Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DOUGLAS WAYNE NIELSEN, Defendant.	No. CR03-4078-MWB **ORDER REGARDING THE GOVERNMENT'S MOTION FOR CORRECTION OF SENTENCE**

On April 13, 2006, the court entered its Memorandum Opinion And Order Regarding Resentencing (Doc. No. 71) following remand from the United States Court of Appeals for the Eighth Circuit. In that order, the court sentenced defendant Douglas Wayne Nielsen to 188 months imprisonment on Count 1 of the Information and 92 months imprisonment on Counts 2 through 7 of the Indictment, all to be served concurrently. This sentence was greater than the sentence originally imposed on the defendant, which the Eighth Circuit Court of Appeals had reversed and remanded for further consideration of the issues in light of *United States v. Booker*. An amended judgment entered accordingly on April 19, 2006 (Doc. No. 72).

This matter comes before the court pursuant to the government's April 26, 2006, Motion For Correction Of Sentence (Doc. No. 73). In its motion, the government points out that Rule 43(a) of the Federal Rules of Criminal Procedure requires that the defendant be present at sentencing. Therefore, the government requests that the court impose sentence with the defendant present in open court. On April 27, 2006, the defendant filed

a resistance to the government's motion (Doc. No. 74), in which he asserts that his presence at the resentencing hearing on March 22, 2006, satisfied the requirements of Rule 43(a), and that he need not be present at the entry of the subsequent written order. Further, the defendant argues no one objected to the court's procedure during the resentencing hearing and that the issue has therefore been waived. Accordingly, he requests the government's motion be denied because it is without merit.

The unedited "real time" transcript (Transcript) of the March 22, 2006, resentencing hearing reveals that the court clearly articulated its intention to take the sentencing under advisement and subsequently to enter a written ruling imposing sentence. Further, it is obvious that the court thereafter offered the parties the opportunity to object to such a procedure as follows:

> THE COURT: I've done this in one other resentencing. I think I'm going to write an opinion rather than announce my sentence from the bench. And it doesn't create a problem because the defendant's already in custody. But I really want some time to think this through a little bit more, and I'm going to reserve my right to enter a written opinion. I'm probably going to vary, but it's not going to be a substantial variance. It's most likely going to be within the 188 to 235 range, somewhere in that range most likely. I'm not sure I'm going to go below that. But I think I'll just do it in a written opinion and then advise the defendant that you have ten days to appeal my decision from the date of my order, and so it would be incumbent upon Mr. Denne to fax you the opinion. That's actually a little inaccurate because I think it's really ten days from when I sign the judgment and committal order, the J and C, not from when I issue an opinion so . . .
>
> MR. DENNE: I filed premature notices of appeal before. The clerk has told me it's not valid –

THE COURT: Because I hadn't signed the J and C yet.

MR. DENNE: Right.

MR. FLETCHER: But generally, Judge, on those you file them both at the same time.

THE COURT: Yeah, sometimes I do file them at the same time. And anyway, you'll have ten days to file your notice of appeal. And, Mr. Denne, you could always file a protective notice of appeal, you know, the day it comes down or the next day till you've had an opportunity to discuss it with your client, then make a decision whether or not you want to withdraw the appeal. And, you know, there's a good chance the government's going to appeal too. But I am going to exercise my right to do it in a written opinion because you've raised some very interesting issues, Mr. Fletcher, and I'm still -- I'm still having some health problems. And I want to feel real comfortable with my opinion when I decide it. And so I think I'm going to proceed that way unless there's any -- well, probably proceed even if there is an objection, but I want to give the parties an opportunity to object to me doing it in a written opinion.

MR. DENNE: I have no objection to that.

THE COURT: Mr. Fletcher?

MR. FLETCHER: No, other than I'd like to make a record now of since you kind of said what you think you're going to do but if you do vary, we would object to any variance and, number two, to any extent of any variance so that I've made my record. Thank you.

THE COURT: Okay. Thank you. Anything further in this matter?

MR. DENNE: No thank you.

THE COURT: Okay. I'll try and get something out within seven to ten days.

MR. FLETCHER: Thank you, Your Honor.

Transcript at 23-25. Assuming, *arguendo*, that the government had any right to demand imposition of sentence in open court, the Transcript unequivocally demonstrates that the government was afforded an opportunity to object and forwent that opportunity. Thus, in light of the foregoing, it is clear the government waived any right to demand imposition of sentence in open court during the resentencing hearing.

Additionally, it is plain that the right at issue *belongs to the defendant*. Thus, the court has considerable doubt that the government even has standing to complain that the sentence must be imposed with the defendant personally present. Turning to the defendant's right to be present at the imposition of sentence, this issue was extensively expounded upon in this court's recent ruling in *United States v. Saenz*, ___ F. Supp. 2d ___, No. CR03-4089-MWB, 2006 WL 1109757 (N.D. Iowa Apr. 24, 2006), where this very same argument was rejected by this court. In *Saenz*, the defendant did not make an express waiver of her right to be present during the imposition of her sentence. *Id.* at *2. Rather, this court found that by not voicing an objection, the defendant had made an implicit waiver of that right and that such a waiver fit within the "voluntary absence" condition of Rule 43. *Id.* at * 5. Specifically, in *Saenz*, this court found that the case "fit the 'voluntary absence' condition in the sense of a defendant who makes a 'knowing and understanding waiver' of her presence at the imposition of sentence." *Id.* In a footnote, this court noted that it could confirm the defendant's waiver by scheduling a hearing to impose the sentence in open court, and if the defendant did not appear, to find that she was voluntarily absent. *Id.* at n.2. Doing so, however, in the eyes of this court resulted in an unnecessary elevation of form over substance. *Id.* Here, the same principles enunciated in *Saenz* are applicable. The only difference is that in this case, the defendant did indeed expressly waive on the record his right to be present during the imposition of the sentence

during the resentencing hearing. This fact bolsters the arguments with respect to this issue that were set forth fully in the *Saenz* opinion.

Unlike in *Saenz*, however, the sentence meted out to the defendant after remand was more onerous than the initial sentence. However, the court finds that the purposes of the "presence" requirement in Rule 43 have already been served here, regardless of the imposition of a more onerous term of imprisonment. The rationale behind this conclusion is fully set forth in *Saenz*. There, this court stated:

> As the Eleventh Circuit Court of Appeals has explained, "The rationale for requiring a defendant to be present at sentencing is 'to ensure that at sentencing—a critical stage of the proceedings against the accused—the defendant has an opportunity to challenge the accuracy of information the sentencing judge may rely on, to argue about its reliability and the weight the information should be given, and to present any evidence in mitigation he may have.'" [*United States v.*] *Parrish*, 427 F.3d [1345,] 1347-48 [11th Cir. 2005] (quoting [*United States v.*] *Jackson*, 923 F.2d [1494,] 1496 [11th Cir. 1991]). Similarly, the Second Circuit Court of Appeals has explained that "[t]he current rule arises out of respect for a defendant's right to be present at a sentencing proceeding, to allocute, and to respond to the definitive decision of the sentencing judge." [*United States v.*] *Arrous*, 320 F.3d [355,] 360 [2d Cir. 2003] (citing *United States v. Behrens*, 375 U.S. 162, 167-68 (1968) (Harlan, J., concurring); *United States v. Johnson*, 315 F.2d 714, 717 (2d Cir. 1963)). Here, the rationale identified by the Eleventh Circuit Court of Appeals has been fulfilled because the defendant was present at the resentencing hearing . . . and had the opportunity at that critical stage of the proceedings to challenge the accuracy of any information presented by the government or on which the court might otherwise rely, the opportunity to argue about the reliability and weight such information should be given, and to present her mitigating evidence. *Parrish*, 427 F.3d at 1347-

> 48. Moreover, the defendant's right to be present at the critical phase of sentencing has been respected, at least to the extent that her presence at the resentencing hearing . . . afforded her the opportunity to present or challenge information presented during the resentencing hearing and to allocute. *Arrous*, 320 F.3d at 360. In short, the court believes that the defendant has been fully and fairly heard on all sentencing issues. Moreover, from a due process perspective, the court cannot find that the defendant's "'presence [at the imposition of sentence in this case] would contribute to the fairness of the procedure.'" *Parrish*, 427 F.3d at 1347 (stating the narrower, due process standard, quoting [*United States v.*] *Novaton*, 271 F.3d [968,] 998 [11th Cir. 2001]).

Id. at * 7. As was the case in *Saenz*, the defendant here was present at his resentencing hearing held on March 22, 2006. He was afforded the opportunity, at that time, to challenge the accuracy of any information presented by the government or contained in the Presentence Investigation Report. Likewise, he had the opportunity to argue about the reliability and weight such information should be given and to present any mitigating evidence.[1] Finally, the defendant was afforded his right of allocution during the resentencing hearing. Even more persuasive is the fact that the court, during the proceeding, specifically indicated its intent to impose a sentence within the 188-235 month range. Thus, the defendant also had the opportunity to "respond to the definitive decision of the sentencing judge," as the undersigned made clear his intent to impose a more onerous sentence within a set range. *Arrous*, 320 F.3d at 360. Accordingly, as was the case in *Saenz*, the court is confident that the defendant's right to be present at the critical phase of sentencing has been respected and believes that the defendant has been fully and

[1]The Transcript reveals defense counsel did just that and argued zealously regarding the weight that should be accorded to the defendant's criminal history.

fairly heard on all sentencing issues.

THEREFORE, the government's Motion For Correction of Sentence is **denied**. The court will not impose upon the defendant the onerous and unnecessary burdens of returning to this forum for the imposition of sentence in open court, when he has expressly waived his presence at the imposition of sentence and has agreed to the imposition of sentence by written ruling after a thorough resentencing hearing at which he was present. The court's April 13, 2006, order imposing sentence and the April 19, 2006, Amended Judgment following from that order shall stand.

IT IS SO ORDERED.

DATED this 4th day of May, 2006.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA