

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2006

6
7 (Argued: February 8, 2007 Decided: September 27, 2007)

8
9 Docket Nos. 05-3677-cr(L), 05-4006-cr(XAP), 05-4009-cr(CON)

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12 UNITED STATES OF AMERICA,

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14 Appellee-Cross-Appellant,

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16 v.

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19 GREG HIRLIMAN, JIMMY LEON, also known as JIMMY DALE, AMOS KEITH,
20 JEFFREY EVANS, RONALD WILSON, EDWARD INGENITO, also known as
21 BUSTER, JOSEPH SCICCHITANO, CARLOS WIGGINS, JEFF BELLAMY, JOHN
22 BRYANT, SHERRY MARIE BOULA, OMAR T. FERGUSON, JAMIE FRIEL, JAMES
23 V. HAMILTON, also known as BLACK, GARY HANSON, THOMAS JOHNSON,
24 also known as T, KIM KOHL, DAVID SHARP, EARL THOMAS, also known
25 as SLIM, LORRAINE BENJAMIN, SCOTT CRANDALL, SUSAN FISHER, KEVIN
26 MARTINELLI, LAMONT PARKS, TERRI PEARMAN, MICHAEL RHODES,
27 DEMETRIOUS SAYLES,

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29 Defendants,

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31 DONALD BENJAMIN, JR., also known as DUCKY, NEAL BENJAMIN,

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33 Defendants-Appellants-Cross-Appellees.

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37 B e f o r e: WINTER, WALKER, and SACK, Circuit Judges.

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39 Neal and Donald Benjamin appeal their sentences for various
40 drug-related offenses, entered in the United States District
41 Court for the Western District of New York (Elfvin, Judge). The
42 government cross-appeals, arguing that Judge Elfvin failed BOTH

1 to give notice of his decision to depart from the Sentencing
2 Guidelines and to provide any explanation of his decision to
3 depart, as required by federal statute and by the order of this
4 court in a previous appeal in this matter. Because the district
5 court once again did not explain its reasons for the sentences
6 imposed, we vacate the sentences and remand with instructions
7 that the case be assigned to a different judge for resentencing.

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9 States Attorney (Terrance P. Flynn,
10 United States Attorney for the
11 Western District of New York, on
12 the brief), Buffalo, New York, for
13 Appellee-Cross-Appellant.

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15 JOHN J. LAVIN, John J. Lavin, P.C.,
16 Buffalo, New York, for Defendant-
17 Appellant-Cross-Appellee Neal
18 Benjamin.

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20 VINCENT E. DOYLE III, Connors &
21 Vilaro, LLP, Buffalo, New York,
22 for Defendant-Appellant-Cross-
23 Appellee Donald Benjamin.

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25 WINTER, Circuit Judge:

26 Neal and Donald Benjamin appeal their sentences imposed by
27 Judge Elfvin for various drug related offenses.¹ The government
28 cross-appeals, arguing that the district judge violated 18 U.S.C.
29 § 3553 and a direction of this court in a previous appeal of this
30 matter, United States v. Evans, 352 F.3d 65 (2d Cir. 2003), by
31 failing for a second time to give notice of his decision to
32 deviate from the Sentencing Guidelines ("U.S.S.G.") and to
33 provide an explanation for his non-Guidelines sentences.

1 provided no coherent explanations for these departures. With
2 regard to Donald's sentence, the district judge said only "I must
3 have downward departed . . . to get those three segments of ten
4 years." Id. At 72. As to Neal's sentence, he said "I would have
5 to assume that I have departed." Id.

6 The Benjamins and the government appealed. The Benjamins
7 challenged both their convictions and their sentences, while the
8 government argued, inter alia, in its cross-appeal that the
9 district court committed error by not giving notice of a possible
10 departure and by failing to articulate his reasons for departing.
11 We rejected all of the Benjamins' arguments, in large part by
12 summary order. United States v. Evans, 82 Fed.Appx. 726 (2d Cir.
13 2003). By way of a published accompanying opinion, the panel
14 found that the district judge had "made no findings of fact or
15 conclusions of law justifying [his] departures and thus [left] us
16 at a total loss in reviewing defendants' sentences." Evans, 352
17 F.3d at 72. Accordingly, the panel vacated the sentences and
18 remanded for resentencing "in accordance with 18 U.S.C. §
19 3553(c)(2) and Sentencing Guidelines 5K2.0[,]" and "direct[ed]
20 the district court to provide clear notice to both parties of any
21 contemplated departure." Id.

22 The district court again provided no notice of any intention
23 to depart or otherwise deviate from the advisory Guidelines
24 ranges prior to the resentencing hearings. At Donald's

1 resentencing, the court heard from the defense and the
2 prosecution, and then announced, "I adhere to that sentence, 360
3 months imprisonment." D. Benjamin Resentencing Tr. at 23. When
4 the prosecutor asked how the court had arrived at that sentence,
5 the judge said "I'll write you a letter" and brought the hearing
6 to a close. Id. at 24. Judge Elfvin provided no explanation of
7 his sentence in his written judgment, other than to check boxes
8 indicating that he "adopt[ed] the presentence report and the
9 Guideline[s] application[] without change" but "did not apply the
10 federal sentencing guidelines at all in this case and imposed a
11 discretionary sentence."

12 A month later, Neal was resentenced. At the outset of the
13 hearing, the defense attorney asked about the letter the district
14 judge had promised to explain Donald's sentence. In response,
15 the judge asked his courtroom deputy to "give [him] a note to
16 remind [him] about that." N. Benjamin Resentencing Tr. at 3.
17 According to the government, no such explanatory note has been
18 received.

19 The district court again provided no advance notice of any
20 intention to deviate from the Guidelines prior to Neal's
21 resentencing. Evidently anticipating the judge's enigmatic
22 behavior and fearing another overturning of the sentence, Neal's
23 attorney came to the hearing with a proposed "notice" for the
24 judge to read into the record. The "notice" was a brief summary

1 of several of the factors a sentencing judge is required to
2 consider under § 3553, and read, in full:

3 Notice is hereby given to the government and
4 defendant, Neal Benjamin, that the Court
5 intends to depart from the advisory
6 guidelines sentence for the following
7 reasons: The proposed sentence is sufficient
8 but not greater than necessary to reflect the
9 seriousness of the offense, to promote
10 respect for the law, to provide just
11 punishment for the offense, to protect the
12 public from further crimes of the defendant,
13 to afford adequate deterrence to criminal
14 conduct, and to avoid sentencing disparity.
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16 Judge Elfvin duly read the "notice" into the record. Id. at 8.
17 The prosecutor objected, suggesting that this did not constitute
18 proper notice. After hearing from the defense and prosecution,
19 the judge announced that "[t]he sentence I impose, Neal, is that
20 you're going to be sentenced to a period of incarceration of 240
21 months, period," N. Benjamin Resentencing Tr. at 15, though he
22 once again adopted the calculations of the PSR -- which provided
23 for a 40-year sentence -- in his written judgment.

24 When, as before, the prosecutor pressed the court to explain
25 this departure, defense counsel volunteered that the reasoning
26 was contained in the notice read into the record. The district
27 judge agreed with this suggestion, adding that he had "considered
28 Neal's case along with his brother's, and everything together,
29 for the long period of time that the case has been in front of
30 me. I think everything is adequately on the record." N.

1 Benjamin Resentencing Tr. at 17. In his written judgment, the
2 judge stated that “[t]he Court imposed a non-guideline sentence
3 pursuant to the factors set forth in 18 U.S.C. § 3553 as read
4 into the record at sentencing.” Once again, both sides appealed.

5 DISCUSSION

6 Because of our disposition of the cross-appeal, the
7 sentences must be vacated and the case remanded to another judge
8 for yet another resentencing. We therefore do not address the
9 Benjamins’ claims at this time.

10 Title 18 U.S.C. § 3553(c) requires a sentencing court to
11 state the reasons for imposing a particular sentence. It reads,
12 in relevant part, that “[t]he court, at the time of sentencing,
13 shall state in open court the reasons for its imposition of the
14 particular sentence” 18 U.S.C. § 3553(c). If the
15 sentence is outside the range described in the Sentencing
16 Guidelines, the court must also provide “the specific reason for
17 the imposition of a sentence different from that described [in
18 the Guidelines], which reasons must also be stated with
19 specificity in the written order of judgment” Id. §
20 3553(c) (2).

21 While United States v. Booker, 543 U.S. 220 (2005), rendered
22 the Sentencing Guidelines advisory rather than mandatory, it did
23 not alter a sentencing judge’s obligations under Section 3553(c).
24 “[T]he Supreme Court left unimpaired Section 3553(c), which

1 requires a district court to 'state in open court the reasons for
2 its imposition of the particular sentence' and . . . state in
3 writing 'with specificity' the reasons for imposing a sentence
4 outside the calculated Guidelines range." United States v.
5 Crosby, 397 F.3d 103, 116 (2d Cir. 2005) (quoting 18 U.S.C. §
6 3553(c)). A court's "failure to comply 'with the general
7 provisions of § 3553(c) . . . regarding [the explanation of
8 reasons for] departures from recommended sentencing ranges'
9 constitutes 'plain error,' even when the length of the resulting
10 sentence would otherwise be reasonable." United States v.
11 Fuller, 426 F.3d 556, 565 (2d Cir. 2005) (quoting United States
12 v. Lewis, 424 F.3d 239, 246 (2d Cir. 2005)).²

13 The plain fact is that, with regard to Donald, the district
14 judge, although accepting the PSR calculations, once again failed
15 to give notice of a possible deviation and provided no
16 explanation whatsoever for his decision to impose a non-
17 Guidelines sentence. When the prosecutor asked for an
18 explanation, he simply replied "I'll write you a letter." D.
19 Benjamin Resentencing Tr. at 24. Even if the judge had written
20 the promised letter -- which he did not -- it would not have
21 satisfied his obligation to "state in open court the reasons" for
22 imposing the particular sentence. 18 U.S.C. § 3553(c). Nor did
23 the district judge explain his decision in the written judgment,
24 which simply stated that he "adopt[ed] the presentence report and

1 the Guideline[s] application[] without change" but "did not apply
2 the federal sentencing guidelines at all in this case and imposed
3 a discretionary sentence." "Stating no reasons at all plainly
4 falls short of the requirement to state reasons that is set forth
5 in § 3553(c), no matter what the required level of specificity
6 may be." Lewis, 424 F.3d at 245 (internal quotation marks
7 omitted). As a result, Donald's sentence must be vacated.

8 Neal's sentencing was as perfunctory as Donald's. It was
9 not preceded by a notice of a possible deviation or accompanied
10 by a statement of reasons, save for the reading -- without
11 evident embarrassment -- of the defense-prepared "notice," which
12 was provided at the hearing and was simply a statement of several
13 of the factors in Section 3553(a). Although once again accepting
14 the PSR calculations, the judge then imposed a sentence 20 years
15 below the Guidelines recommendation. Quite apart from the fact
16 that the "notice," written by defense counsel before the
17 resentencing was known, was hardly the product of the judge's own
18 thinking, it made no attempt to explain how the individual
19 Section 3553(a) factors applied to Neal's particular case and led
20 to the sentence imposed. As before, the district judge "made no
21 findings of fact or conclusions of law justifying [his]
22 departures and thus leaves us at a total loss in reviewing
23 defendants' sentences." Evans, 352 F.3d at 72.

24 The district judge's behavior compels us to order that the

1 case be assigned to a different judge on remand. In general,
2 "reassignment to another judge may be advisable in order to avoid
3 an exercise in futility (in which) the Court is merely marching
4 up the hill only to march right down again." United States v.
5 Robin, 553 F.2d 8, 11 (2d Cir. 1977) (en banc) (internal
6 quotation marks omitted).

7 Reassignments because of the failure of the district judge
8 to impose a proper sentence are uncommon, but it is not
9 unprecedented for a case to be remanded to a different judge
10 after a district court has twice used an improper sentencing
11 procedure. See United States v. Brown, 470 F.2d 285, 288-89 (2d
12 Cir. 1972). We note, moreover, that reassignments are not
13 uncommon in the case of Judge Elfvin. This is the third case of
14 reassignment in less than two years based on his failure to give
15 notice of, and an explanation for, a departure in the original
16 sentencing proceeding and on a remand. See United States v.
17 Toohey, 448 F.3d 542 (2d Cir. 2006), and United States v.
18 Sicurella, 2006 U.S.App. LEXIS 13546 (2d Cir. May 23, 2006)
19 (unpublished order). In Toohey, we had remanded twice because
20 Judge Elfvin had not explained a sentence of probation. 448 F.3d
21 at 543. At the third sentencing hearing, he explained that he
22 had imposed probation because of his personal relationship with
23 the defendant when both were practicing law. Id. at 544. On the
24 next appeal, we then remanded to a different judge. Id. at 546.

1 In Sicurella, Judge Elfvin refused to explain his reasons for
2 imposing the sentence, stating on the second remand: "Upon
3 reflection here and with further reflection to come in the
4 future, I'm going to continue the sentence of 70 months. I will
5 give it further reflection and if I change my mind, I'll let
6 everyone know." 2006 U.S.App. LEXIS 13546 at *3 n.2. With
7 little comment, the Sicurella panel determined that this
8 "explanation" failed to satisfy the requirements of § 3553(a) and
9 (c), and remanded, ordering reassignment to another judge.

10 This is, therefore, the third case in two years in which
11 Judge Elfvin failed in the initial sentencing proceeding to
12 comply with the requirements of notice and explanation for the
13 imposition of a non-Guidelines sentence and then, on remand,
14 failed to follow a direction of this court to comply with those
15 requirements. This pattern of behavior is disturbing evidence of
16 willfulness. The need to remove Judge Elfvin from this case
17 being self-evident, we order reassignment to a different judge.

18 CONCLUSION

19 For the foregoing reasons, the sentencing orders of the
20 district court are vacated and the case is remanded with
21 instructions that it be assigned to a new judge for resentencing.
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FOOTNOTES

1. Donald Benjamin was convicted of (1) one count of conspiracy to possess with intent to distribute and conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 as it relates to 21 U.S.C. § 841(a)(1); (2) five substantive distribution counts, in violation of 21 U.S.C. § 841(a)(1); and (3) one count of using a minor to distribute controlled substances in violation of 21 U.S.C. § 861(a)(1) and (2). Neal Benjamin was convicted of one count of the same conspiracy offense and one count of possession with intent to distribute and distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1). Evans, 352 F.3d at 68.

2. Nor did Booker alter the requirement that a district court provide parties with notice of possible departures and variances from the advisory Guidelines ranges. See Fed. R. Crim. P. 32(h). Although we did not decide until after Donald and Neal Benjamin were resentenced that the notice requirement applied equally to non-Guidelines sentences as to departures, United States v. Anati, 457 F.3d 233, 236-37 (2d Cir. 2006), the district court could have been under no misapprehensions regarding its obligation to inform the parties of any intent to impose a sentence outside the applicable Guidelines ranges in light of our

admonitions in Evans, see Evans, 352 F.3d at 72.