



United States v. Peterson

2010 | Cited 0 times | D. South Dakota | August 27, 2010

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

Defendant, Azizia Peterson, moves for dismissal of her indictment and argues that the government committed selective, discriminatory prosecution. She also seeks a hearing on whether the government charged her more harshly than her husband, Milton Peterson, who was indicted for his participation in the alleged crime. The motion is denied.

BACKGROUND

Azizia married Milton on August 1, 2008, in Sioux Falls, South Dakota. The couple worked on Milton's farm, which experienced significant monetary troubles after the couple married. On February 1, 2010, the county sheriff served Azizia with divorce papers and a restraining order requiring her to vacate the premises. At that point, Azizia told the sheriff that Milton dealt drugs out of the couple's home. She showed the sheriff where the drugs were located. The sheriff then confronted Milton, who cooperated and informed the sheriff that the couple sold drugs out of their home. Milton then led the sheriff to the shed where there were more drugs. The sheriff recovered additional powder and crack cocaine in the shed and the cab of Milton's pickup truck, totaling approximately 33.4 grams of crack cocaine and 514 grams of powder cocaine.

After Azizia was arrested, she tried to cooperate with Agent Hummel of the Drug Enforcement Agency. The interview did not result in a proffer letter. Milton also met Agent Hummel and that interview resulted in a proffer letter from the government. A grand jury indicted Azizia for conspiracy to distribute more than 50 grams of crack cocaine mixture in violation of 21 U.S.C. §§ 841(a)(1), 846, which has a mandatory 10-year sentence. The same grand jury indicted Milton for a conspiracy to distribute more than 5 grams of crack cocaine, which has a mandatory 5-year sentence.

DISCUSSION

I. Selective Prosecution Claim

A. Azizia Was Not Similarly Situated to Other Defendants

Azizia argues that the government persuaded the grand jury to charge her and Milton with different crimes, even though their conduct was similar. The Supreme Court has repeatedly held that the government retains broad discretion in determining whom to prosecute. See *Wayte v. United States*,



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470 U.S. 598, 607 (1985); *United States v. Goodwin*, 457 U.S. 368, 380, n.11 (1982); *Marshall v. Jerico, Inc.*, 446 U.S. 238, 248 (1980). " '[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.' " *Wayte*, 470 U.S. at 607 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). "[T]he decision to prosecute is particularly ill-suited to judicial review." *Id.*

But prosecutorial discretion is not unfettered. *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 125 (1979)). Prosecutors must abide by the Constitution and cannot selectively prosecute based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (internal citations omitted). The court looks to ordinary equal protection standards in resolving a selective prosecution claim. *Wayte*, 470 U.S. at 608. The equal protection clause prohibits race and sex discrimination. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

A defendant claiming selective prosecution bears a heavy evidentiary burden. *United States v. Swanson*, 509 F.2d 1205, 1208 (8th Cir. 1975). A defendant must meet a two-pronged test: "(1) people similarly situated to him were not prosecuted; and (2) the decision to prosecute was motivated by a discriminatory purpose." *United States v. Hirsch*, 360 F.3d 860, 864 (8th Cir. 2004) (citing *United States v. Perry*, 152 F.3d 900, 903 (8th Cir. 1998)). Meeting this test requires a substantial showing by the defendant. *United States v. Deering*, 179 F.3d 592, 595 (8th Cir. 1999) ("Absent a substantial showing to the contrary, governmental actions such as the decision to prosecute are presumed to be motivated solely by proper considerations.").

Under the first prong, Azizia argues that she and Milton are similarly situated because both were charged with crimes stemming from the same drugs seized by the sheriff. The government responds that other defendants have been charged similarly to Azizia and that Milton was not similarly situated because he cooperated early with the government.

A defendant fails to meet her burden under prong one if there were past federal prosecutions of defendants charged with the same crime. *United States v. Leathers*, 354 F.3d 955, 963 (8th Cir. 2004) (citing *United States v. Garner*, 32 F.3d 1305 (8th Cir. 1994); *United States v. Talley*, 16 F.3d 972 (8th Cir. 1994)). The United States Attorney's Office in Sioux Falls has prosecuted and charged other defendants with the same crime with which the grand jury indicted Azizia, 21 U.S.C. §§ 841(a)(1), 846. See, e.g., *United States v. Wallace*, CR 09-40118-01 (charging defendant with conspiracy to distribute and possession with intent to distribute 50 grams or more of a mixture containing crack cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846). Azizia fails the *Leathers* test because she cannot show that other similarly situated people have not been federally prosecuted for the same crime. See *Leathers*, 354 F.3d at 963.

Further, Milton completed a successful proffer interview. When agents interviewed Azizia, they felt that she was lying. Docket 59 at 4. She never completed a successful proffer interview. Docket 59 at 4.



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Defendants who fail to cooperate with the government are not similarly situated with defendants who do cooperate with the government. *United States v. Cain*, 487 F.3d 1108, 1115 (8th Cir. 2007) (finding that the defendant was not similarly situated with other defendants in the conspiracy because, unlike the others, he did not cooperate or testify for the government); *United States v. Humphrey*, 205 Fed. Appx. 473, 476 (8th Cir. 2006) (same). Azizia did not cooperate early with the government like Milton because she did not complete a successful proffer. Accordingly, she has not met the evidentiary burden required for a selective prosecution claim.

B. Azizia Failed to Prove a Discriminatory Purpose

The second prong of the selective prosecution *prima facie* case requires Azizia to prove that the government's decision to prosecute her was motivated by a discriminatory purpose. *Hirsch*, 360 F.3d at 864. Azizia must make a substantial showing that the government acted with a discriminatory intent. *Deering*, 179 F.3d at 595.

Azizia claims that the government discriminated against her on the basis of her race and sex. To be successful on her claim, however, she must offer evidence of discrimination. *United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992) (denying defendants' selective prosecution claim when the defendants failed to "offer any evidence that the decision to prosecute them was based on their race."). Azizia alleges no specific facts as to how the government discriminated against her. Consequently, Azizia failed to make the requisite factual showing that the government engaged in selective prosecution.

Azizia also failed to resolve the fact that Milton cooperated with the government and she did not. When a defendant fails to cooperate with the government but others involved in the crime did cooperate, it is difficult for her to make out a *prima facie* case of selective prosecution. *United States v. Brink*, 648 F.2d 1140, 1144 (8th Cir. 1981). Given that Azizia failed to show any discriminatory purpose by the government or respond to the difference in cooperation between her and Milton, she has not met her evidentiary showing under prong two of the selective prosecution test.

II. An Evidentiary Hearing Is Not Required

Azizia seeks a hearing to determine if the government charged her more harshly than Milton. "Whether to hold an evidentiary hearing and whether to grant a pre-trial motion to dismiss an indictment are matters within the trial court's discretion." *United States v. Kelley*, 152 F.3d 881, 885 (8th Cir. 1998) (citation omitted). An evidentiary hearing is not automatically required in a selective prosecution case. *United States v. Silien*, 825 F.2d 320, 322 (8th Cir. 1987). Rather, "the defendant must present facts 'sufficient to create a reasonable doubt about the constitutionality of a prosecution.' " *Id.* (quoting *United States v. Hayes*, 589 F.2d 811, 819 (5th Cir. 1979)).

Azizia has failed to establish a *prima facie* case alleging selective and discriminatory prosecution. She failed to meet either prong of the two-prong test. Accordingly, this court declines to hold a



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hearing on Azizia's selective prosecution claim. Therefore it is

ORDERED that defendant's motion to dismiss the indictment and for a hearing on selective prosecution (Docket 52) is denied.

