

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: December 11, 2007 Decided: January 15, 2008)

Docket Nos. 05-4285-cr(L); 06-5737-cr(CON); 06-5820-cr(CON)

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UNITED STATES OF AMERICA,

Appellee,

-v.-

CHRISTOPHER DEMOTT, also known as JOHN MORRIS, also known as
RICHARD O'BRIAN, also known as CHRISTOPHER MORRIS, also
known as WARDEN JOHN DOE,

Defendants,

CHRISTOPHER CAMPBELL DAY, also known as KIP,

Defendant-Appellant.

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Before: JACOBS, Chief Judge, POOLER and SACK,
 Circuit Judges.

Appeal from a memorandum and order of the United States
District Court for the Eastern District of New York (Platt,
J.) resentencing defendant principally to 180 months'
imprisonment, following his guilty plea to conspiring to
distribute and possess with intent to distribute over one

1 thousand kilograms of marijuana. By resentencing defendant
2 without providing notice to defendant or his counsel, the
3 court violated defendant's right to be present at
4 resentencing and his right to notice that the court intended
5 to impose an adverse non-Guidelines sentence. In addition,
6 there was no compliance with 18 U.S.C. § 3553(c), which
7 requires a sentencing judge to state "in open court" the
8 reasons for imposing a particular sentence. We must
9 therefore vacate the sentence and remand the case for
10 resentencing. Reassignment is appropriate in these
11 circumstances because the district judge may reasonably be
12 expected to have substantial difficulty ignoring his
13 previous views during a third sentencing proceeding.
14 Moreover, resentencing without eliciting the views of the
15 defendant or the prosecutor bespeaks a lack of receptivity
16 to their views and arguments. The sentence is VACATED and
17 the case REMANDED for resentencing with instructions to
18 reassign the case.

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21 NORMAN TRABULUS, New York, NY,
22 for Defendant-Appellant.

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24 BURTON T. RYAN, Assistant United
25 States Attorney (Peter A.
26 Norling, of counsel; Roslynn B.
27 Mauskopf, United States

1 Attorney, Eastern District of
2 New York, on the brief), United
3 States Attorney's Office for the
4 Eastern District of New York,
5 New York, NY, for Appellee.
6

7 PER CURIAM:
8

9 Christopher Campbell Day pled guilty to conspiring to
10 distribute and possess with intent to distribute over one
11 thousand kilograms of marijuana. He appeals from a
12 memorandum and order of the United States District Court for
13 the Eastern District of New York (Platt, J.) resentencing
14 him, after a remand, to the same term of 180 months'
15 imprisonment. By resentencing Day without providing notice
16 to Day or his counsel, the district judge violated Day's
17 right to be present at resentencing and his right to notice
18 that the court intended to impose an adverse non-Guidelines
19 sentence. In addition, by providing only a written
20 sentencing explanation in the form of a memorandum and
21 order, the district judge neglected 18 U.S.C. § 3553(c),
22 which requires a sentencing judge to state "in open court"
23 the reasons for imposing a particular sentence.
24 Consequently, we vacate the sentence and remand the case for
25 resentencing by a different judge. Reassignment is
26 appropriate because the district judge may reasonably be

1 expected to have substantial difficulty ignoring his
2 previous views during a third sentencing proceeding.
3 Moreover, resentencing without eliciting the views of the
4 defendant or the prosecutor bespeaks a lack of receptivity
5 to their views and arguments.

7 **BACKGROUND**

8 Day pled guilty to one count of conspiracy to
9 distribute and possess with intent to distribute more than
10 one thousand kilograms of marijuana in violation of 21
11 U.S.C. §§ 846 and 841(b) (1) (A) and one count of conspiracy
12 to distribute and possess with intent to distribute more
13 than 100 kilograms of marijuana in violation of 21 U.S.C. §§
14 846 and 841(b) (1) (B). The district court initially
15 sentenced Day to 180 months' imprisonment, the combined
16 total of the statutory minimum sentence for each count. We
17 vacated and remanded for resentencing because the district
18 court erroneously believed that the two minimum sentences
19 must run consecutively, and because we were unable to
20 discern from the record whether the court would have imposed
21 the same sentence had it not misapprehended the law. See
22 United States v. Day, 201 F. App'x. 27 (2d Cir. 2006). On

1 November 28, 2006, without notice to Day or the presence of
2 Day or his counsel, the district court filed a memorandum
3 and order resentencing Day to 180 months' imprisonment.
4

5 DISCUSSION

6 I

7 The parties agree that the judgment should be vacated
8 and the case remanded for resentencing because the district
9 court violated Day's right to be present at resentencing,
10 his right to counsel at resentencing, and his right to
11 notice that the court intended to impose an adverse non-
12 Guidelines sentence. They also agree that the district
13 court failed to comply with 18 U.S.C. § 3553(c), which
14 requires a sentencing judge to state "in open court" the
15 reasons for imposing a particular sentence.

16 The parties are correct. "[A] defendant has a
17 constitutional right to be present [during resentencing],
18 because technically a new sentence is being imposed in place
19 of the vacated sentence." United States v. Arrous, 320 F.3d
20 355, 359 (2d Cir. 2003) (citation omitted). The denial of
21 this right is subject to harmless error review, id. at 361,
22 but such error is harmless only where it is "unimportant and

1 insignificant" in the context of the case, such as where the
2 new sentence is "less onerous than the original sentence" or
3 where "defendant's presence would not have affected the
4 outcome." Id. Since a new sentence was imposed out of the
5 presence of the defendant, his lawyer, and the prosecutor,
6 we cannot confidently decide that there has been no harm.

7 Under Fed. R. Crim. P. 32(i)(1)(C), "a district court
8 [must] provide a defendant with notice of its intent to
9 impose an adverse non-Guidelines sentence and an opportunity
10 to challenge the grounds for such a sentence"; failure to
11 provide such notice amounts to plain error. United States
12 v. Gilmore, 471 F.3d 64, 66-67 (2d Cir. 2006) (per curiam)
13 (citing United States v. Anati, 457 F.3d 233 (2d Cir.
14 2006)). The district court therefore committed plain error
15 by failing to inform Day of its intent to impose an adverse
16 non-Guidelines sentence.

17 Finally, the district court's written sentencing
18 explanation does not satisfy 18 U.S.C. § 3553(c), which
19 requires a sentencing judge to state the reasons for
20 imposing a particular sentence "in open court." See United
21 States v. Lewis, 424 F.3d 239, 248-49 (2d Cir. 2005)
22 (treating § 3553(c) errors as plain errors). We therefore

1 vacate the sentence and remand for resentencing.

3 II

4 Day asserts that the district court erred in its
5 Guidelines calculation and improperly withheld "safety
6 valve" relief. The government has agreed to allow Day to
7 make an additional safety valve proffer prior to a second
8 resentencing. The district court, which will hear new
9 evidence on this issue, should have the opportunity to
10 consider these issues in the first instance on remand. In
11 so doing, the court will bear in mind that the fifth
12 requirement for safety valve relief--"the defendant has
13 truthfully provided to the Government all information and
14 evidence . . . concerning the offense . . .," 18 U.S.C. §
15 3553(f)(5)--requires that the sentencing judge "mak[e] a
16 factual finding as to whether the defendant has made a
17 complete and truthful proffer . . .," United States v.
18 Jeffers, 329 F.3d 94, 100 (2d Cir. 2003), and not rely
19 entirely on the withdrawal of the government's § 5K1.1
20 letter.

22 III

1 Day argues that the case should be reassigned on remand
2 to a different sentencing judge because Judge Platt firmly
3 believes that a sentence of 180 months' imprisonment is
4 appropriate in this case. The government argues that there
5 is no evidence that Judge Platt is personally biased against
6 Day and that the memorandum and order set forth a reasonable
7 basis for the sentence.

8 Three considerations listed in United States v. Robin,
9 553 F.2d 8, 10 (2d Cir. 1977) (per curiam), are useful in
10 deciding whether to reassign a case on remand: "(1) whether
11 the original judge would reasonably be expected upon remand
12 to have substantial difficulty in putting out of his or her
13 mind previously-expressed views or findings determined to be
14 erroneous[,] . . . (2) whether reassignment is advisable to
15 preserve the appearance of justice, and (3) whether
16 reassignment would entail waste and duplication out of
17 proportion to any gain in preserving the appearance of
18 fairness." Id.

19 Reassignment is appropriate in the present
20 circumstances. "[I]t is not unprecedented for a case to be
21 remanded to a different judge after a district court has
22 twice used an improper sentencing procedure." United States

1 v. Hirleman, 503 F.3d 212, 216 (2d Cir. 2007) (citing United
2 States v. Brown, 470 F.2d 285, 288-89 (2d Cir. 1972)).

3 Having reimposed an identical sentence after the first
4 remand, the district judge may reasonably be expected to
5 have substantial difficulty ignoring his previous views
6 during a third sentencing proceeding. Moreover,
7 resentencing without eliciting the views of the defendant or
8 the prosecutor bespeaks a lack of receptivity to their views
9 and arguments. We cannot find on this record that Judge
10 Platt is personally biased against Day; but an objective
11 observer might nonetheless question his impartiality. See
12 United States v. Londono, 100 F.3d 236, 242 (2d Cir. 1996)
13 ("To reassign a case on remand, we need only find that the
14 facts might reasonably cause an objective observer to
15 question [the judge's] impartiality" (citations and
16 internal quotation marks omitted) (alteration in original)).
17 Moreover, reassignment would not waste substantial judicial
18 resources because the sentencing followed a plea. See
19 Robin, 553 F.2d at 11 ("A judge who has presided over a
20 lengthy trial often gains an intimate insight into the
21 circumstances of the defendant's crime, which may prove
22 uniquely useful in determining the sentence to be imposed,

1 whereas no such reason would normally exist upon sentencing
2 after a guilty plea."). Accordingly, we direct that further
3 proceedings be assigned to a different judge.

4
5 **CONCLUSION**

6 We **VACATE** the sentence and **REMAND** for resentencing,
7 with instructions to reassign the case to a different judge.