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One Day in Jail – Commencing Now

By Joel Cohen

It was the day my client was to be sentenced. That's a day that is always fraught for any defendant and his lawyer. All of the stars may actually be aligned. Still, one never knows what the judge—any judge—will do. Maybe he woke up on the wrong side of bed. Maybe she just read an article about white-collar sentences being too low. And here, the case was in a courthouse outside New York state, where I'm never particularly at ease.

The client had pleaded guilty to a fraud several years back. He had no trouble with the law until this, and certainly none since. His criminal activity ended many years ago. He pleaded guilty (and quickly), he took valuable steps to demonstrate his remorse and sought to deter others from committing the crime he did (or any crime for that matter). Meaning, in my mind at least, he did everything right (if that's the correct word for it). Still, you never know; and preparing the client for the worst is difficult—especially when the sentencing guidelines for the crime could potentially have imprisoned him for up to three years.

The client was not a flight risk—he was out on an agreed-upon bail for years (delays were partly due to COVID-19). As a white-collar offender, I figured the judge would give him six weeks or so to surrender if she jailed him, as was a good, even likely, possibility. That has been the practice for as long as I can remember, and the prosecution had no objection. Indeed, the co-conspirator had been given that courtesy when he was sentenced. So … I confidently told the client and his wife on the morning of sentencing: "Don't worry at all about going to jail today. Not a chance. You'll sleep in your own bed tonight."

The judge is extremely meticulous in the sentencing process. Was the judge's mind made up when arriving on the bench? I've informally asked many judges that question—and have never really received a firm answer. The prosecutor—honorable and forthcoming in the extreme—made her very helpful remarks; I made mine, and my client addressed the court. The judge was difficult to read—detached in demeanor. I had no real sense.

The judge then did something I had actually not seen before—and left the bench and asked the probation representative to meet in chambers briefly. What did that portend? After all, this judge is clearly confident in decision-making, and rightly so.

Soon thereafter, the judge re-took the bench and I noticed out of the corner of my eye three U.S. Marshals unobtrusively enter the nearly empty courtroom—chambers obviously having tipped them off as to what would happen. Always a telltale sign. I thought to myself—where did this go off the rails? How could I have been so wrong? What would the judge do? My heart sank. I couldn't readily tell my client what the presence of the Marshals meant, i.e., an immediate remand. Courthouse COVID-19 protocols didn't allow me to sit directly next to him as the judge put the pre-sentence remarks on the record—that, by the way, weren't particularly sympathetic.

And then it happened. The judge sentenced him to six months of electronically-monitored home confinement. But first, and critically, he would be remanded to custody for 24 HOURS—the sentence to begin IMMEDIATELY. I can only guess, but it seems that the judge wanted to give him "a taste." Basically, without these words uttered, "so that you, Mr. Defendant, recognize in a very clear-eyed way exactly what jail will be for you if you ever come into contact with the criminal justice system again." The client was then, within seconds it seemed, being taken away after the handcuffs were slapped on him, without so much as a moment to comfort his crying wife.

At first, it seemed to me silly: 24 hours? Hardly worth the manpower required to take him into custody and do the paperwork. Perhaps, though, the judge somehow thought the defendant should be compelled to yield "a pound of flesh," as it were, but given the prosecutor's strong advocacy of a non-custodial sentence and the passage of time, a more severe punishment might seem largely unnecessary.

And maybe it was something altogether different. Maybe the judge was communicating to the defendant exactly what would happen if he violated any of the conditions of probation, some of which were specific to him. No matter the intent—the judge made an important impact on my client.

The next day, my client called me when the 25th hour and freedom had arrived. He had not had his medications (he thought he would be OK without them for 24 hours) and his health was not great. But he was fine, and ready to go home. Astonishingly, though, this is what he told me: "I'm glad that the judge sent me to jail this way. I now fully understand what that experience—what jail—might have been like, even though I had to experience it only briefly."

Whatever motivated it, the judge had a point to make, and made it well and effectively. And while I was somewhat aggravated at the precise moment that the handcuffs appeared—having specifically told him he wouldn't go to jail that day—I get it now. Yes, it's apostasy for a criminal defense lawyer to say so but I must admit, now that the dust has settled, that what the judge did was extraordinarily beneficial in some ways. Not only for society's protection, but also for a defendant—no matter how remorseful he had been over his criminal conduct. I was later told by someone that a few judges in that district have used that boot camp-like procedure somewhat, particularly in sentencing cooperators in the age of COVID-19. Actually makes some sense.

Strangely, now that I have spoken at some length with my "liberated" client, I, too, am glad that he had to endure that day of incarceration (easy as it is for me to say given that I went home that night). He'll be better for it and, most important, he himself knows it.

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