voluntary manslaughter in North Carolina, for an incident that occurred in September 1994. He pled guilty and served about 10 years. PRE-SENTENCE INVESTIGATION REPORT [PSR] ¶ 35 (Oct. 22, 2019) (contained in sealed appendix). As Mr. Crocco was born in April 1976, *id.* at 2, his age at the time of the crime was 18 years and 4 months. Mr. Crocco is now in his mid-40s.

In 2011, Mr. Crocco was convicted in Virginia of possession of marijuana with intent to distribute, for which he was sentenced to "10 years imprisonment, 9 years suspended for 10 years of good behavior, 1 year of which includes supervised probation…." PSR ¶ 47.

These convictions affected Mr. Crocco's sentence in two ways.[1]

First, based on the 2011 Virginia conviction, the court augmented Mr. Crocco's sentence on its determination that, pursuant to USSG § 4A1.1(d), "[t]he defendant committed the instant offense while under a criminal justice sentence." PSR ¶¶ 49-50.

Second, considering the 1995 North Carolina conviction and the 2011 Virginia conviction together, Mr. Crocco was deemed a career offender, pursuant to USSG § 4B1.1(b)(3).

Consequently Mr. Crocco's offense level was elevated from 24 to 32 points, and his criminal history category inflated from III to VI, USSG § 4B1.1(b), resulting in a much lengthier sentence calculation.

The court sentenced Mr. Crocco to 144 months, committed. VERDICT (Sept. 25, 2018), *Addendum* at 31; JUDGMENT IN A CRIMINAL CASE (Oct. 30, 2019), *Addendum* at 24; *Sent.Trn 2* at 29.

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[1] "The court adopts the presentence investigation report without change." STATEMENT OF REASONS (Oct. 30, 2019) ¶I.A.

SUMMARY OF ARGUMENT

Joseph Crocco first argues that, because there was no proof that he actually served time in prison for a prior crime, he was not under a "criminal justice sentence" for the purposes of USSG § 4A1.1, and that his sentence is therefore unconstitutionally unreasonable.

Second, he argues that his prior conviction was not a "controlled substance offence" for the purposes of USSG § 4B1.1, and he was therefore unlawfully deemed a career offender.

Mr. Crocco contends that he should not have been labeled as a career offender based on a long-ago conviction that occurred just past his 18th birthday.

Mr. Crocco also argues that his sentence was over-long because he was categorized as a career offender based on antiquated marijuana laws.

Mr. Crocco requests his case be remanded for re-sentencing.

ARGUMENT

I. Mr. Crocco Was Unlawfully Sentenced Because He Was Not Under a "Criminal Justice Sentence" at the Time of Sentencing

The sentencing guidelines provide that a defendant attains an extra two criminal history points "if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence." USSG § 4A1.1(d). The commentary on the rule provides:

> Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. … For the purposes of this subsection, a "criminal justice sentence" means a sentence countable under § 4A1.2 … having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included.

USSG § 4A1.1, cmt. (n.4)

Courts have come to various results on whether a prior sentence is a "criminal justice sentence" for purposes of USSG § 4A1.1, depending upon the specific terms of the prior sentence. In *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993), for example, the court held that "a suspended sentence, standing alone without an accompanying term of probation, is not a 'criminal justice sentence.'" *Id.* at 1467. In *United States v. Delgado-López*, 837 F.3d 131, 135 (1st Cir. 2016), this court presumed that

a sentence which included probation is a criminal justice sentence.[2]

The Fourth Circuit, wherein occurred Mr. Crocco's marijuana conviction, has construed Virginia's statute. Its precedent shows that probation alone, without a preceding period of actual incarceration, does not count as a criminal justice sentence. In *United States v. Brown*, 909 F.3d 698 (4th Cir. 2018), the Fourth Circuit held that a sentence suspended upon the condition of "good behavior," is a criminal justice sentence under USSG § 4A1.1 because the defendant "was still subject to the authority of the state court, which could revoke the suspended sentence if [he] violated the good behavior condition." *Id.* at 700. However, in *United States v. McCrary*, 887 F.2d 485 (4th Cir. 1989), the Fourth Circuit limited that holding to defendants who "have actually served a period of imprisonment" for the prior crime – a limitation with which the Government agreed. *Id.* at 489.

In Mr. Crocco's case, however, the record contains no indication that Mr. Crocco actually served a period of imprisonment for the Virginia possession conviction. The PSR – the only source of information in the

[2]In *United States v. Jones*, 778 F.3d 375, 386 (1st Cir. 2015), the defendant did not dispute whether "a supervised release term is a criminal justice sentence." *See also United States v. Gonzalez Vasquez*, 719 F.3d 1086 (9th Cir. 2013); *United States v. Franco-Flores*, 558 F.3d 978 (9th Cir. 2009); *United States v. Cruz-Alcala*, 338 F.3d 1194 (10th Cir. 2003); *United States v. Gorman*, 312 F.3d 1159 (10th Cir. 2002); *United States v. Norman*, 129 F.3d 1393 (10th Cir. 1997); *United States v. Labella-Scuba*, 92 F.3d 136 (2nd Cir. 1996); *United States v. Miller*, 56 F.3d 719 (6th Cir. 1995); *United States v. Johnson*, 43 F.3d 1211 (8th Cir. 1995); *United States v. Lloyd*, 43 F.3d 1183 (8th Cir. 1994); *United States v. v. Vela*, 992 F.2d 1116 (10th Cir. 1993); *United States v. Caputo*, 978 F.2d 972 (7th Cir. 1992).

record – is silent on the matter.[3] It is the government's burden to prove prior convictions used to enhance sentences, *See United States v. Thomas*, 749 F.3d 1302, 1315 (10th Cir. 2014), and the court cannot presume facts about them. *See United States v. Denton*, 598 F.3d 1206 (9th Cir. 2010); *United States v. Jackson*, 368 F.3d 59 (2d Cir. 2004).

Because the government failed to offer evidence that the defendant served time for the Virginia conviction, the sentencing court did not have authority to impose 2 points under USSG § 4A1.1(d). Accordingly, this court should remand for re-sentencing.

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[3]PSR ¶47, provides:

08/15/2011 (Age 35)	1. Misdemeanor Concealed Weapon 2. Misdemeanor Petit Larceny 3. Possession of Marijuana with the Intent to Distribute Greensville County (VA) Circuit Court Docket No.: CR11011345-00, 01 & 02	06/05/2012: Pled guilty; 1 & 2. 12 months HOC, suspended for 3 years; 3. 10 years imprisonment, 9 years suspended for 10 years of good behavior, 1 year of which includes supervised probation, to run consecutively to count 1, $250 fine, license suspended for 6 months, 1 year probation.	4A1.1(b)

The defendant was represented by counsel. Counts 1 and 2 originally charged Possession of a Firearm by a Convicted Felon and Larceny of a Firearm. The original charging documents alleged that on August 15, 2011, the defendant purchased a firearm with the knowledge that it had been previously stolen and unlawfully possessed marijuana with the intent to distribute. He was arrested on the same day.

II. Mr. Crocco Was Unlawfully Sentenced Because His Prior Virginia Marijuana Conviction Was Not a "Controlled Substance Offense"

To qualify as a career offender, the defendant must have "at least two prior felony convictions of either a crime of violence or a *controlled substance offense*." USSG § 4B1.1(a)(3) (emphasis added).[4]

Mr. Crocco's was deemed a career offender based in part on his 2011 Virginia conviction of Possession of Marijuana with the Intent to Distribute. PSR ¶¶ 28, 47.

In Virginia, however, possession or distribution of marijuana is not a "controlled substance offense." Rather, Virginia has a statute regulating possession and sale of "controlled substances," VA. CODE ANN. § 18.2-250, *addendum* at 32, and another statute separately regulating possession and sale of marijuana. VA. CODE ANN. § 18.2-250.1, *addendum* at 33. *See United States v. Cooper*, 19 F.3d 1430 (4th Cir. 1994). While it is apparent that Virginia regulates marijuana, the Commonwealth does not consider it a "controlled substance." *See Ruplenas v. Commonwealth*, 275 S.E.2d 628, 630 (Va. 1981) ("Prior to July 1, 1979, marijuana was a Schedule I controlled substance and penalties regarding its possession, sale, and other related offenses were contained in Code § 18.2-248. The 1979 General Assembly chose to treat marijuana offenses separate from other controlled-substance violations and accordingly added § 18.2-248.1

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[4]The sentencing guidelines provide:

> The term "controlled substance offense" means an offense under federal or state law, … that prohibits the … distribution, or dispensing of a controlled substance … or the possession of a controlled substance … with intent to … distribute, or dispense.

USSG 4B1.2. Because the definition is tautological in this context, it is not enlightening.

to the Code.").

Accordingly, Mr. Crocco's Virginia conviction is not a "controlled substance offense." *United States v. Townsend*, 897 F.3d 66, 70 (2d Cir. 2018) (whether federal appellate courts defer to state law categorization of controlled substance); *see also United States v. Mulkern*, 854 F.3d 87 (1st Cir. 2017) (predicate crimes neither "violent felony" nor "serious drug crime"). He was therefore unlawfully categorized as a career offender, and this court should remand for re-sentencing. *See United States v. Dávila-Félix*, 667 F.3d 47 (1st Cir. 2011) (drug offense not qualify as predicate in bank robbery sentencing); *United States v. Kovac*, 367 F.3d 1116 (9th Cir. 2004) (similar).

Further, while marijuana was not a "controlled substance offense" in Virginia, it is no longer even a crime. As of July 1, 2020, Virginia decriminalized marijuana. VIRGINIA HB-972ER2 (signed by Governor on May 22, 2020, effective July 1, 2020), *addendum* at 34. Because the sentencing statute directs that "[t]he court shall impose a sentence sufficient, but not greater than necessary," 18 U.S.C. 3553(a), it is unjust and unreasonable to hold Mr. Crocco accountable for conduct which is no longer a crime. *See United States v. Villanueva*, 821 F.3d 1226, 1240 (10th Cir. 2016) (whether to discard prior marijuana conviction in calculation when marijuana was legalized elsewhere but criminalized locally).

III. Mr. Crocco's North Carolina Offense, Occurring Barely Beyond his 18th Birthday, Should Have Been Ignored for Career Offender Analysis

Mr. Crocco's 1995 North Carolina conviction stemmed from an incident that occurred when he was just four months past his eighteenth birthday, while Mr. Crocco was in the company of two much older men. PSR ¶ 35; DEFENDANT'S SENTENCING MEMORANDUM (Oct. 21, 2019) at 10. There is no further information in the record regarding Mr. Crocco's role in the offense, how the crime was allegedly committed, or any other circumstances surrounding the incident.

Mr. Crocco was originally charged with felony-murder, which under North Carolina law, was punishable by the death penalty or life in prison. N.C. GEN.STAT. § 14-17(a)[5]; *State v. Cherry*, 257 S.E.2d 551 (N.C. 1979) ("[T]he Legislature has left no doubt that the death penalty is available upon a felony murder conviction."); *State v. King*, 340 S.E.2d 71, 74 (N.C. 1986) (felony-murder statute applies to wide range of felonies).

Ultimately, Mr. Crocco pleaded to voluntary manslaughter when he was just 19. PSR ¶ 35.

The United States Supreme Court has commented on the quandary of youthful offenders:

- "[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."

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[5]N.C. Gen. Stat. § 14-17(a) ("A murder which shall be … committed in the perpetration or attempted perpetration of [specified crimes], or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, … and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine.").

- "[A]dolescents are overrepresented statistically in virtually every category of reckless behavior."
- "[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.
- "[J]uveniles have less control, or less experience with control, over their own environment."
- "[T]he character of a juvenile is not as well formed as that of an adult."
- "The personality traits of juveniles are more transitory, less fixed."
- "The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult."
- "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."
- "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."
- "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."
- "[T]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."

Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (quotations and citations omitted). Further, "the science and research" relied on by the Supreme Court in *Roper,* "refused to identify a bright-line 18th-birthday cutoff but showed there was a continuum lasting until the early 20s." Kenneth M. Streit & John T. Chisholm, *Expand Sentencing Options for Young Adults*, WIS. LAW. (May 2013) at 38, 40-41.

These observations suggest it is unlawful and unconstitutional for a court to sentence based on adolescent transgressions, especially here where the defendant has exactly two predicate offenses, his youthful crime was 23 years before the instant offense and 17 years before the second career offender predicate – hardly making crime Mr. Crocco's "career." *See, e.g., United States v. Howard*, 773 F.3d 519, 531 (4th Cir. 2014) (error to ground career offender status for 40-year-old man by excessive focus on adolescent offenses); *United States v. Naylor*, 359 F. Supp. 2d 521, 525 (W.D. Va. 2005) ("[T]echnical distinctions concerning age, which have such ramifications for the ultimate sentence, persuade [sentencing court to] not apply the career offender enhancement.").

Accordingly, this court should remand, with direction that Mr. Crocco should be re-sentenced, ignoring his youthful conviction for career offender analysis.

IV. Mr. Crocco's 2011 Virginia Conviction was for Marijuana, Which Has Been Largely Decriminalized, and Resulting Career Offender Status Thereby Overstates His Criminal History

Since Mr. Crocco was convicted in 2011 in Virginia for Possession of Marijuana with the Intent to Distribute, nearly all states have enacted some sort of full or partial, recreational or medical, marijuana decriminalization or legalization. National Conference of State Legislatures (NCSL), *State Medical Marijuana Laws*, (Mar. 20, 2020), <www.ncsl.org/research/health/state-medical-marijuana laws.aspx>. As of July 2020, Virginia has decriminalized it. At the same time, marijuana-related crimes are becomming less frequently prosecuted in federal courts. John G. Roberts, Jr., Chief Justice, *2019 Year-End Report on the Federal Judiciary* at 6 (Dec. 31, 2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf>.

The sentencing statute directs that "[t]he court shall impose a sentence sufficient, but not greater than necessary." 18 U.S.C. 3553(a). Accordingly, the sentencing guidelines provide:

> If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history …, a downward departure may be warranted.

USSG §4A1.3(b)(1).

Without career offender status, under the guidelines Mr. Crocco would have been liable for between 63 and 78 months (offense level 24 with 6 criminal history points). Instead, he was sentenced to 144 months.

In *United States v. Lawrence*, 916 F.2d 553 (9th Cir. 1990), the defendant was convicted of possession of over 100 marijuana plants with

intent to distribute. Application of the guidelines would have given the defendant "a term of 12.6 to 15.6 years," but the court sentenced him to six months by ignoring career offender status because it found that the guidelines "significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." *Lawrence*, 916 F.2d at 554. *See also Davis v. Zahradnick*, 432 F. Supp. 444, 452 (W.D. Va. 1977), rev'd sub nom. *Davis v. Davis*, 646 F.2d 123, 124 (4th Cir. 1981) (sentence of 40 years and $20,000 fines for possession and sale of less than nine ounces of marijuana grossly disproportionate) (procedural history omitted).

The Chief Justice's annual report, and the NCSL's compilation of state laws constitute "reliable information" that basing Mr. Crocco's career offender status on antiquated and increasingly un-prosecuted laws results in a "criminal history category [which] over-represents the seriousness of the defendant's criminal history." *Id.; see* Adam Davidson, *Learning from History in Changing Times: Taking Account of Evolving Marijuana Laws in Federal Sentencing*, 83 U. CHI. L. REV. 2105 (2016).

Consequently, this court should remand for re-sentencing, with direction for the court to consider recent trends in marijuana laws and prosecution, and to accordingly formulate a more just sentence. *See United Lawrence*, 916 F.2d at 553.

CONCLUSION

Because the Government did not prove either a necessary element of the sentencing enhancement, nor the basis for career offender status, Mr. Crocco's sentence is constitutionally unreasonable, *see Rita v. United States*, 551 U.S. 338 (2007), and this case should be remanded for re-sentencing. In addition, Mr. Crocco's criminal history is overstated, and his sentence unjust, because his career offender status was based on antiquated laws.

Respectfully submitted,

Joseph Crocco
By his Attorney,
Law Office of Joshua L. Gordon

/s/

Dated: July 21, 2020

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046, 1st Cir. No. 33963

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Defendant requests that Attorney Joshua L. Gordon be allowed oral argument.

I hereby certify that on July 21, 2020, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a), and that it contains no more than 3,297 words, exclusive of those portions which are exempted.

Dated: July 21, 2020

/s/

Joshua L. Gordon, Esq.

ADDENDUM