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TO THE POINT

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U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences

By Johanna S. Zapp, Esq.

The United States Sentencing Commission voted today to reduce the sentencing guideline levels applicable to most federal drug trafficking offenders.

The Commission voted unanimously to amend the guidelines to lower the base offense levels in the Drug Quantity Table across drug types. The drug guidelines under the amendment would remain linked to statutory mandatory minimum penalties. The Commission estimates that approximately 70 percent of federal drug trafficking defendants would qualify for the change, with their sentences decreasing an average of 11 months, or 17 percent, from 62 to 51 months on average.

The Drug Quantity Table amendment would:

- Generally reduce by two levels the base offense levels for all drug types in the Drug Quantity Table in guideline §2D1.1, which governs drug trafficking cases;

- Ensure the guideline penalties remain consistent with existing five- and ten-year statutory mandatory minimum drug penalties by structuring the Drug Quantity Table so that offenders eligible for the five- and ten-year mandatory minimum penalties would receive base offense levels 24 and 30 (which correspond to a guideline range of 51 to 63 months and 97 to 121 months, respectively), rather than the existing levels of 26 and 32 (which correspond to 63 to 78 months and 121 to 151, respectively);

- Maintain 38 as the highest base offense level in the drug quantity table for the highest quantities of drugs;

The Commission also voted today to prepare a study of the impact of making the drug amendment retroactive and will consider the issue as required by statute. **This means, we do not yet know if this is retroactive. It is not clear if you would receive this benefit if you have already been sentenced. I REPEAT: WE DO NOT KNOW IF THIS IS RETROACTIVE.**

This amendment will pass in November 2014, however, your lawyer MUST ask the court to apply it now. The policies for the US Attorney's offices appear to be that they will not object to the request made by your attorney to have the two point reduction applied to your sentence before the November date. However, it is required that your attorney ask for the two point reduction, it will not be offered by the government unless your attorney asks for it.

The Thing Most Defendant's Fear

Kerry Kennedy Is Found Not Guilty of Driving While Impaired

By Joseph Berger, The New York Times, Feb. 28, 2014

WHITE PLAINS — After nearly 20 months of buildup, the misdemeanor trial of Kerry Kennedy ended on Friday in a breakneck blur, as jurors took less than two hours to find her not guilty of driving under the influence of a drug. The four-day trial, which featured a riveting turn on the witness stand by Ms. Kennedy, 54, was centered on an act that neither she nor prosecutors dispute: On July 13, 2012, she drove her Lexus S.U.V. erratically after swallowing Zolpidem, a generic form of the sleep medication Ambien. She sideswiped a tractor-trailer on a highway in Westchester County before she was found, slumped over her steering wheel, her car stalled on a local road.

Ms. Kennedy has maintained that she took the pill accidentally, mistaking it for medication she took for a thyroid condition. She testified on Wednesday that she did not realize her mistake until well after the accident.

At issue was whether Ms. Kennedy, the former wife of Gov. Andrew M. Cuomo and a daughter of Robert F. Kennedy, should have been aware that she was feeling the drug's soporific effects, was swerving and driving erratically, and stopped the car.

The case which was given to the jury late Thursday afternoon, attracted so much attention that the county had to shift locations to one of its largest courtrooms in Westchester County Courthouse, from its original venue, the North Castle Town Court. Yet all this fuss and stir was over a misdemeanor, for a crime with scarcely a victim.

One of Ms. Kennedy's lawyers, Gerald B. Lefcourt, in his closing argument on Thursday, contended that the jury had "not heard any evidence from the prosecutor, who has the burden of proof that Kerry Kennedy did realize she accidentally took the sleeping pill Zolpidem and continued to drive."

"This is a case with not a reasonable doubt — there is

overwhelming doubt," Mr. Lefcourt said.

To convict Ms. Kennedy, he concluded, the jury would have to believe that "she's a callous person and knowing she was under the influence of Zolpidem and continued to drive."

The fact that Ms. Kennedy was tried before a jury was unusual. Although there are 2,500 cases brought every year in Westchester County for driving under the influence of either alcohol or drugs, they are typically bargained down to a noncriminal violation requiring a guilty plea and a fine. Ms. Kennedy's lawyers believe a misdemeanor charge would not have been brought at all were she not a Kennedy. Prosecutors with the district attorney's office believe they should show Ms. Kennedy no favor just because she comes from a prominent family.

She had faced up to a year in jail if convicted.

Commentary

This is what every defendant fears: that someone in authority will make a ridiculous decision. It is why it is more than reasonable to fear—yes fear—power. A woman who has never done a criminal thing in her life and is known for helping people states that she took a sleeping pill known for unconscious activity (driving, cooking, eating, walking) while on it, is prosecuted for driving under the influence, and no one, not just the trial prosecutor but his supervisor and his supervisor did not stop this insanity. Not hard to believe. It can happen. And it can happen to you.

You know I recall a prosecutor in the Southern District of New York who had the case of governor Eliot Spitzer. He investigated it thoroughly and decided not to present the case. He could easily have done so thinking it could help him or as in the Kennedy case above, go out of his way to show that the rich and famous were not given special treatment. Instead he did the right thing. Examined it as he would any other case and dismissed it when the investigation proved that no crime was committed. That's the way you hope cases would be decided and in most cases they are. But there is always that one that isn't.

– David Zapp, Esq.

The Hole

NYTimes editorial,
February 21, 2014

The New York State prison system has for years been among the nation's worst when it comes to the overuse of solitary confinement. At any given time about 3,800 inmates across the state are held in windowless isolation for 23 hours a day, the vast majority for disciplinary infractions. The average length of a stay in solitary is five months, and from 2007 to 2011, nearly 2,800 people were in solitary for a year or more.

On Wednesday, corrections officials took a major step toward reform by agreeing to new guidelines for the maximum length prisoners may be placed in solitary. Those younger than 18 will receive at least five hours of exercise and other programming outside their cell five days a week. Solitary confinement will be presumptively prohibited for pregnant women, and inmates with developmental disabilities will be held there for no more than 30 days. Jail officials announced that they had stopped sending mentally ill inmates to solitary. Those inmates are now being diverted to psychiatric treatment in jail.

Wednesday's agreement was the result of lawsuits by three prisoners, one of whom spent more than two years in solitary confinement for filing false legal documents.

Commentary

I have never understood why more federal and state judges that I knew personally and knew to be quite sensitive to cruelty and unfairness were not more vocal about the obviously cruel and unusual nature of segregation in the prison system even when they had the opportunity to address it in a case before them. I know it is the law, but a dissent or two would not have disturbed the status quo and may have been the gadfly if not the lightening rod to reform. One judge could have pied piper-ed a line towards reform. Instead it took a few lowly prisoners to file lawsuits to reform what was so obviously torture.

– David Zapp, Esq.

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