

From: Scot Umlauf [<mailto:scotu@co.douglas.mn.us>]
Sent: Friday, October 25, 2013 11:03 AM
To: Guidelines, Sentencing (MSGC)
Subject: Response to round table

Dear Commission,

I want to thank you for giving us the opportunity to speak at the round table discussion on October 15, 2013. It seems to me the issue, regarding changes being made to 1st and 2nd degree controlled substance crimes, is the departure rate from the presumptive sentence and why this is happening.

I'm employed by the Douglas County Sheriff's Office and assigned to the West Central MN Narcotics Task Force as the Commander. I currently serve as a board member for the MN State Association of Narcotics Investigators (MSANI) and attended this meeting to represent the over 350 member/officers of this association. I've been a narcotics officer for over 9 years and believe I can shed some light on this question.

Departures are commonly used as a tool in obtaining a guilty plea from the defendant(s) and there are reasons why this is done. In narcotics investigation, officers often use Confidential Informants (CI) to gain access to drug organizations and CI's play a vital role in our drug interdiction efforts. CI's are often hesitant to cooperate with the police if doing so may expose them to the danger of violence, physical harm and coercion if their identity is revealed. It may also compromise other ongoing investigations. Because of this, prosecuting authorities and investigating officers are willing to negotiate with the defense to resolve these cases. You also have to consider the court process. If the prosecuting authority is unwilling to negotiate, more cases will go to trial and this would clog the system. You have to ask yourself...if an individual charged with a 1st degree sales crime has a presumptive sentence of 86 and this is the offer from the prosecution, what incentive would the defendant have to not take the case to trial? What better way for the defendant to learn the identity of the CI? What better way to learn how law enforcement operates?

It's also important to understand what kind of departure is used. In most cases, we are not letting the defendants off. Most negotiation result in lower time served and the crime remains the same. An example of this might be an offer from the County Attorney of 74 month (bottom of the box) instead of 86 months. The incentive for the defendant gets 1 year less on the sentence and the conviction remains a 1st degree.

I also heard comments that we are putting drug dealers in the same category as violent offenders. Make no mistake about it, drug crimes revolve around violent crime. My response to this comment would be, we should raise the presumptive sentence on those crimes instead of lowering one of the main causing factors of the crime. I've personally assisted on many of the crimes (homicides, 1st degree burglaries, 1st degree assaults, and the list goes on) listed which were directly related to drugs.

I've had the opportunity to attend previous Commission meeting and heard the arguments made by some of the members and especially on the public defender side. The majority of the time we work with public defenders throughout our districts and to not use departures would overwork an already short staffed entity. This is how the process of drug crimes operates and in our opinion it is not broken. You could lower the sentence on the grid, but ultimately you will see the same results. We will always have departures in drug cases for the above reasons.

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From: Dan Cain [<mailto:dcain@rseden.org>]
Sent: Thursday, October 17, 2013 10:09 AM
To: Guidelines, Sentencing (MSGC)
Subject: Roundtable discussion

Is the guideline for controlled substance crimes in the 1st and 2nd degree broken?

That depends on if you want a guideline, or an enforcement tool subject to manipulation.

First the obvious: If you have a 49% departure rate some could argue that you still have a guideline. At 50% you have a coin flip. At 70% you are approaching the frequency at which a blind squirrel can reasonably be expected to find a nut. If you want to remain consistent with guidelines philosophy, you're definitely broken. Guidelines were developed on the principal of certainty and truth in sentencing with slight deviation based upon specifics outlined in the commentary and subject to judicial review. In this case you have neither certainty nor truth. And since judicial review is only triggered when one or the other side asks for it, and most sentences are the result of either plea or charge negotiation, the 70% departure rate has stood the test of time. Nonetheless, when the exception becomes the rule, you no longer have a rule.

If practice became consistent with guidelines, Minnesota would need another prison.

Law enforcement, and prosecution, will always argue that the system works. Because it works for them. One of the comments I found particularly egregious in the meeting was the officer who openly admitted that he routinely supported downward departures for his confidential informants, a practice specifically prohibited (at least in past guidelines and commentary).

Another was the comment that someone selling 10 grams of a substance was a major dealer. With the ability to aggregate over 90 days you can conceivably have a seller who is no more sophisticated than a doorknob. He knows or is related to someone who has a small amount of drugs. He can meet you on the street corner, take your money, and go to a place unknown to you and buy a half gram of a drug (1-3 doses) and bring it back. He preserves the hidden nature of the person he buys from, because before returning that half gram to you, he removes a small amount for himself and replaces it with sugar. He is a snot nosed junkie who has the advantage of knowing someone. The police can use him to buy that half gram 20 times over a 90 day period. Now he's a major dealer. Except he's not. Compared to the person that can sell 10 grams at one time, he is a nobody. But practice allows him to be treated the same. Guidelines were developed on the principal that like offenders, who committed like crimes, would receive like treatment, absent "substantial and compelling" reasons to the contrary. Now if the police left our small time dealer on the street long enough to turn him into a major dealer, that would be seen as unethical by most people, especially if during that 90 day period a naïve loved one also purchased drugs from him, misused them, overdosed and died. So does it happen? Who knows? But the fact that it can, is inconsistent and wrong.

Law enforcement and prosecution like long sentences that they never intend to use because they provide leverage. But the reality is, virtually all discretion now lies outside the judicial branch of government, where it belongs constitutionally.

The guidelines commission was intended to be insulated from political influence. Unfortunately that insulation has eroded over time. One way we attempted to stop that erosion, and preserve some objectivity, was to develop an algorithm that assigned weight to crimes based upon a number of variables, specifically; the interest being protected; the type of potential harm; and the level of harm, among other things. We recognized the need for a separate, but similar strategy for drug and sex crimes, partly due to the fact that if you evaluated drugs by their potential for harm, alcohol would come close to being the most egregious with some of the drugs we now categorize more severely falling down the scale. This exercise was in progress in 1990. In 1991, due to a new governor, and legislation that took place the previous session making 8 commission terms coterminous with the term of the governor, it was abandoned. I would recommend it be resurrected and debated by the commission. It's far from finished, so it would need to be debated based upon its philosophical underpinnings more than its content. But at least you wouldn't be starting with a blank page.

The criminal justice system is, and always will be, influenced by various parts of the system attempting to manipulate facts to support their outcome goals. Stating that is not meant to be judgmental. It's simply a fact. Everyone tries to tip the scales in their favor based upon their perception of justice. It's what we do. So whatever you develop will never be perfect, and even if you come close to perfection it will erode over time. The Commission is comprised of people representing all ends of the system so as to come as close as possible to objectivity, to be vigilant, and to make changes when that erosion becomes problematic and inconsistent with guidelines philosophy. In this case I believe it has reached that point.

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From: Cutcher, Scott [<mailto:scott.cutcher@pubdef.state.mn.us>]
Sent: Thursday, October 17, 2013 3:07 PM
To: Guidelines, Sentencing (MSGC)
Subject: Changing the Guideline Severity Levels for CSC 1 and CSC 2

First degree controlled substance crime should be changed to a severity level VIII felony and second degree controlled substance crime should be changed to a severity level VII felony on the Minnesota Sentencing Guidelines. The fact that over 50% of the time there is a downward departure from the presumptive sentence for these two offenses and new conviction rates are 20.6% for probationers as opposed to 26.6% for those sent to prison for the two offenses is a clear indication that an adjustment is mandated. Public safety is clearly not sacrificed in light of this data and the cost savings of not sending drug offenders to prison is quite significant. There is no rational way to reconcile the purpose of the sentencing guidelines with a 50+ downward departure rate. This is glaringly true when one looks at the disparity in departures for the two offenses judicial district to judicial district. Frankly, a State v. Russell situation exists right now with where Minnesota citizens receive disparate treatment based upon where they live with regard to first and second degree controlled substance crimes. Drug courts are a beneficial tool but clearly exacerbate the departure issue as evidenced by the difference in downward departures in the 5th Judicial district (64%) and the 8th Judicial district (19%) for the two offenses.

One also cannot overlook that level IX drug offenses are currently ranked the same with Third degree murder, Kidnapping with great bodily harm, First degree manslaughter and first degree assault. Level VIII drug offenses are ranked with Criminal vehicular homicide, First degree aggravated robbery, First degree burglary with an assault or weapon and Drive by shooting. The argument that law enforcement at times deal with dangerous situations because someone is “high” on drugs is not relevant to the discussion as those situations will result in a charge that is ranked as high if not higher on the guidelines. Also, this is not a discussion about the effect drugs have on people but whether can we truly reconcile the purpose of the guidelines with such a high departure rate. We cannot.

Thank you very much for taking the time to consider this matter.

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