

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, )  
 )  
 Appellee, )  
 v. ) No. 07-2514  
 )  
 HOLLIS WAYNE FINCHER, )  
 )  
 Appellant. )

UNITED STATES' RESPONSE TO DISTRICT COURT'S JULY 27, 2007 ORDER

Comes now the United States of America, acting by and through Robert C. Balfe, United States Attorney for the Western District of Arkansas, and for its Response to District Court's July 27, 2007 Order, states:

The Appellant, Hollis Wayne Fincher (hereinafter "Fincher") was arrested on November 9, 2006, on a warrant based on a Complaint charging him with Possession of a Machine gun in violation of 18 U.S.C. § 922(o). At his initial appearance on that date, Fincher executed a document entitled "Financial Affidavit In Support Of Request For Attorney Or Other Court Services Without Payment Of Fee." In the financial affidavit, Fincher indicated that he owned a home and 120 acres in Fayetteville, Arkansas and gave the value of the property as "unknown."

Fincher's case was tried to a jury and on January 12, 2007, he was convicted of both charges of a two-count Indictment, Possession of a Machine gun, in violation of 18 U.S.C. §§ 922(o) and 924(a)(2), and Possession of a Sawed off Shotgun not Registered, in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871. A presentence investigation report was prepared in connection with Fincher's sentencing. In the section entitled "Financial Condition: Ability to Pay," the Report stated that Fincher had "recently transferred" the property to his two daughters,

jointly, by quit claim deed executed on January 29, 2007, but that his wife continued to live on the property.

On June 22, 2007, Fincher was sentenced to concurrent terms of 78 months imprisonment on each count of conviction. Although 18 U.S.C. § 3571 authorized a fine of up to \$250,000 and the Guidelines suggested a fine range of \$12,500 to \$125,000, the Court, acting under the belief that Fincher had no significant assets, imposed a fine of only \$1,000.

Circumstances which came into focus only after Fincher was sentenced obliged the district court to further investigate Fincher's financial condition, most particularly the value of the property and the circumstances of its conveyance. An evidentiary hearing was conducted on July 3, 2007, and the Court thereafter obtained the services of Tom Reed, of Reed & Associates, Inc., to prepare a professional appraisal of the property. That appraisal placed the market value of Fincher's property at \$455,000. The district court concluded that the financial affidavit signed by Fincher contained a material misrepresentation of fact and that Fincher knew of the misrepresentation when he signed the document with the intent of obtaining an appointed attorney. The district court also concluded that at the time he signed the financial affidavit Fincher did not qualify for appointment of counsel.

The district court made several findings relating to Fincher's case and to his sentence in an Order issued July 27, 2007. The District Court submitted its Order to this Court, stating that:

While the Court is precluded from revisiting the issue of Fincher's fine due to the pendency of his appeal, it is persuaded-based on the facts set forth in this Order-that Fincher's sentence should be vacated and he should be resentenced. The Court feels strongly enough about the matter that it will take the unusual course of asking the Eighth Circuit Court of Appeals to remand the matter to this Court, so that it can vacate the sentence pronounced upon Fincher and resentence him in light of the true facts about his financial condition.

Upon receipt and review of the district court's Order, this Court directed the United States to

“address that portion of Chief Judge Hendren's order asking that the case be immediately

remanded for further sentencing proceedings, including vacatur of the sentence imposed in the case.”

In response to this Court’s direction, the United States submits that it supports and agrees with the district court’s determination that vacatur of Fincher’s sentence is proper and that remand for re-sentencing is appropriate at this stage despite the fact that Fincher’s appeal remains pending with this Court. Although unusual, the unique circumstances of this case wherein the accurate facts concerning Fincher’s true financial condition were not discovered until after Fincher was sentenced (but before this Court could consider his appeal) dictate that the district court should be given the opportunity to pronounce a sentence that reflects the true facts about Fincher’s financial state. This is true because the district court’s initial sentence granted a significant downward variance as to Fincher’s fine on the basis of its erroneous perception that he was unable to pay a fine within the Guidelines range. The Eighth Circuit has repeatedly held that a sentence may be unreasonable if it is outside of the range justified by the facts of the case. See, e.g., United States v. Tjaden, 473 F.3d 877 (8<sup>th</sup> Cir.2007). Additionally, vacatur at this point would promote a central tenet of Guidelines sentencing, the reduction of sentencing disparities. “The goal of the Sentencing Guidelines is . . . to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.” Koon v. United States, 518 U.S. 81, 113 (1996). The goal of Guidelines Sentencing is thwarted when the Court bases a sentence on inaccurate information about a defendant’s financial situation. Additionally, the justice system is damaged when it is deceived by a defendant such as Fincher. As stated in United States v. Bishop, 774 F.2d 771, 776 (7<sup>th</sup> Cir.1985), a “defendant’s action in intentionally deceiving the court strikes at the very heart and foundation of the American system of justice.” The system demands honesty

from every participant, and it has not had that from Fincher with regard to his financial situation. Lastly, judicial and litigant efficiency will be served by allowing the district court to determine Fincher's sentence in light of the true facts prior to appeal, rather than awaiting the conclusion of appeal and possibly triggering a second appeal. Because courts have “the inherent power to correct judgments obtained through . . . intentional misrepresentation,” Bishop, supra (citing Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944)), the Court will be able to take up the problems herein described upon the conclusion of Fincher's appeal (unless he is able to set aside his conviction), but postponing the matter until that time would prolong the proceedings. The United States agrees with the district court that the better route would be to resolve the issue now, before appeal.

WHEREFORE, the United States respectfully submits that it agrees that Fincher's sentence should be vacated and that the matter should be remanded to the district court for re-sentencing in light of the facts discovered subsequent to Fincher's initial sentencing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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