NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 03-3164

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UNITED STATES OF AMERICA

v.

KEITH FISHER,

Appellant

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 01-203)
District Judge: The Honorable R. Barclay Surrick

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Submitted Pursuant to Third Circuit LAR 34.1(a)
December 7, 2004

BEFORE: AMBRO and VAN ANTWERPEN, Circuit Judges,
and SHADUR, District Judge*

(Filed February 4, 2005)

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OPINION

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*Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

SHADUR, District Judge.

Keith Fisher ("Fisher") pleaded guilty to two counts of bank fraud in violation of 18 U.S.C. § 1344 in the case now on appeal, Docket No. 01-203 in the Eastern District of Pennsylvania. Fisher also entered guilty pleas in two other cases: Docket No. 02-641 in the Eastern District of Pennsylvania and Docket No. 03-199 in the District of New Jersey. On April 11, 2003 the three cases were consolidated for sentencing in the Eastern District of Pennsylvania. As to the two bank fraud counts in Docket No. 01-203, Fisher was sentenced to concurrent terms of 96 months' imprisonment and five years' supervised release (to run concurrently as well with the terms imposed in the other two cases) and was ordered to pay a $200 special assessment and $6,500 in restitution. Fisher's restitution obligations in the other two cases aggregated $402,001.19.

Although Fisher then sought to file appeals in all three cases, the appeals in the New Jersey-originated case and in one of the Pennsylvania-originated cases have earlier been dismissed on the government's motion because Fisher had expressly waived his appellate rights in the plea agreements in those cases. That left viable only the current appeal in Docket No. 01-203.

Fisher's appointed counsel Elliot Cohen ("Cohen") has moved to withdraw pursuant to the well-known teaching of Anders v. California, 386 U.S. 738, 744 (1967):

> Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the

appeal.

In turn, our Local Appellate Rule 109.2(a) implements the Anders command.

With any Anders-directed brief having been submitted, we engage in a twofold inquiry (United States v. Youla, 241 F.3d 296, 300 (3d Cir. 2001)):

> (1) whether counsel adequately fulfilled the rule's requirements; and (2) whether an independent review of the record presents any nonfrivolous issues.

As to the first requirement, we explained in United States v. Marvin, 211 F.3d 778, 780 (3d Cir. 2000) (citing United States v. Tabb, 125 F.3d 583, 585-86 (7th Cir. 1997)) that the duties of counsel when preparing an Anders brief are twofold:

> (1) to satisfy the court that he or she has thoroughly scoured the record in search of appealable issues; and (2) to explain why the issues are frivolous.

Although Cohen has regrettably failed to fulfill those duties, our own analysis readily suffices to dispatch Fisher's appeal. But before we explain why, a review of counsel's efforts is in order.

Cohen's initial Anders brief did not deal with Docket No. 01-203 at all--surprisingly, it instead addressed Docket No. 01-399, despite that appeal having already been dismissed by this Court. When notified that his Anders brief had addressed the wrong case, attorney Cohen initially refused to file a supplemental reply brief and instead submitted a one-paragraph letter. That letter first stated a proposition already recognized by Fisher's pro se brief and by the government's response: that the District Court had erred in failing to fix a payment schedule for restitution. Next Cohen's letter

proceeded to reject, without reference to any caselaw or record citations, Fisher's pro se contention that his sentence was unconstitutional under the principles set forth in Blakely v. Washington, 124 S.Ct. 2531 (2004).

Unsatisfied with that response and its lack of analysis, we then ordered Cohen to file a supplemental reply brief responsive to the issues raised by the government's response. Cohen has filed that brief, and it too falls short of the requirements set forth in Anders and Marvin.

Cohen's most recent brief does address, with reference to statutes, cases and record citations, whether the sentencing court erred in establishing a restitution payment schedule, and it concludes that remand is necessary as to that issue. As we have already stated, that issue is really undisputed, and we agree.

But as to whether Fisher's sentence is unconstitutional under the reasoning earlier set forth in Blakely and since applied to the federal Sentencing Guidelines ("Guidelines") in United States v. Booker, 125 S.Ct. 738 (2005),[1] Cohen does not demonstrate that he has "thoroughly scoured the record" as to that issue. He addresses it in general terms and makes no record citations of his own, instead inserting a paragraph from the government's brief that contains such citations. While, as we explain in the next section

[1] We do not of course fault Cohen for not having anticipated the unusual totality of the Supreme Court's decision in Booker, with its two separate majority opinions. But as to the constitutional question posed by the current appeal, it was generally (if not indeed universally) expected that the five-justice majority in Blakely would hold firm in applying the same analysis to the federal Guidelines. And that proved to be the case, with Justice Stevens writing that portion of the Court's decision.

of this opinion, we agree with the government's assessment of Fisher's claim, Cohen's own effort falls well short of demonstrating "that he thoroughly searched the record and the law in service of his client" (Marvin, 211 F.3d at 781).

Generally speaking, where as here "we are not satisfied that counsel adequately attempted to uncover the best arguments for his client" (Marvin, 211 F.3d at 781), we will reject counsel's Anders brief, grant counsel's motion to withdraw and appoint new appellate counsel (*see* Youla, 241 F.3d at 302). But Marvin, 211 F.3d at 781 makes clear that we need not follow that course of action, despite any inadequacy of the Anders brief, "in those cases in which the frivolousness is patent." After independently undertaking our own thorough review of the record, we have concluded that Fisher's appeal is patently frivolous, with the exception of the payment schedule issue, and we therefore find any appointment of new appellate counsel to be unnecessary.

Fisher's Sixth Amendment Challenge

At sentencing, all of the counts in Fisher's three consolidated cases made up a single group, pursuant to the rules set out in Guidelines §§ 3D1.1 to 3D1.5, for purposes of calculating a combined offense level adjusted upward from the base offense level of 6. That combined offense level was determined by applying adjustments that were supported entirely by the charges in Docket No. 02-641 and related conduct as found in that case, comprising a 14-level increase for the amount of loss, a 2-level increase for the number of victims, another 2-level increase based on Fisher's employment of sophisticated means

and a 3-level increase for committing the offenses involved in Docket No. 02-641 while on pretrial release in Docket No. 01-203, with a 3-level reduction for acceptance of responsibility. Fisher admitted the facts underlying all of those adjustments except that for his asserted employment of sophisticated means.

When the adjusted combined offense level of 24 was then linked with Fisher's criminal history category IV, the resulting Guidelines range was 77 to 96 months. Fisher was permissibly sentenced at the top of that range, 96 months, as to each charge that permitted a sentence at that level--each of the two bank fraud counts in Docket No. 02-641 and each of the two bank fraud counts in Docket No. 01-203, with those sentences to run concurrently (see Guidelines § 5G1.2(b)). But because the statutorily authorized maximum for the mail fraud counts in the other cases was 60 months, pursuant to Guidelines §§ 5G1.1 and 5G1.2(b) that 60-month sentence was imposed on the remaining five mail fraud counts (four stemming from Docket No. 03-199 and one from Docket No. 02-641), to run concurrently with the 96-month sentences imposed on the bank fraud counts.

As stated earlier, during the pendency of this appeal the decision in Booker has held that the Sixth Amendment principle announced in Blakely applies to the Guidelines as well. And under Blakely and Booker the only potentially nonfrivolous argument that Fisher could advance is that the increase in the adjusted combined offense level ascribable to his use of sophisticated means was improper because it relied on the District

Court's finding of facts beyond those that Fisher had admitted.

But it will be recalled that the 96-month sentence imposed in Docket No. 01-203 was identical to that imposed on the other bank fraud counts in Docket No. 02-641--the latter sentence having been based both on the admitted and the judicially found facts, and having been rendered invulnerable to attack because of Fisher's waiver of any right to appeal the conviction or the sentence in that case. That being so, with Fisher's conviction in Docket No. 02-641 and the 96-month sentence imposed on the bank fraud counts in that case thus being final, Booker offers him no potential relief (see 125 S.Ct. at 769, specifying that its holding applies only to cases pending on direct review). Hence any possible constitutional challenge to the sentence imposed in Docket No. 01-203, which runs concurrently with the Docket No. 02-641 sentence (whose validity Fisher cannot challenge), is moot. No relief that we could grant in this case would have any effect on the 96-month sentence that Fisher must serve in all events because of the total punishment on the counts in Docket No. 02-641.

We recognize that Benton v. Maryland, 395 U.S. 784, 789-91 (1969) held that a challenge to a criminal conviction is not moot in the jurisdictional sense simply because the sentence imposed on that conviction runs concurrently with a longer sentence whose validity is not challenged. But the Court also recognized that the "concurrent sentence rule" may still be employed as a discretionary bar to judicial review (id. at 791). And as the Seventh Circuit has recognized, the reasons for applying that concept are particularly

strong where, as here, "the challenge is to the sentence rather than the underlying conviction" (United States v. Kimberlin, 675 F.2d 866, 867 (7th Cir. 1982)). In such cases the unreviewed sentence is unlikely to have any adverse future collateral consequences.

That is true of Fisher's sentence in this case. In any future federal prosecution, the calculation of Fisher's criminal history would consider the sentences imposed in the three cases discussed here to be "one sentence" (see Guidelines § 4A1.2(a)(2)) and would use the longest of those sentences (the 96-month sentence imposed on the Docket No. 02-641 bank fraud counts) for purposes of determining Fisher's criminal history category under Guidelines § 4A1.1. Any reduction of the sentence in this case would accordingly have no effect on any future criminal history category determination. Because Fisher thus has nothing to gain from any possible favorable ruling on his Sixth Amendment challenge to the sentence imposed in this case, nor anything to lose from our refusal to address that challenge, we decline to review his sentence and find his appeal on that ground to be wholly frivolous.

Conclusion

For the reasons stated in this opinion, we DISMISS Fisher's substantive appeal as frivolous. While we conclude that the patent frivolousness of Fisher's challenge to the length of his sentence does not require the appointment of new appellate counsel, Cohen's Anders brief correctly points out that the District Court failed to set a payment

schedule for the total required restitution of $408,501.19, as is required by 18 U.S.C. §3664(f)(1)(A)(2). Because nothing we have said as to Cohen's handling of this appeal suggests that he cannot competently represent Fisher in the resolution of that issue, we DENY his motion to withdraw and REMAND the case to the District Court for the limited purpose of establishing a payment schedule for restitution.