



Convicted of Fraud but Changed Their Lives; Appeals Court Takes Note

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The U.S. Court of Appeals for the 7th Circuit [recently issued a notable decision in the case of *United States v. Robertson*](#), vacating and remanding the sentences of two defendants convicted of a mortgage fraud scheme because the sentencing judge failed to consider unusually strong evidence of self-motivated rehabilitation.

In the late 1990's, Henry and Elizabeth Robertson were involved in a mortgage fraud scheme through their company Elohim, Inc. The Robertsons bought residential properties and then sold those properties to buyers at inflated prices. They would provide lenders with false information about the buyers' finances, sources of down payments, and intentions to occupy the properties. In total, the scheme involved 37 separate transactions and a net loss of more than \$700,000 to various lenders.

The scheme eventually collapsed and the Robertsons went bankrupt and moved on with their lives. They were not charged with any crimes at the time. They began to rebuild their lives, with Elizabeth working full time as a hospital nurse and Henry working full time as a cable technician. They raised their three children and volunteered in the community. Neither of them engaged in any criminal activity from 1999 to 2010, apart from a reckless driving offense by Henry in 2002.

One day before the 10-year statute of limitations for one of their crimes would have expired, the government charged the Robertsons with one count of wire fraud and two counts of bank fraud. They both pleaded guilty to one count of wire fraud and were sentenced in March 2011. Elizabeth was sentenced to 41 months in prison, and Henry received 63 months in prison. They were also ordered to pay more than \$700,000 in restitution.

On appeal, the Robertsons argued that the district court failed to adequately consider their unusually strong evidence of self-rehabilitation. The appeals court agreed.

The Supreme Court noted in *Gall v. United States* in 2007 that it was reasonable for the district court to attach "great weight" to a defendant's decision to withdraw from a drug distribution conspiracy and on his own initiative change his life. The Court in *Gall* said it was not an abuse of discretion by the district court to sentence a man to probation who had pleaded guilty to conspiracy to distribute Ecstasy when the recommended guidelines range was 30-37 months imprisonment. The 7th Circuit found in this case, just as in *Gall*, that self-motivated rehabilitation "lends strong support to the conclusion that imprisonment [is] not necessary to deter [a defendant] from engaging in future criminal conduct or to protect the public from his future criminal acts."



The 7th Circuit noted that 18 U.S.C § 3553(a) requires that any sentence imposed consider “the history and characteristics of the defendant.” The court stated that “[d]emonstrated self-motivated rehabilitation is direct and relevant evidence” of the characteristics of a defendant that should be considered in crafting a sentence.

Interestingly, the appeals court remanded the case to the district court for resentencing, but did not reach a finding that the sentence was substantively unreasonable. The district court was instructed to carefully weigh the evidence of the defendants’ self-motivated rehabilitation, but this leaves open the possibility that the district court could again issue a substantial prison sentence. No date has been set yet for re-sentencing.

In addition to *Gall*, the appeals court relied on the 2011 Supreme Court decision in *Pepper v. United States*. In *Pepper*, the Court held that when a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant’s rehabilitation after the initial sentence, and if appropriate, may use this in support of a downward variance from the guidelines. This is in stark contrast to USSG § 5K2.19, which had been the dominant jurisprudence on the issue and stated that post-sentencing rehabilitation should not be considered. In *Pepper*, the Supreme Court stated that “the punishment should fit the offense and not merely the crime.” Here, the 7th Circuit is clearly taking much more than the loss amount into consideration in suggesting how a sentence should be crafted.

This is an important decision. It shows that courts must assess all important factors in the defendants’ lives in crafting a just sentence, even beyond the crimes of which they were convicted.

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