

Ira DeMent
Middle District of Alabama

Now you come to the Sentencing Guidelines, which I don't like either, if you want to know the truth. . . . And they will never undo them . . . because the bureaucracy is dug in, and they have laid triple concertina and double apron strand of barbed wire, and it continues to grow. And it's the law and I must follow it, so that my answer to you . . .¹

Appointed by: President George H.W. Bush, 1992.

Law School: Univ. of Alabama, J.D. 1958.

Military Service: U.S. Army & Air Force Active & Reserve (Maj. Gen.-Ret.), 1953-74.

Prior Legal Experience: Calvin M. Whitesell, 1961-62; Whitesell & DeMent, 1962; Whitesell, Alton & DeMent, 1962-65; DeMent & Wise, 1982-87; Solo-practitioner, 1965-69, 1977-82, 1987-92.

Government Service: Assistant U.S. Attorney 1959-61; Assistant City Attorney, City of Montgomery 1965-69; U.S. Attorney 1969-77.

Background and Reputation in the Legal Community

Judge DeMent attended Marion Military Institute and the University of Alabama. He served in the United States Army in the Infantry and in the Air Force with the Judge Advocate General. For his military service, he was awarded the Meritorious Service Award, Legion of Merit, and the Air Force Distinguished Service Medal. He is a life member of the Air War College Alumni Association and the Air War College Foundation.

During his legal career, Judge DeMent rose to become a name partner in several firms as well as engaging in periods of solo practice. Before being appointed to the federal bench, Judge DeMent was also an Assistant City Attorney, an Assistant United States Attorney, and for eight years, the appointed United States Attorney for the Middle District of Alabama. As a lawyer and now as a judge, Judge DeMent has been active in his local and state bar and in several national legal associations.

Lawyers say that Judge DeMent has outstanding legal skills. One lawyer noted that he “revels in the more academic stuff, but he has a lot of experience in the trenches too. It’s a good combination, and he puts it to good use.” Another said, “He can be very exacting. He requires everyone to behave courteously and professionally.” In trial, lawyers note that his military background comes through, saying things such as, “He makes the trains run on time.” “He runs a very tight ship.”

Both civil and criminal lawyers consider him fair. One lawyer said that Judge DeMent “can’t help but lean a little toward the prosecution given his background, but I wouldn’t

¹ *United States v. Kenneth Stovall*, Sent. Tr. at 12-13, No. 92-064 (M.D. AL, July 2, 1992)[the judge corrected typographical errors in the transcript by letter to author, February 1, 2004].

go so far as to call it bias. He's fair in the end." Another stated that he "doesn't put up with any nonsense from either side." During the Guidelines era, criminal lawyers said he sentenced within the Guidelines and rarely departed. However, they also acknowledged that his sentences varied, as one noted, it "all depends on the circumstances."

Kenneth Stovall

Charge: Conspiracy to Distribute & Distribution of Crack Cocaine.
Sentence: 292 Months.
Projected Release Date: May 3, 2013.

Kenneth Stovall was twenty-three years old when he received a twenty-four year and six months sentence for conspiracy to distribute and distribution of crack cocaine for a single drug deal that was monitored and recorded by government agents from its inception. The circumstances of his case present a palette for many of the judicial complaints about the sentencing in the Guidelines era. For Judge DeMent, however, it was the impact of "acquittal conduct" on Kenneth's sentence that he found particularly contrary to fundamental principles of the Anglo-American system of justice. Understanding exactly how Kenneth's sentence was enhanced by conduct for which he had been acquitted at trial requires an explication of the investigation and trial and the applicable Guidelines and case law on this issue.



On January 25, 1992, a confidential informant arranged to purchase four ounces of crack cocaine from Langston Howard. They arranged to meet at a Howard Johnson's motel room. After the informant showed Howard the money, the two men went to a Waffle House where they were joined by three more of Kenneth's co-defendants, Andre Aiken, John Phifer, and Reginald Moore. In several cars, these five men then returned to the Howard Johnson's. Somewhere along the way, Aiken and Moore picked up Kenneth, who remained in the parking lot with Moore, while the informant, Phifer, Howard, and Aiken completed transaction in the Howard Johnson's hotel room. The total amount of crack the informant purchased weighed 111.5 grams.

Unbeknownst to the defendants, the transaction in the hotel room was recorded and all five defendants were arrested in the parking lot. Kenneth was in the back seat of one car, along with three of his four co-defendants, including Aiken.² Aiken was found to be in possession of the marked "buy money," and a loaded revolver was also found under Aiken's front passenger seat.³ When questioned by the police, however, Howard indicated that it was Kenneth whom he had called during the negotiations for instructions

² Howard was in a different car by himself.

³ Aiken also was found to be in possession of four rounds of ammunition that matched the gun.

on how to complete the transaction, and that it was Kenneth, not Aiken, who was the “big man.”

Aiken also revealed that he, Kenneth, Phifer, and Moore had been in a room at the Villager Inn before the deal. A search of their room at that motel yielded a bag with 73.9 more grams of crack cocaine. All five men were eventually indicted for conspiracy to distribute and distribution of crack (for the Howard Johnson sale), possession with intent to distribute crack cocaine (for the drugs found at the Villager Inn), and possession of a firearm during a drug trafficking offense (for the gun under Aiken’s seat).

Several of the defendants, including Kenneth, wanted to cooperate in exchange for a lesser sentence. Kenneth even agreed to be interviewed by the government without any advance promises of leniency. Unfortunately, Kenneth’s lawyer chose not accompany him to this “proffer interview” with the prosecutor, out of concern that he “might be representing some of the individuals” that Kenneth might mention and he did “not want to have a conflict.”⁴ Thus, Kenneth did not have the benefit of counsel to help him negotiate his way. In fact, before the interview, Kenneth’s lawyer told the prosecutor he could talk to Kenneth about drugs, but not about the gun that was recovered from the car, apparently out of a misguided concern that this information might be used against Kenneth later on.⁵ In fact, at sentencing, the government alluded to this condition as one reason that Kenneth was not offered a cooperation agreement,⁶ although given Howard’s initial claim that Kenneth was the “big man,” it is not clear that the prosecutor would have wanted Kenneth to testify against his co-defendants under any circumstances.⁷

It is also unclear whether Kenneth was given an opportunity to plead guilty to lower his sentencing exposure. At the sentencing hearing, the prosecutor claimed that he had made a plea offer which Kenneth’s attorney rejected, an assertion that Kenneth’s attorney hotly contested.⁸ What is clear is that Kenneth’s co-defendant, Phifer, was able to

⁴ Sent. Tr. at 19.

⁵ His attorney argued at sentencing that he would have been giving up his right to a jury trial if he had made “a proffer statement that he doesn’t know whether they are going to accept it or not. . . .” and that the government had tried to “forc[e] him to testify against himself, and with no promises whatsoever unless he signs an agreement.” Sent. Tr. at 30. Judge DeMent clarified this point at sentencing by assuring himself that the government did not in fact use any “of the information that [Kenneth] gave [the government] against him on the trial of this case.” Sent. Tr. at 30.

⁶ In arguing that Kenneth should not get a reduction for acceptance of responsibility, the prosecutor stated that “He admitted partial participation, we still have the matter of the gun which Mr. Bell told his client not to talk about. I think that’s the whole problem with this case, each of the Defendants wanted to talk about little specific instances instead of the whole thing. . . .” Sent. Tr. at 49.

⁷ Both sides agreed that, in his proffer interview, Kenneth provided the name of his supplier in Mississippi and some other individuals who were selling drugs in the Montgomery area. The government maintained that it already knew of these people and that no arrests or prosecutions resulted from Kenneth’s information, thus he was not entitled to a government motion for substantial assistance. Sent. Tr. at 24.

⁸ The prosecutor stated that he offered to let Kenneth plead to certain counts and “we would reduce his sentence by a certain amount.” Sent. Tr. at 26. Kenneth’s attorney asserted no plea offer was

negotiate a cooperation agreement and Kenneth and three others chose to proceed to trial with Phifer as a government witness.

To some extent, however, the trial did not go all that badly for these defendants. The judge granted motions for judgement of acquittal for all defendants on the firearms count and completely acquitted Moore (the co-defendant who remained with Kenneth in the parking lot). The jury then found Kenneth and his remaining co-defendants not guilty on the possession with intent to distribute count for the crack found at the Villager Inn. However, the jury did find sufficient evidence to convict Kenneth, Howard, and Aiken of conspiracy to distribute and distribution for the Howard Johnson transaction, setting the stage for the operation of the Sentencing Guidelines approach to “acquittal conduct.”

Under the Sentencing Guidelines and controlling Eleventh Circuit case law,⁹ in computing the offense level, the sentencing judge was required to include all relevant conduct which met the preponderance of the evidence standard, regardless of whether the defendants had been acquitted for these acts by the jury under the higher beyond a reasonable doubt standard. Thus, although the jury had found Kenneth not guilty on the count involving the crack at the Villager Inn, the probation officer included these 73 grams in the quantity calculation, pushing Kenneth’s drug quantity into the next offense category (thereby adding two points to his offense level).¹⁰ Next, he was assessed two offense level points for possession of a gun during a drug trafficking offense, even though he was acquitted on the firearm count. Lastly, Kenneth’s offense level was increased another four points for having a leadership role in a conspiracy with *five or more participants* (italics added), even though one of the five participants (Moore) had been completely acquitted at trial. Thus, “acquittal conduct” in this case added six offense level points to his offense level.¹¹ With a Criminal History Category I, this raised his guidelines range from 151 to 188 months to 292 to 365 months.¹² In other

ever made, to which the prosecutor responded, “That’s a lie.” Sent. Tr. at 25. Because nothing was reduced to writing, the judge could not sort out what had happened other than that no agreement on a plea or cooperation was ever reached, thus he had no power to alter Kenneth’s sentence. There was also some testimony about the failure of Kenneth or his attorney to sign and return the “proffer letter” that was given to Kenneth at his meeting with the prosecutor. Kenneth did not know what happened to the letter and the government’s position at sentencing was that Kenneth’s attorney “rejected the offer that we made” and that “[i]t stopped there.” Sent. Tr. at 24. Kenneth writes that he attempted to encourage his attorney to obtain a plea agreement but was told that the “U.S. Attorney’s office offered none.” Dec. 13, 2006 letter to author at 1 (on file with author).

⁹ The Supreme Court confirmed that the use of acquittal conduct under the Guidelines did not offend the Constitution in *United States v. Watts*, 519 U.S. 198 (1997).

¹⁰ For 111 grams, his Base Offense Level would have been 32 but the Villager Inn drugs pushed the total to over 150 grams, the triggering quantity for Level 34.

¹¹ If Kenneth had been found to be a “leader or organizer” of a conspiracy with less than five participants, his offense level would only have been increased by only two points. *See* U.S.S.G. §3B1.1(c). Therefore, acquittal conduct added two points (not four) for having a leadership role, two points for the gun, and two points on the drug quantity for a total of six offense level points.

¹² Kenneth was also denied a reduction for acceptance of responsibility, which is sometimes given

words, the mandatory use of acquittal conduct added over eleven years to the minimum sentence the judge was required to impose.

At sentencing, Judge DeMent agreed that conduct for which the defendant has been acquitted should not be considered at sentencing, but he noted he had lost this issue in the Court of Appeals on a case in which he had been the defense attorney; stating that he had “cited a thousand common law cases to that effect that acquittal is a complete vindication going all the way back to the Magna Carta, and the Court of Appeals rejected my argument and didn’t even discuss the cases which I cited.”¹³ When the defense attorneys complained that use of acquittal conduct was unfair, Judge DeMent responded that a lot of judges opposed it as well, “but the judges have to follow the law.”¹⁴ As a result, Judge DeMent upheld the enhancements for drug quantity, the gun, and leadership role.¹⁵ In discussing these calculations, Judge DeMent also added

Now you come to the Sentencing Guidelines, which I don’t like either, if you want to know the truth. . . . And they will never undo them . . . because the bureaucracy is dug in, and they have laid triple concertina and double apron strand of barbed wire, and it continues to grow. And it’s the law and I must follow it, so that my answer to you. . . .¹⁶

Judge DeMent then sentenced Kenneth to 292 months, telling him that this was “the bottom, that’s the lowest that I can give you, Mr. Stovall. You understand that? Indeed, I could give you up to 365 months from 292, but I am giving you the lowest possible sentence, 292 months, which is what, 24 years?” Kenneth replied, “yes, sir, 24 and a

to defendants who go to trial. Here, Kenneth did not testify at trial; thus, he did not commit perjury, and he admitted his guilt in his presentence interview with the probation officer and acknowledged he was deserving of some punishment. However, the probation officer and the government opposed this reduction, with the prosecutor complaining that Kenneth had not completely accepted responsibility for all his conduct, such as the gun, which a co-defendant had claimed came from Kenneth. Without making a specific finding, Judge DeMent sided with the government on this point. Sent. Tr. at 47-50.

¹³ Sent. Tr. at 12. See *United States v. Averi*, 922 F.2d 765 (11th Cir. 1991).

¹⁴ Sent. Tr. at 42. Judge DeMent also added that the Guidelines and the case law placed Kenneth “in the unfortunate position of having the conduct of which you complain used against him in computing his guideline range. I could spend an hour telling you what I personally think about that, but I am obligated to follow the law.” Sent. Tr. at 13.

¹⁵ The probation officer concluded that it was reasonably foreseeable that a gun would be present at this transaction and the judge agreed with this assessment. Sent. Tr. at 32-33. Although at trial, Howard recanted his assertion that Kenneth was the “big man,” Judge DeMent noted that other witnesses confirmed that Kenneth had “made arrangements to get the drugs in the right place at the right time to effect and complete the deal.” Sent. Tr. at 4. He also quoted the Guidelines Manual that more than one person could qualify for a leadership role and concluded that Howard and Kenneth were both “major roles players in the drug transaction.” Sent. Tr. at 5.

¹⁶ Sent. Tr. at 12-13.

half,” and that he understood.¹⁷

When allowed to allocute, Kenneth expressed his distress that his co-defendants made him out to be the leader. He claimed that “I did not tell anybody to do nothing for me. . . . And Mr. Phifer testified that everybody was talking to me when they was talking to Mr. Aiken and me, you know what I am saying. It was all of us together. . . . [T]hey were locked up together, they got their stories together against me.”¹⁸

Kenneth was born in Montgomery but his parents moved north before he was five. When he was eight, his parents moved to Grand Ledge, Michigan, where by high school, he had become a budding football star.¹⁹ However, his father then left the family, “causing us to become very poor.”²⁰ His mother chose to remarry and he moved to California with her and her new husband. He writes that his Michigan community was predominantly white and stable, whereas in California, it was mixed crowd, “with a very fast environment.”²¹ Thus, although he graduated from high school, he suffered setbacks in school and in football from “these environmental changes.”²²

After high school, Kenneth moved to Atlanta to work in his father’s construction business, but he started drinking and using marijuana, “which eventually [led] to selling drugs.”²³ He left Atlanta for Montgomery for three years and then moved back to California to go to community college and pursue football again. He came back to Montgomery for a holiday break and got involved in the deal that lead to his conviction.

Kenneth says that he realizes that his crime was not victimless and that it had harmed the community. He believes now that “five years would have served the public and myself properly.”²⁴ In prison, he has completed nearly every adult continuing education

¹⁷ Sent. Tr. at 39-40.

¹⁸ Sent. Tr. at 38. Although Kenneth did not testify at trial, at sentencing Kenneth’s lawyer further proffered that Howard had set up this deal without Kenneth, who was not even in town at the time of the initial contact. He explained that Kenneth just happened to be at the home of “Derrick,” who was supposed to be the supplier for the deal, when Howard called that day. When “Derrick” was unable to provide the crack Howard needed, Kenneth stepped into his role. Sent. Tr. at 6. Even under this version of events, however, Judge DeMent could have considered Kenneth a leader or organizer under the Guideline’s definition of these terms. However, the government added that its evidence was that Kenneth had rented the room at the Villager Inn and directed the transaction as it occurred by phone and the judge accepted this version of the events for purposes of this sentencing enhancement. Sent. Tr. at 10.

¹⁹ December 13, 2006 letter to author at 1 (on file with author).

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.* at 1.

²³ *Id.*

²⁴ *Id.*

program that the BOP offers. He writes that he is currently studying heating and air conditioning, “which I believe will eventually become my trade.”²⁵

He has one child, a son, who is now seventeen, who he says “is struggling tremendously because of my excessive incarceration.”²⁶ He writes most recently that his boy is “very bright but hasn’t been taught any discipline or the importance [of] working for something.”²⁷ Although Kenneth calls and writes, he has only seen his son seven times in the fifteen years he has been incarcerated.

Compiled from Sentencing Transcript, PSI, inmate letters, correspondence with Judge DeMent.

²⁵ Id.

²⁶ Oct. 30, 2006 letter to author at 1 (on file with author).

²⁷ Dec. 13, 2006 letter, at 2. Kenneth has a good prison record. He reports that after his son was kicked out of school at one point, for a short time “lost my focus and started drinking,” testing positive for alcohol. However, he believes that “anyone in the BOP would still say that I’ve been a model inmate.” *Id.*