

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 02-10391- RGS

UNITED STATES OF AMERICA

v.

FRANK F. DERBES

MEMORANDUM CONCERNING A SENTENCING  
DEPARTURE IN SATISFACTION OF THE REQUIREMENTS  
OF 18 U.S.C. § 3553(c) (2004)

October 1, 2004

STEARNS, D.J.

On January 27, 2003, Frank Derbes and his brother Robert Derbes, the co-owners of a Quincy Massachusetts paving company, pleaded guilty to an information charging six counts of business-related tax evasion. On April 29, 2003, the court sentenced Robert Derbes to one year and a day in prison, a sentence which the government did not appeal.<sup>1</sup> In the case of Frank Derbes, who was sentenced at the same hearing, the court departed downward four levels from an adjusted offense level of 14 to a level 10, and imposed a sentence of two years probation with, among other conditions, that nine months be served in home confinement with electronic monitoring. In so doing, the court alluded to United States v. Olbres, 99 F.3d 28 (1st Cir. 1996), which allows a sentencing court to consider the prospect of job losses by innocent employees resulting from a defendant employer's

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<sup>1</sup>The court departed downward one-level from the agreed total offense level of 14 in consideration of Robert Derbes' medical condition.

incarceration.<sup>2</sup> The court's decision to depart, however, was based on Frank Derbes' mental condition and the court's assessment that the Bureau of Prisons could not provide an adequate substitute for Derbes' seven-year relationship with his treating psychiatrist. The government then appealed.

Before the appeal was heard, the so-named PROTECT Act amended 18 U.S.C. § 3742(c), to require the Courts of Appeals to review sentencing departures under a de novo standard, that is, without the deference that had been previously accorded to the district courts' application of the guidelines to the facts of a particular case. Applying the PROTECT Act's de novo standard, the First Circuit vacated Derbes' sentence. See United States v. Derbes, 369 F.3d 579 (1st Cir. 2004). While the Court of Appeals did not rule out the possibility of a departure based on Derbes' mental condition (a factor discouraged but not prohibited by the guidelines), it could not find in the district court's terse oral statement of reasons,<sup>3</sup> a "firm basis for concluding that Derbes' imprisonment will prevent adequate treatment, whether based on required drugs or a unique therapeutic relationship." Derbes, 369 F.2d at 582-583. Consequently, it remanded the case to the district court for a fuller development of the record. Anticipating the possibility (or probability) that the court would determine that a custodial sentence of some duration was warranted, the Court of Appeals also directed the district court to consider the magnitude of the credit that should be given to Derbes for that part of his prior sentence that had been

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<sup>2</sup>That Frank Derbes has played a crucial role in sustaining Derbes Brothers as an ongoing enterprise is not disputed by the government.

<sup>3</sup>Prior to the PROTECT Act, a district court was not required to make written findings supporting a decision to depart.

discharged. Id. at 584. See United States v. Martin, 363 F.3d 25 (1st Cir. 2004).

By the time of the resentencing, Derbes had served the full nine months of home detention and had completed seventeen months of the probationary sentence. At the resentencing hearing, Derbes withdrew the request that the court consider a departure on mental health grounds.<sup>4</sup> The principal point of contention rather concerned the credit that should be given for so much of the prior sentence as Derbes had served. Derbes, not surprisingly, argued that he should be credited day for day for service of his prior sentence, a wishful proposition that has no support in the case law. See Martin, 363 F.3d at 40 (a day for day credit for time spent in home detention or on probation “would be too lenient to represent the punishment that Congress intended.”). The government’s position, on the other hand, was that Derbes should receive a minimal credit of one month, likening a sentence of probation and home detention to an enforced vacation with inconveniences.

The underlying principles are set out forcefully in Martin, 363 F.3d at 37.

The Double Jeopardy Clause “absolutely requires that punishment already exacted must be fully ‘credited’ in imposing a sentence upon a new conviction for the same offense.” North Carolina v. Pearce, 395 U.S. 711, 718-719, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). See also Jones v. Thomas, 491 U.S. 376, 381-382, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989) (holding that crediting time already served against the final sentence fully vindicates the defendant’s double jeopardy rights). This crediting principle applies equally to a new sentence imposed for the same conviction after a government appeal. See Pearce, 395 U.S. at 718, 89 S.Ct. 2072 (stating that the protection against double punishment is violated “whenever punishment already endured is not fully subtracted from any new sentence imposed”); United States v. Bogdan, 302 F.3d 12, 17 (1st Cir. 2002) (remanding after government appeal for resentencing within the guideline

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<sup>4</sup>The withdrawal was not based on the merits of the request, but on Derbes’ reluctance, apparently on privacy grounds, to comply with the court’s directive that he make his psychiatrist’s treatment records available to the government for inspection.

sentencing range subject to credit for time already served); United States v. McMillen, 917 F.2d 773, 777 (3rd Cir. 1990) (holding that defendant must be given full credit for time served when resentenced after successful government appeal). It also applies to sentences of probation which, although not as harsh as imprisonment are nonetheless “punishments” imposed for the offenses of conviction. See Korematsu v. United States, 319 U.S. 432, 435, 63 S.Ct. 1124, 87 L.Ed. 1497 (1943) (“[A] probation order is ‘an authorized mode of mild and ambulatory punishment. . . .’”); United States v. Bynoe, 562 F.2d 126, 128 (1st Cir. 1977) (“[P]robation is nonetheless a punishment imposed on the defendant, albeit a mild one.”) Thus, because the sentence of probation is “a punishment already exacted” for Martin’s offense, it must be credited against a new sentence of imprisonment imposed after an appeal.

The issue of how to calculate the amount of the credit that is to be given is one that Martin left to the district court.<sup>5</sup> I disagree with the government’s argument that a probationary and home detention sentence is essentially no punishment at all. While no sane person would choose incarceration over probation, even probation without special conditions (as were imposed here), subjects a defendant (apart from the stigma of a felony conviction) to intrusive supervision by an officer of the court, including unannounced and warrantless searches of his home and person, as well as restrictions on travel, terms of employment, and freedom of association. Home detention carries with it even greater restraints on personal freedom (and a financial penalty), although no one would suppose that confinement in a prison is an even arguable equivalent to a forced stay in the comforts of one’s own home.

In calculating the appropriate credit in this case, I began with the adjusted offense

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<sup>5</sup>By “credit,” Martin does not mean an actual deduction from the sentence imposed. Because the Bureau of Prisons does not believe that it has the authority to grant such a deduction, “the proper means for crediting probation, including home detention, against imprisonment is a downward departure by the district court upon remand.” Martin, 365 F.3d at 39.

level of 14 and its presumptive sentencing range of 15 to 21 months. In my view, there is no “one size fits all” formula for determining the required credit. Nor do I believe that in making an adjustment a court should consider only the burdens implicit in the terms and conditions of the sentence itself, but rather it should consider all of the circumstances of the case, including those that are personal to the defendant. Thus, in addition to the conditions of the sentence itself, I considered Derbes’ remorse, his mental fragility, his evident anguish at the prospect of having to twice face the prospect of imprisonment, his charitable works in the Quincy community, and his role in reviving a business on which some thirty people depend for their livelihoods. Taking all of these factors into account, I determined that in Derbes’ case, the discharged portion of the sentence warranted a reduction of six months in the new sentence.<sup>6</sup> By subtracting six months from the minimum sentence prescribed under level 14, I determined that the resulting nine month sentence fell within the level 10 Zone B sentencing range of 6-12 months. Consequently, I imposed the following Zone B sentence: one-year’s probation with the special conditions that Derbes serve three months in community confinement and three months in home detention with electronic monitoring.<sup>7</sup>

RESPECTFULLY SUBMITTED,

/s/ Richard G. Stearns

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<sup>6</sup>In rough terms, I have treated three days of home detention and five days of probation as the equivalents of a day in custody.

<sup>7</sup>The fines and special assessments previously imposed by the court have been paid. The court reimposed the condition that the defendant cooperate fully with the Internal Revenue Service in resolving any outstanding tax liability issues (if any, in fact, remain).

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UNITED STATES DISTRICT JUDGE