

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,)	File No. 09-MJ-00108
)	(RHK/FLN)
Plaintiff,)	
)	
vs.)	Saint Paul, Minnesota
)	September 28, 2009
John Constantine Golfis,)	10:30 a.m.
)	
Defendant.)	
)	

BEFORE THE HONORABLE RICHARD H. KYLE
UNITED STATES DISTRICT COURT JUDGE
(CRIMINAL MOTIONS HEARING - APPEAL)

APPEARANCES

For the Plaintiff:	UNITED STATES ATTORNEY LEEANN K. BELL, AUSA 300 South Fourth Street Suite 600 Minneapolis, Minnesota 55415
For the Defendant:	ABBOTT LAW OFFICE GREGORY A. ABBOTT, ESQ. PO BOX 24453 MINNEAPOLIS, MINNESOTA 55424
Court Reporter:	CARLA R. BEBAULT, RPR, CSR 146 Federal Building 316 North Robert Street Saint Paul, Minnesota 55101

Proceedings recorded by mechanical stenography;
transcript produced by computer.

P R O C E E D I N G S**I N O P E N C O U R T**

1
2
3
4 THE COURT: We're here on United States of America
5 versus John Constantine Golfis. Is that the right
6 pronunciation?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Criminal file number 09-108. Let's
9 start with the appearances for the Government.

10 MS. BELL: LeeAnn Bell appearing on behalf of the
11 United States.

12 THE COURT: Good morning, Ms. Bell.

13 For the Defendant.

14 MR. ABBOTT: Gregory Abbott, your Honor.

15 THE COURT: And the Defendant is also present.

16 We are also here as a result of an appeal having
17 been filed by the Defendant with respect to the sentence and
18 judgment which was entered -- imposed by Magistrate Judge
19 Noel and then entered in court. The parties have set their
20 positions in writing which are before the Court. The Court
21 also has a copy, and has reviewed a copy, of the transcript
22 of the hearing before Judge Noel on August 12th, the date
23 the sentence was imposed.

24 So I think I'm familiar with what the issues are,
25 what happened. So, Mr. Abbott, let's start with you.

1 MR. ABBOTT: Well, just, you know, briefly, your
2 Honor, I think we have a situation where, you know, the
3 maximum sentence was imposed; and the standard of under 18
4 USC 3553(a) is the sentence should be sufficient but not
5 greater than necessary to meet the factors that it lists.
6 And I do not think the sentence that was imposed balanced
7 those factors appropriately. It creates what amounts to, I
8 think, a kind of a Catch-22 situation. I mean, the
9 underlying offense is failure to pay child support, and yet
10 we're putting somebody in jail for failure to pay child
11 support, yet he can't pay child support while in jail.

12 And the plea bargain that the -- that we had
13 agreed to with the Government was a five-year period of
14 probation.

15 THE COURT: No, that was not the plea agreement.
16 There was no agreement for a five year probationary
17 sentence. Let me read it to you just so we don't have any
18 misunderstanding about it.

19 MR. ABBOTT: Right.

20 THE COURT: The plea agreement said, "Should the
21 Court." "Should the Court." It doesn't mean the Court
22 will. "Should the Court impose a probationary sentence, the
23 parties agree to jointly recommend five years of probation
24 in order to allow sufficient time to pay restitution. This
25 recommendation is in no way binding upon the Court, and it

1 is not an agreement to recommend probation." That's in the
2 plea agreement that you signed, the Defendant signed. He
3 was asked about it before the sentence was imposed by Judge
4 Noel and he acknowledged that that was the agreement.

5 So make any argument you want, but don't tell me
6 that there was an agreement here to impose probation because
7 that's not what I see.

8 MR. ABBOTT: Well, that wasn't precisely my
9 argument.

10 THE COURT: Well, it came awful close to it,
11 didn't it?

12 MR. ABBOTT: I think --

13 THE COURT: Your argument basically is you don't
14 like the sentence. You think it's too high.

15 MR. ABBOTT: We do.

16 THE COURT: Okay. But I have that all the time.

17 MR. ABBOTT: Right. All I'm suggesting, your
18 Honor, is that prior to the time the sentence was imposed,
19 the discussions we were having with the Government, I think
20 those discussions I think were more appropriate given the
21 circumstances than the sentence that was imposed. That's
22 the argument that I'm making. And I think that --

23 THE COURT: But you and the Government, no matter
24 what the discussions you might have had or you and the
25 Defendant and the Government, that's not the -- you're not

1 the sentencing authority. I mean, whatever you do, any plea
2 agreement, is subject to separate review by the sentencing
3 court. And a lot of the time the Court goes along with what
4 the parties recommend.

5 But that recommendation starts out by saying,
6 "Should the Court impose a probationary sentence," then you
7 agree it should be five years or something like that. But
8 the first part of it, it doesn't even look like there is a
9 joint recommendation for a probationary sentence.

10 MR. ABBOTT: Okay. Well, your Honor, I don't
11 dispute that in any way, shape, or form. The argument I'm
12 making, I think that the situation, the fact situation, I
13 think the best -- in the interests of justice and the
14 interests of getting this child support payment situation
15 resolved -- I mean, that's the whole purpose of the statute,
16 by the way, is to give people incentive to actually pay
17 their child support. If we're just going to throw people in
18 jail for not paying child support we get into a situation
19 that looks like debtor's prison. And I don't think that was
20 the intent of enacting the statute. And I don't think
21 that --

22 THE COURT: What is the statute supposed to do?
23 The statute calls for possible penalties of six months.

24 MR. ABBOTT: It does.

25 THE COURT: So that's clearly what Congress

1 envisioned, at least in certain circumstances.

2 MR. ABBOTT: And I'm not suggesting the statute on
3 its face is in any way, shape, or form deficient or whatnot.
4 I'm saying as applied to the situation. You know, we have a
5 situation where we have a substantial backlog of child
6 support. It would be in the interests of justice to have
7 that child support be repaid.

8 THE COURT: But there's nothing about your
9 client's, the Defendant's, track record which would say that
10 he's going to do anything about it, or that he's done
11 anything about it. I don't know how you accumulate this
12 amount of child support in arrears and then tell me he ought
13 to get out so he has a couple extra months to really get at
14 it and start paying this stuff back. I mean, nothing has
15 happened that would indicate that he has any intention of
16 doing that. And if he doesn't, he will be back in court
17 again.

18 MR. ABBOTT: But why not at least give him the
19 chance to make some payments as opposed to cutting him right
20 off at the knees?

21 THE COURT: It's only six months. I know from his
22 standpoint it's a big six months. But, I mean, in terms of
23 the financial picture and the chance of getting paid, you're
24 basically arguing that he shouldn't go to prison at all.

25 MR. ABBOTT: Well, I think the ship has sailed on

1 that. He's been in jail for six weeks.

2 THE COURT: If you knew what was going to happen,
3 you would have been arguing to Judge Noel there should be no
4 incarceration because he's in a position to pay some of that
5 child support which he will not be able to do over whatever
6 period of time he is incarcerated.

7 MR. ABBOTT: Right. I would be making the
8 argument to Judge Noel that my client should in fact suffer
9 some consequences for the difficulties he had with the
10 probation officer in terms of financial disclosure. I mean,
11 I'm not arguing for a consequence-free environment here.
12 But I do think that there ought to have -- the sentence that
13 was imposed should have left room for maybe additional
14 gradations of punishment to kind of step him up the ladder
15 in order to, you know, point him in the right direction.

16 At this point there's nothing left. I mean, he's
17 in jail. He can't pay it back. He gets released without
18 any supervision. It doesn't seem to me to fit the
19 Government's interests, it doesn't fit the client's
20 interests.

21 THE COURT: Maybe it will send a message to your
22 client.

23 MR. ABBOTT: Well, but the question under 18 USC
24 3553(a) is whether this message that was sent is not greater
25 than necessary. Why not a three-month sentence?

1 THE COURT: Well, the only reason he probably
2 wasn't given a higher sentence is because the statute says
3 it can't be imposed. I'm guessing if Judge Noel had had his
4 choice, it would have been a higher sentence. I suspect if
5 I had my choice it would be a higher sentence.

6 MR. ABBOTT: Well, I -- to a certain extent this
7 is kind of a Rorschach test. I mean, you look at the
8 situation and you think the sentence is too much or not. I
9 mean, if that's the position you take, I don't know what I
10 can argue to you about.

11 THE COURT: Well, all I know is that, one, my
12 standard of review is discretionary here.

13 MR. ABBOTT: Right.

14 THE COURT: In other words, I can't say, at least
15 in my mind -- well, I shouldn't say. I want to hear from
16 your client before I say what I'm going to say. But it
17 seems to me you have a tough, uphill battle to convince any
18 reviewing court that what Judge Noel did here was
19 irrational, contrary to law, whatever you call it, whatever
20 the terms are.

21 MR. ABBOTT: Well, before we -- before I stop,
22 your Honor, I do want to talk about the financial -- the
23 restitution part of the judgment because I do think the
24 court miscalculated significantly in terms of -- the
25 judgment orders my client to pay \$5,000 a month upon

1 release. And there's nothing in the record which would tend
2 to indicate that my client has anything close to the kind of
3 resources to be able to make \$5,000 a month payments.

4 You know, the presentence investigation report,
5 and I've summarized the financial components of that in my
6 brief, the PSI talks about the fact that he's got an average
7 income of something like, you know, \$30,000 a year since
8 he's been -- since he was released from incarceration in
9 2003, 2004.

10 And there's nothing in -- there's nothing in the
11 record which indicates that the presentence investigation
12 report is wrong about this point. I mean, there's nothing
13 in the record to indicate that my client is sitting on any
14 kind of assets at all. And, you know, when the trial
15 court -- when the court below says that it evaluated his
16 ability to pay and ordered him to pay \$5,000 a month, I
17 think that's a fairly clear error.

18 Now, if you have a situation where my client has
19 not done enough financial disclosure and you argue that my
20 client has not provided the court with sufficient
21 information to make the assessment, that's what ought to
22 have been in the judgment, not the statement that the
23 ability to pay has in fact been correctly analyzed.

24 And I think this gets back to the Catch-22. I
25 mean, this is obviously an ongoing situation. The child

1 support is still going to be due and owing when he gets out
2 of jail. You know, it's a situation where you're setting
3 him up to go back to jail because you're ordering him to
4 make restitution that he can't make. And it seems to me
5 that the appropriate point in time to fix this problem would
6 have been, you know, at the sentencing situation in the
7 court below as opposed to having us go through this kind of
8 endless series of motions to amend the judgment after he
9 gets out of jail.

10 THE COURT: Well, the plea agreement provides that
11 he agrees to make monthly payments of at least a thousand
12 dollars.

13 MR. ABBOTT: Well, that was before he was likely
14 going to spend six months in jail.

15 THE COURT: Well, but unless he can demonstrate to
16 his probation officer that he is unable to pay the minimum
17 monthly payment, then he goes to the probation officer and
18 explains it. It seems to me that why can't that still
19 happen now? He gets out, he goes to talk to the probation
20 officer, and we go from there.

21 MR. ABBOTT: Well, there is no probation as a
22 result of the sentence that's imposed. It's just he is
23 released and then he's got this restitution obligation.
24 There's no process by which I can -- I don't know if I'll
25 represent him at that point or not, but there is no process

1 by which he can go forward and make that change. I mean,
2 you almost have to make a motion to reopen the underlying
3 criminal case and then take it in front of Magistrate Judge
4 Noel, I imagine. I mean, it would be easier to go through
5 the probation officer but there's no procedure in the
6 criminal judgment to do that.

7 THE COURT: Ms. Bell, what about the probation
8 officer. Will there be a probation officer involved here?

9 MS. BELL: The way that Judge Noel set up the
10 judgment there was no supervision to follow six months.

11 THE COURT: Is that required or could he have had
12 supervision?

13 MS. BELL: I think -- it's a little unclear
14 exactly how he did it but by imposing the statutory maximum
15 six months, I think there is no supervision to follow
16 because he has used up the statutory maximum.

17 Now, there is the new act in probation but I'm not
18 sure if this Defendant -- where you can get -- kind of keep
19 violating and go back to jail, but I'm not sure it applies
20 to this because of the start date of this offense. I think
21 the ex post facto clause would put us back in an earlier
22 version.

23 THE COURT: But isn't it the normal rule that if a
24 Defendant receives the statutory maximum, there is no
25 probation or supervised release to follow?

1 MS. BELL: I couldn't tell you if that's the
2 normal rule. I've never had anybody receive the statutory
3 maximum.

4 THE COURT: I'm not sure I have either.

5 MS. BELL: It's the case that generally the
6 statutory maximum is life or something.

7 THE COURT: Yeah, life or 40 years or something.

8 MS. BELL: So I don't know if it would be
9 impossible to impose, but I know that it was not imposed in
10 this case. There was no probation or supervised release to
11 follow. I could look and see if there's a quick way.

12 THE COURT: Do you have any response to what
13 counsel is saying about the monthly payments?

14 MS. BELL: I think I summarized my -- sort of my
15 response to it in my brief.

16 THE COURT: Well, I read it but tell me again what
17 you said.

18 MS. BELL: I think the Catch-22 here is created by
19 the Defendant. I think Judge Noel felt that the Defendant
20 was not being truthful and honest with the probation officer
21 about his financial circumstances and, therefore, sort of
22 did the analysis of his financial circumstances based in
23 part on what the Defendant provided and in part on the fact
24 that this individual owes an extraordinary amount of child
25 support, almost \$400,000. The time to pay that back, he's

1 got a \$5,000 repayment schedule set up over the course of 78
2 months. So that's still -- I mean, we're talking six and a
3 half, seven years of time even at the \$5,000.

4 THE COURT: Even if he made all the payments.

5 MS. BELL: Right.

6 THE COURT: Which he is unlikely to do or be able
7 to do. At least the track record would indicate that.

8 MS. BELL: The track record would indicate that.
9 So I think the issue that we have is we do -- and I think
10 Judge Noel was pretty clear on the record. I think the
11 probation office was pretty clear. We do not have as what
12 they would view as a full financial picture. And,
13 therefore, at the time of the sentencing the judge had to
14 use his best estimate and his discretion to come up with a
15 schedule because the Defendant put the Court in the position
16 of not having the financial information.

17 Do we have complete financial information? No.
18 But is that -- did the Court do its best to request it?

19 THE COURT: Let's assume I affirmed the sentence
20 as imposed by Judge Noel. That would not preclude, I
21 assume, the Defendant from coming back to court, whether it
22 be back to Judge Noel or back to this Court, seeking some
23 relief from that after there's been a further disclosure of
24 his financial condition.

25 MS. BELL: I don't know what avenue that would be.

1 I know that he could --

2 THE COURT: It wouldn't make any difference if
3 the -- if the sentence were the six months in prison, which
4 is the statutory max for incarceration. Let's assume Judge
5 Noel said a thousand dollars a month instead of the five
6 thousand. Wouldn't we have exactly the same problem here?
7 Who supervises that payment schedule?

8 MS. BELL: Essentially my understanding of it is
9 the restitution order will then be converted into -- I'm
10 certainly not accurate in this -- some sort of civil
11 judgment where the asset and recovery folks in my office can
12 go after assets.

13 THE COURT: Or deal with the Defendant with
14 respect to working out a schedule for doing it. That this
15 would get reduced to a judgment?

16 MS. BELL: Right.

17 THE COURT: And there's a restitution order in
18 here for -- is there a restitution order?

19 MS. BELL: I think it's --

20 THE COURT: 300,000.

21 MS. BELL: \$391,400, I believe.

22 MR. ABBOTT: It's on the last page of the
23 judgment.

24 THE COURT: The last page? Oh, of the judgment.

25 MS. BELL: Page 3.

1 MR. ABBOTT: Page 3, I'm sorry, your Honor.

2 THE COURT: Page 3 of the judgment? Here, let me
3 find it. Okay. \$391,400.

4 And assume that the payments then are that \$5,000
5 that we're talking about that's part of the sentence.

6 MR. ABBOTT: The \$5,000 a month comes on the next
7 page, page 4, where he has checked item D on the schedule of
8 payments.

9 THE COURT: Anything else on that?

10 MS. BELL: Just so the Court's aware, and I know
11 Magistrate Judge Noel understood that, but the mandatory
12 Victim Restitution Act does require that the full amount of
13 restitution be ordered. The Defendant is required to pay
14 the 391,000. I think the only issue is how that's going to
15 get worked out.

16 THE COURT: Well, it seems to me that that is
17 going to get reduced to judgment. That's the standard
18 procedure for your office, as I recall.

19 MS. BELL: That's my understanding.

20 THE COURT: That that's the time to take this up
21 with the US Attorney's Office in terms of working out a
22 schedule. We've had that before. Not exactly these
23 circumstances, but there are schedules that are worked out
24 and sometimes they will change them because the Defendant's
25 circumstances change, either with more funds available or

1 less funds available.

2 I'm, frankly, inclined to leave it as is. We'll
3 see what happens. We've got 30 days after his release and I
4 would think that he ought to sit down with the US Attorney's
5 Office and see what could be worked out. I don't think the
6 court is going to have any objection if they work out
7 something other than the \$5,000. But I want to have
8 somebody overseeing that workout other than myself.

9 Well, is there anything else we need to say?

10 MR. ABBOTT: No, your Honor.

11 THE COURT: Mr. Golfis, is there anything that you
12 would like to say? Anything you think you can add to the
13 discussion that's been going on?

14 THE DEFENDANT: Yes, your Honor, I would.

15 First of all, I do appreciate what you have said.
16 I'm not here to deny my inability to pay the child support.

17 As far as me having an intent to do so, I would
18 like to state that when I was working a few years ago I was
19 paying a very substantial amount more than the child support
20 agreement that I had with my ex-wife. Receipts have been
21 sent to the Government. I'm not sure if you have received
22 them or not. But after that I was incarcerated for almost
23 three years and I was not able to pay child support and the
24 amount kind of added up. But I was paying child support
25 before that.

1 My intent is to put this behind me and reclaim my
2 life back so I can at least, whatever years I have left, you
3 know, to have an enjoyable life. I do intend to make
4 restitution to the best of my ability.

5 At this point all I can say is that I would like
6 to have an opportunity to do that, whether it's after the
7 six months or before. But I do have the intent in order to
8 put this behind me.

9 THE COURT: Okay. Anything else we need to cover?

10 MS. BELL: Judge, I'm just going to -- trying to
11 answer your question about whether you could have probation
12 or some sort of supervised release to follow. It -- the
13 statute, it's 18 USC 3583, does not sort of preclude a term
14 of supervised release to follow a sentence of imprisonment.
15 It's up to the Court whether they want to impose supervised
16 release or not. For a misdemeanor it would be not more than
17 one year of supervised release. So that's the maximum that
18 can be imposed.

19 THE COURT: Well, I'm not sure it would add
20 anything. It would have made it a little simpler for me to
21 be able to avoid the particular problems that are in front
22 of me. But I don't think I'm going to change that aspect of
23 Judge Noel's sentence. I think the appropriate thing to do
24 here is just to let this run out in terms of your office. I
25 would hope, Ms. Bell, that you would talk with whoever in

1 your office is in charge of these things, explain the
2 circumstances here when the Defendant is released, which
3 will be three months or something like that.

4 MR. ABBOTT: It should be February.

5 THE COURT: It will be four months from now, that
6 an arrangement be made or a meeting be made to sit down and
7 work something out. Because obviously -- I shouldn't say
8 obviously. I don't know whether he can pay the \$5,000 or
9 not. It's a higher amount than I think probably the parties
10 contemplated in the plea agreement. But I can't say from
11 trying to review what Judge Noel did that it was totally
12 irrational or not supported. I mean, it's clear from
13 reading the transcript Judge Noel was not particularly
14 pleased with the way this matter came before him and the
15 Defendant's conduct leading up to it. And I must say I can
16 understand his views in that regard.

17 But I think I'll just -- I'm going to -- well,
18 whether -- and I gather everybody seemed to think that this
19 is an abuse of discretion review. But I want to make clear
20 if that's the review, I think it's clear that the order
21 should be affirmed. If it's de novo review for some reason,
22 if somebody takes the position down here, I can say that
23 having read the entire file, I can say including the
24 transcript before Judge Noel and the other documents in the
25 file, I would reach the same conclusion as Judge Noel did,

1 certainly with respect to the monetary or to the position of
2 the six months. I think even though it's the maximum, I
3 think under the circumstances here anything less would not
4 in fact satisfy the purposes of 18 USC 3553(a).

5 And so I will affirm -- the sentence will be
6 affirmed in all regards and we'll take it from there.

7 Anything else we need to cover?

8 MS. BELL: No, your Honor.

9 MR. ABBOTT: Not that I am aware of, your Honor.

10 THE COURT: We are in recess.

11 (Court adjourned at 10:53 a.m.)

12 * * *

13
14
15 I, Carla R. Bebault, certify that the foregoing is
16 a correct transcript from the record of proceedings in the
17 above-entitled matter.

18
19
20 Certified by: s/Carla R. Bebault
21 Carla R. Bebault, RPR, CSR