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ORIGINAL

SUPERIOR COURT OF
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH

2013 MAY 22 P: 1: 0 | Criminal No.: 2012 CF1 003958

v.

FILED

Judge: The Honorable Herbert B. Dixon, Jr.

ELLSWORTH COLBERT,
Defendant.

Sentencing Date: May 29, 2013

GOVERNMENT'S MEMORANDUM IN AID OF SENTENCING

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits this memorandum in aid of sentencing. For the reasons set forth herein, the government respectfully recommends that the Court impose a sentence totaling at least 240 months (20 years') imprisonment, followed by an appropriate period of supervised release. In support of this recommendation, the government submits the following points and authorities, and any others which may be cited at a hearing on this matter.

I. Background

The evidence at trial showed that on Sunday, March 4, 2012, at approximately 10:15 a.m., members of the Metropolitan Police Department responded to 3607 Highwood Drive SE, Washington, DC, for the report of a stabbing. Upon arrival to the scene, officers located the decedent, Robert Wright, lying in the driveway of the house at that address. Mr. Wright, who was suffering from stab wounds to the body, was unconscious and unresponsive. Mr. Wright was transported to Prince George's Hospital Center where all life saving efforts proved futile, and Mr. Wright was pronounced dead at 11:01 a.m. The cause of death was determined by autopsy to be multiple (8) sharp force injuries, and the manner of death was determined to be homicide.

Evidence adduced at trial demonstrated the following: Anthony Davis testified that he met with Mr. Wright as Mr. Wright was walking the dog that Sean Hurd cared for. Mr. Davis walked with Mr. Wright past the defendant's house, when the defendant angrily came out of his house brandishing an open bladed knife and a walking stick. Mr. Davis testified that the defendant confronted Mr. Wright about the dog allegedly

defecating in his yard. Mr. Davis further testified that the defendant followed Mr. Davis and Mr. Wright back to Sean Hurd's house, to also complain to Mr. Hurd that Mr. Wright was irresponsible in his care of the dog.

Mr. Hurd testified that while standing in front of his house, 3607 Highwood Drive SE, he saw the defendant approaching his house and angrily complaining about Mr. Wright allowing the dog to defecate in his yard. Both Mr. Davis and Mr. Hurd saw the defendant with a walking stick in one hand and an open bladed knife in the other. While arguing with Mr. Wright, Mr. Hurd saw the defendant swing the knife at Mr. Wright, stabbing Mr. Wright in the neck, inflicting a serious injury according to Victor Weedn, MD, formerly of the Maryland Office of the Chief Medical Examiner. Thereafter, both witnesses saw Mr. Wright run to the rear of the house, and return holding a shovel. Both Mr. Davis and Mr. Hurd saw the defendant and Mr. Wright go into the street and swing their weapons at one another, landing blows.

The defendant then tackled Mr. Wright, relieving Mr. Wright of the shovel. Both witnesses saw the defendant and Mr. Wright struggling prone on the roadway of the street. Mr. Davis described the sound of the defendant further stabbing Mr. Wright, as the shovel lay in the street. When the defendant and Mr. Wright disengaged, the defendant taunted Mr. Wright as he walked away. As he stood up, Mr. Wright stumbled and fell from his stab wounds, one of which had perforated his aorta. Mr. Wright lost consciousness and died of massive internal bleeding, falling face first onto the pavement of the driveway of 3607 Highwood Drive.

The defendant was indicted for First Degree Premeditated Murder While Armed, Assault With Intent to Kill While Armed, two counts of Assault with a Dangerous Weapon and one count of Carrying a Dangerous Weapon. After a ten day trial, on January 18, 2013, the defendant was convicted of Voluntary Manslaughter While Armed, Assault With a Dangerous Weapon (knife) and Carrying a Dangerous Weapon (knife).

II. Sentencing Factors

It is well-established that in determining the appropriate sentence for the defendant, the Court may take into consideration any factor other than race, gender, marital status, ethnic origin, religious affiliation, or sexual orientation. See, D.C. Sentencing Guidelines Practice Manual at § 3.2. It is appropriate for the Court to take into consideration the nature and circumstances of the defendant's offenses, his criminal history and background, and the public's interest in punishment, deterrence and rehabilitation. As discussed, each of the factors below support the government's recommendation that the defendant should be sentenced to an appropriate period of incarceration for his offenses, in this case, to a total of at least 240 months' (20 years') imprisonment, followed by an appropriate period of supervised release.

A. Nature and Circumstances of the Instant Offense

The nature and circumstances of the defendant's offenses are horrifically violent. The Court must keep in mind at the outset that the defendant was the sole instigator of the entire sequence of events leading to Mr. Wright's death. The defendant initiated a confrontation with Mr. Wright, as Mr. Wright was doing nothing more objectionable than walking a dog close by the curtilage of the defendant's mother's property. As Mr. Wright passed the defendant's house, the defendant came out of his front door, immediately brandishing a knife and a walking stick as he accosted Mr. Wright. As described by Mr. Davis in his testimony, it was apparent from the defendant's demeanor and behavior that the defendant saw Mr. Wright approaching while still inside the house, and likely armed himself to aggressively exit the house and confront Mr. Wright. When Mr. Wright attempted to ignore the defendant, the defendant aggressively walked to the home of the dog's caretaker, and berated that witness, Mr. Hurd, about Mr. Wright's care of the dog.

When Mr. Wright made some remark challenging the defendant's conduct, the defendant stabbed Mr. Wright in the neck. As Medical Examiner Victor Weedn, MD testified, that single wound, while not fatal, was extraordinarily dangerous given the vital blood vessels close to where the wound was inflicted. Not being satisfied with having stabbed Mr. Wright in the neck, the defendant declined to return to his house

when Mr. Wright ran to the back of the Hurd home to retrieve a shovel. Rather, the defendant remained, correctly anticipating that his outrageous conduct was provoking further confrontation.

When Mr. Wright returned, the defendant welcomed the opportunity to end what he had begun. As Mr. Davis testified, Mr. Davis could hear the sound of the defendant stabbing Mr. Wright, describing the sound of the blows against Mr. Wright's nylon jacket. The defendant delivered these fatal blows, including the stab wound to Mr. Wright's aorta, after the defendant had tackled Mr. Wright, relieving him of the shovel.

The defendant's conduct was utterly outrageous. The Court would be hard pressed to imagine a more senseless taking of life, or a more horrific endangerment of another. Simply put, the defendant showed himself to be a bully, who instigated a deadly confrontation and carried it through to its end. Justly, the defendant's cowardly claim of self defense was rejected by the jury, who understandably saw that the defendant both provoked the confrontation and used excessive force.

B. The Defendant's Criminality and Background

As an initial matter, the government challenges the calculation made by the Presentence Report (PSR) writer regarding the defendant's criminal history score. Specifically, in the "Prior Criminal Record" section of the PSR, the writer incorrectly characterizes the defendant's November 21, 2007 conviction in case number 5E00336565, from the District Court of Maryland for Prince George's County, as warranting a score of only .25. See, PSR, p. 12. The PSR writer erroneously likens the defendant's Maryland conviction of Second Degree Assault to the D.C. Code misdemeanor offense of Simple Assault. An examination of the facts of that Maryland offense reveals that it is more appropriately analogous to Assault With a Dangerous Weapon, ("ADW") (22 D. C. Code § 402), warranting 2 points rather than the .25 of a point calculated by the PSR writer.

Section 2.2.6(a)(6) of the District of Columbia Voluntary Sentencing Guidelines Manual directs that "[i]f the government determines that the criminal history score for [an] out-of-District conviction under-

represents the severity of the offense, then the government may seek a criminal history departure. If the [C]ourt concludes by a preponderance of the evidence that the underlying conduct for the out-of-District conviction most closely matches a more severe D.C. offense, then the Court *must* apply the same number of criminal history points applicable to the more severe D.C. offense.” *Id.*, (emphasis added). In case 5E00336565, the conduct for which the defendant was convicted of Second Degree Assault consisted of brandishing a knife at complainant Sharon Holeman, holding the knife to Ms. Holeman’s face, and threatening to cut her. *See*, Attachment 1, fourth un-numbered page. That conduct more closely resembles the D.C. offense of Assault With a Dangerous Weapon. Appropriately, such a conviction in Maryland carries with it a potential penalty of 10 years’ imprisonment. Accordingly, that offense should be characterized as the felony offense of ADW, which in D.C.’s Guidelines scheme, warrants 2 criminal history points. Therefore, the defendant’s total criminal history score should be 3.0 rather than the 1.0 calculated by the PSR writer.

An examination of the defendant’s extensive criminal history reveals an individual who has, at least since 1997, routinely displayed behavior consistent with his March 4, 2012 killing of Mr. Wright. Indeed, the confrontation that the defendant initiated resulting in his killing of Mr. Wright, represents the culmination of a period of at least 15 years, where the defendant consistently used violence and intimidation in his interactions with others. The defendant’s criminal history belies the specious and self-serving claim of the defendant’s son, Damon Colbert, who conveyed to the PSR writer that the son “has only known his father to defend himself, but not to be violent on his own,” and that with regard to previous assaults, that they resulted “[b]ecause [the defendant] was provoked. He didn’t back down.” PSR, p. 19.

On the contrary, beginning in May of 1997, and continuing with little interruption until the defendant killed Robert Wright in March of 2012, the defendant has been charged sixteen times with either acts of violence or violating protective orders. An examination of some of the facts of those cases illustrates for the Court how the defendant typically acted with aggression, violence and intimidation towards others. Far from

merely protecting himself, the defendant has acted as an initial aggressor, provoking others and using violence and intimidation to force the submission of others. In short, the defendant has made routine use of violence against others. His killing of Mr. Wright is a the most egregious example of this larger pattern of violent behavior.

According to a statement of charges filed on July 24, 1997, in Maryland District Court for Prince George's County by Beverly Colbert, then the defendant's wife, on May 27, 1997, the defendant hit her several times in the head with a beer bottle and broke the index finger of her left hand, when Mrs. Colbert raised that hand to defend herself. Then on July 23, 1997, the defendant again punched Mrs. Colbert in the mouth, bloodying her lip, because she refused to have sex with him. See, Attachment 2.

According to another statement of charges filed on October 8, 2000, in that same court by Beverly Colbert, on October 6, 2000, the defendant threatened Mrs. Colbert when accusing her of listening in on his telephone calls. Mrs. Colbert reported that the defendant threatened to "bite the nose off my face [and] stick it up my ass." After another day of threatening Mrs. Colbert, on October 8, 2000, the defendant hit Mrs. Colbert a number of times in her head with a watering can, when angry that yard plants had not been watered. In that same statement of charges, Mrs. Colbert claimed that a number of weeks prior, the defendant had also made threats towards her. See, Attachment 3.

According to another statement of charges filed on June 10, 2004, by Mrs. Colbert, on June 6, and again on June 9, 2004, the defendant bit Mrs. Colbert on her face and her finger, kicked her in her back and buttocks, and punched her in the mouth with his fist. In that statement of charges, Mrs. Colbert stated that "I have been married to this monster for 27 years [and] he has displayed physical, verbal [and] emotional abuse throughout that time period." See, Attachment 4.

In another statement of charges filed by Mrs. Colbert on August 3, 2004, the defendant again attacked Mrs. Colbert, twisting her arm and demanding keys that she held. See, Attachment 5.

On five occasions between June of 2004 and August of 2005, the defendant was charged with

violating protection orders sought by Mrs. Colbert.

In an incident foreshadowing the defendant's killing of Mr. Wright, on May 15, 2006, case number 2006-CF2-9623 was begun in D.C. Superior Court charging the defendant with Assault With a Dangerous Weapon (ski pole). In that case, it was alleged that the defendant was blocking traffic by standing outside of a car talking to someone when a car containing the victim honked at the defendant to move on. Allegedly, the defendant, who was carrying what was characterized as a "ski pole," took umbrage at this action by the driver, approached the offending vehicle and struck it with the pole. When victim Jamil Offutt, one of the passengers, attempted to exit the vehicle, the defendant allegedly stabbed Mr. Offut in the neck with the weapon, which was similar to the "walking stick" that he used against Mr. Wright in the instant case. The puncture wound to Mr. Offutt's neck required hospitalization. That case was ultimately dismissed.

According to a statement of facts filed in Maryland District Court for Prince George's County on September 28, 2007, by Sharon Holeman, during a dispute with Ms. Holeman the preceding day, September 27, 2007, the defendant brandished a knife, put that knife to Ms. Holeman's face and threatened to cut Ms. Holeman with it, within the captive environment of an automobile being driven by the defendant. See Attachment 1. The defendant was convicted of Second Degree Assault on November 21, 2007 and sentenced to 18 months, 15 months suspended. See, PSR p. 12.¹

On July 11, 2009, during an argument at a family reunion in Washington, DC, the defendant punched a relative, Charles Tuckson, in the face. When Mr. Tuckson fell to the ground, the defendant stood over Mr. Tuckson, grabbed him by the head and bit Mr. Tuckson on the eyebrow. Several family members pulled the defendant from Mr. Tuckson an the defendant fled. See, Attachment 6. The defendant was charged with Simple Assault in case number 2009-DVM-2001. The defendant was convicted of this offense on October 6, 2009.

1. In addition to being the offense that the PSR writer erroneously scored as a .25 point misdemeanor rather than a 2 point felony, the defendant's conviction for this offense also represents one of the predicate felonies exposing him to heightened penalties pursuant to 22 D.C. Code § 1804a(a)(1).

On January 21, 2011, the defendant entered the District Building, where the District of Columbia City Council meets, and entered an office of the Chairman of the D.C. City Council. There the defendant began arguing with a City Council employee and threatened the employee by stating "Don't make me go Southeast on you." The defendant was arrested and charged with Attempted Threats. See, Attachment 7. The defendant was charged in Superior Court in case number 2011-CF2 1307. On March 17, 2011, the defendant entered a deferred sentencing agreement in that case.

The defendant's long history of violence places in context his actions of March 4, 2012, and makes understandable how he could provoke such a confrontation with Mr. Wright. The defendant is a person much accustomed to using violence and threatening words in his interactions with others, not only to get his way, but to make himself feel superior to others.

This sense of superiority and false grievance is evident in the descriptions given by the defendant to the PSR writer regarding his family, employment and health histories. Despite being raised by a stable, intact family – including both parents and siblings in a solid, prosperous neighborhood in Washington, DC – the defendant claims that his problems began from racism and "living while black. The black man's dilemma in America." See PSR, p. 19. The defendant's placing blame for his criminal conduct on society is truly offensive, when the Court considers how so many in our community manage to live productive and law abiding lives, having grown up in so much less fortunate circumstances than the defendant. Further, the defendant blames the demise of his marriage not on his 27 years of constant abuse towards his wife, but rather because "[s]he put me out on the street, because no finance, no romance." See PSR, p. 21. Additionally, while it is ironic that the defendant claimed at trial that he was physically outmatched by Mr. Wright and killed him on March 4, 2012, in self-defense, and argued for his pretrial release citing his alleged frail health, the defendant told the PSR writer that the staff of the D.C. Jail "can't even give me an aspirin. My body is a temple. They said I got the body of a 25 year old." See PSR, p. 28. This statement evinces that the defendant is one who sees himself as superior to others, and goes far to explain his sense of

entitlement to others' deference, and his justification in using violence to vindicate himself.

The defendant attributes much of his trouble to his claim that he was wrongfully fired from his job with the District of Columbia Department of Public Works ("DPW"). In truth, the defendant was fired from his job with the DPW for threatening acts of violence, for assaulting a supervisor on June 3, 1997, for neglect of his duties by failing to comply with various work directives and rules, and for insubordination, by contravening the direct order of a supervisor not to visit the premises where the violent altercation had taken place between the defendant and the supervisor that he had assaulted. See, District of Columbia Public Works v. Colbert, 874 A.2d 353, 357 n. 1, (D.C. 2005).

Prior to his ultimate termination from DPW, the defendant was responsible for a long series of violent and threatening encounters with coworkers and superiors. The defendant's transgressions were catalogued by the DPW, and submitted as evidence in the lawsuit following DPW's termination of the defendant. The DPW submitted: (1) a memorandum dated August 24, 1995, to William McGuirk, Chief of the Traffic Signal Systems Division, from Thomas Jackson, Chief of the Traffic Signal Maintenance Branch, reporting that the defendant had threatened to physically harm Jackson; (2) an incident report dated August 29, 1995, alleging that the defendant threatened a security guard with physical violence; (3) an incident report dated August 30, 1995, alleging another threat of physical violence against the same security guard; (4) a letter dated August 31, 1995, from the Traffic Signal Mechanic Foreman, to Jackson, alleging that the defendant initiated a verbal altercation; (5) a memorandum dated September 5, 1995, from Jackson to McGuirk, alleging that the defendant initiated a verbal confrontation with the same security guard and caused a gate to pin the security guard against a brick wall resulting in injury; (6) a memorandum dated September 6, 1995, to the defendant from McGuirk, informing the defendant that he was being transferred to the Traffic Signal Construction Branch; (7) a memorandum dated March 12, 1996, reporting that the defendant persistently refused to comply with instructions and thereby endangered the safety of fellow workers; (8) a memorandum dated March 20, 1996, to the personnel file from Jackson stating that the defendant refused

to leave Jackson's office until Jackson placed a phone call with the Metropolitan Police Department; (9) an incident report dated March 28, 1997, and ensuing documentation, indicating that the defendant was arrested for failure to display a valid driver's license while operating a government vehicle; (10) a memorandum dated June 24, 1997, to the defendant from McGuirk, informing the defendant that he was no longer eligible for a weekend overtime program because he allegedly initiated a verbal altercation with Parney Jenkins, Chief of the Street Construction and Maintenance Branch; and (11) a memorandum dated June 28, 1997, to McGuirk from Jenkins, confirming in writing the verbal altercation cited by McGuirk in the June 24 memorandum. See, Id., 874 A.2d at 357, n. 2.

The defendant's obsession with his having been fired was much on his mind during the time immediately leading up to his killing of Mr. Wright. The defendant was scheduled to testify before a committee of the City Council about his grievance, and did so during the week preceding his March 4, 2012, killing of Mr. Wright. During an email exchange with his son Damon Colbert on February 8, 2012, in anticipation of his City Council testimony in early March, the defendant informed his son about his upcoming testimony. This email prompted the defendant's son to respond "stop cluttering my email with this BULLSHIT." See, Attachment 8. The defendant responded to his son "Fuck U!!!" Id. To this, Damon Colbert responded "That's it. You're back on punishment. Stupid fuck." Id. In response to this, the defendant forwarded the email train to his ex-wife, Beverly Colbert, and with two emails stated to her, "u need to remind ur boy, that I am NOT the one . . ." and "They will find his bitch-ass in an abandoned well in [Fort] Washington." Id.

The Court should consider this exchange in the context of the facts of Mrs. Colbert's statements of charges describing the defendant's behavior towards her and the manner in which he seemingly routinely spoke to her. Thus, this exchange between father and son serves to further illustrate how explosive is the defendant's volatility, how easily provoked he is by mere challenging words, and how he so little regards the son whom he proudly referenced in his taunts to Mr. Wright, as the defendant killed him. It should be no

surprise then, that an individual who treats his loved ones so poorly, would have no misgivings about attacking and killing the random passer-by unfortunate enough to cross his path and offend his inflated sense of pride and grievance. The defendant's entire criminal history demonstrates the horrifically violent manner in which he has for many years treated others. Given his history, the defendant's killing of Mr. Wright is no less outrageous, but sadly predictable.

C. The Public's Interests in Punishment, Deterrence, and Rehabilitation

In this matter, the offenses committed by the defendant were of the utmost seriousness and the public's interest is correspondingly strongly in favor of an appropriately lengthy period of imprisonment. The defendant must be appropriately punished for so horribly and senselessly taking the life of Robert Wright. In addition, as is noted by the PSR writer, the defendant has indisputably demonstrated that he poses a danger to the community, see PSR p. 30. Moreover, the defendant's criminality and background raise concerns that he may commit additional offenses, including violent offenses, if he is released prematurely. Accordingly, the public's interest in deterring the defendant from committing further offenses, including acts of violence, likewise strongly favors a lengthy period of imprisonment. While the defendant's rehabilitation is always a consideration at sentencing, against this back drop, a lengthy period of imprisonment is appropriate in this case.

III. Government's Recommendation

The defendant has caused irreparable harm by his killing of Robert Wright. Not only is the senseless taking of another's life the most horrific offense that can be committed against a fellow human being, but the taking of that life also has such a profoundly devastating effect upon that decedent's family and friends. Mr. Wright was a friend and family member to many, a father to three, and a beloved son of an elderly mother, who cannot bring herself to come to Court to face discussion of the circumstances of her son's death. As Mr. Wright's cousin, Aprele Smith, states in her Victim Impact Statement, see, Attachment 9, "Robert's life was snuffed out without regard to what he meant to those of us who loved him." The defendant is the

author of such great misery. Justice demands his punishment.

The defendant's criminal conduct in this case warrants a sentence that accurately reflects his culpability. Accordingly, the government respectfully recommends that the Court take into consideration the government's challenge to the PSR writer's erroneous calculation of the defendant's criminal history score, and to consider the defendant to fall within Column "C" rather than Column "B." Additionally, the government urges the Court to consider the "three strikes" sentencing enhancement to which the defendant is justly subjected pursuant to 22 D.C. Code § 1804a, by virtue of his previous felony convictions, thus raising his guidelines to a maximum of 360 months (30 years) imprisonment for each felony offense of conviction in this case. Accordingly, the government recommends that the Court impose sentences totaling 240 months (20 years) imprisonment, to be followed by an appropriate period of supervised release.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by email upon defendant's counsel, James Rudasill, at rudasilljr7@aol.com, this 22nd day of May, 2013.



EDWARD A. O'CONNELL
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