

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 2:16-CR-3-KS-MTP

KENNETH E. FAIRLEY

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion for Hearing for Re-sentencing, and for Bail Pending Re-sentencing (“Motion for Hearing”) [158] filed by Defendant Kenneth E. Fairley. After considering the submissions of the parties, the record, and the applicable law, the Court finds that this motion is not well taken and should be denied.

I. BACKGROUND

In March 2016, Defendant Kenneth E. Fairley (“Defendant”) was indicted along with his co-conspirator, Artie Fletcher for conspiring to defraud the United States – specifically, to steal government money in violation of 18 U.S.C. § 641. Fletcher pleaded guilty to a separate information, while Defendant proceeded to trial on three counts: conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 (“Count I”), and two counts of theft of government money in violation of 18 U.S.C. § 641 (“Counts II and III”). After a six-day trial in September 2016, a jury of Defendant’s peers returned guilty verdicts on all three counts. On December 19, 2016, the Court sentenced Defendant to 36 months confinement per count, to be served concurrently. The Court also imposed restitution in the amount of \$60,223.95, and a fine in the amount of \$30,000.00. A mandatory special assessment fee of \$100 per count was also imposed.

On January 22, 2018, the Fifth Circuit affirmed the Court's judgment as to Count I of the indictment, the conspiracy charge, and vacated and remanded as to Counts II and III, the theft charges. The Fifth Circuit specifically remanded for the Court "to determine whether Fairley's sentence should change in light of the vacated convictions." (USCA Opinion [156] at p. 2.) Defendant now brings his Motion for Hearing [158], arguing that he is entitled to a re-sentencing hearing and that he should be released on bail pending such a hearing.

II. DISCUSSION

Defendant argues that *United States v. McRae*, 795 F.3d 471 (5th Cir. 2015) mandates that he is given a re-sentencing hearing that followed the same procedures as the original sentencing. In doing so, though, Defendant broadens the holding of *McRae* to encompass the procedures followed by the Eastern District of Louisiana after the Fifth Circuit remanded the case to the district court for re-sentencing. *McRae*, however, stands only for the proposition that the district court should be given the opportunity to reconsider an imposed sentence when one count of a multicount conviction is vacated. 795 F.3d at 483-84. Having disposed of Defendant's misconception as to the law, the Court turns to the Fifth Circuit precedents which speak to this issue.

"[A] defendant's presence in court is not required every time judicial action is taken to correct a sentence." *United States v. Clark*, 816 F.3d 350, 355 (5th Cir. 2016) (quoting *United States v. Erwin*, 277 F.3d 727, 730 (5th Cir. 2001)) (alteration in original). Whether a defendant has a right to be present depends on the Court's actions. *Id.* "If the district court is imposing a new sentence after the original sentence has been set aside, the defendant is entitled to be there. However, a defendant is not entitled to be present when the district court merely modifies an existing sentence." *Id.* (quoting *United States v. Patterson*, 42 F.3d 246, 248-49 (5th Cir. 1991)). In *Clark*, the Fifth Circuit explained:

We have long recognized the distinction between proceedings in the district court that modify an existing sentence and those that impose a new sentence after the original sentence has been set aside. In the former instance, the presence of the defendant usually is not required, unless the modification makes the sentence more onerous. In the latter instance, however, we have consistently held that a defendant's rights to be present and to allocute at sentencing, which are of constitutional dimension, extend to resentencing proceedings.

Id. (quoting *United States v. Moree*, 928 F.2d 54, 655-56 (5th Cir. 1991)). Furthermore, while Defendant contends that his sentence was a “sentencing package” which was “unbundled” by the Fifth Circuit’s judgment, even if true, the Fifth Circuit has held that “where the entire sentencing package has not been set aside, a correction of an illegal sentence does not constitute a resentencing requiring the presence of the defendant, so long as the modification does not make the sentence more onerous.” *Id.* at 357 (quoting *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 2016)).

In Defendant’s case, his sentence for Count I was not set aside. In fact, the Fifth Circuit upheld the sentence imposed for Count I on the grounds challenged by Defendant on appeal. (*See* USCA Opinion [156] at pp. 24-28.) The Court originally imposed a sentence of 36 months confinement, restitution in the amount of \$60,223.95, a fine of \$30,000, and a mandatory assessment fee of \$100.00 for Count I. Nothing in the underlying facts considered by the Court in imposing its judgment has changed, and it would impose the same sentence if considering Count I separate from Counts II and III.¹ The only modification of the sentence the Court deems necessary is the reduction of the mandatory assessment fees from \$300.00 to \$100.00, to reflect the vacations of Counts II and III. A full re-sentencing hearing is not required for this minor modification.² The Motion for Hearing [158] will therefore be **denied**.

¹ The underlying conduct of Counts II and III are related conduct that can and would be duly considered by the Court.

² Of course, because a full re-sentencing hearing is not needed, Defendant’s request of bail is also denied, though the Court is unsure if there is even any legal basis for such a request.

III. CONCLUSION

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Hearing [158] is **denied**. Defendant's sentence under Count I remains the same, with 36 months of confinement, \$60,233.95 in restitution, and \$30,000.00 in fines. The judgment, however, is hereby **modified** to reflect the change in mandatory assessment fees from \$300.00 to \$100.00.

SO ORDERED AND ADJUDGED, on this, the 23rd day of April, 2018.

s/Keith Starrett
UNITED STATES DISTRICT JUDGE