U.S. v. HATHAWAY

2004 | Cited 0 times | D. Minnesota | January 30, 2004

MEMORANDUM OPINION AND ORDER

Defendant Eugene Carl Hathaway was indicted for bank robbery,forcible accompaniment to avoid apprehension for bank robbery, andintimidation of a witness to hinder communication with law enforcement.The defendant has moved in limine to exclude prior felonyconvictions, and has also requested that the Court grant him a trialwithout a jury.[1] The Court held a status conference on January 29,2004, and heardPage 2argument regarding, among other preliminary matters, the parties'positions with regard to Count II, forcible accompaniment to avoidapprehension for bank robbery.

I. Defendant's Motion in Limine

Defendant has prior felony convictions for robbery, possession of afirearm, and a narcotics offense. The government clarified at the statusconference that it ¶ not intend to offer any of the prior convictionsin its case-in-chief. To the extent defendant's motion sought theexclusion of such evidence in the case-in-chief, the motion is granted.

Defendant also argues in his moving papers that none of the priorconvictions involve dishonesty or deceptive behavior, and therefore, theconvictions lack impeachment value. In addition, defendant argues thatthe prior conviction for robbery has similarity to the bank robbery countin the current indictment, and therefore may lead the jury to use theevidence for an improper purpose. The Court will reserve ruling on thisissue.

II. Defendant's Request for a Bench Trial

The Government does not consent to a waiver of a jury trial in thismatter. Fed.R.Crim.P. 23(2). At the time Defendant submitted hisrequest for a non-jury trial, his motion for the Court to dismiss CountIII was pending. Defendant argued that because Count II is a sentencingenhancement, and Count III should be dismissed, there would be no needfor a trial at all. The Court subsequently denied defendant's motion todismiss Count III. Defendant also argued that the Court should grant hisrequest for a bench trial because this is a case in which the defendanthas presented compelling reasons to be triedPage 3by a judge alone. Specifically, defendant argues that his status,and his mental state would prevent a fair trial.[2] Although the Courtis sympathetic to defendant's argument, the Court does not find that thiscase presents the "compelling circumstances" hypothesized by the Court inSinger v. United States, 380 U.S. 24, 36 (1965).[3] Seealso United States v. Jackson, 278 F.3d 769,

771 (8th Cir. 2002)(noting that defendant "has failed to show the existence of any suchcompelling circumstances in this case" and not articulating what suchcompelling circumstances might be).

III. Count II

Count I of the superseding indictment alleges that defendant took, byforce, violence, and intimidation, approximately $821 from the U.S. Bankin the city of Minnetonka, in violation of 18 U.S.C. § 2113(a). CountII alleges that defendant forced "R.A. (a minor) and Shakur Awale Hashito move from one location to another without their consent in an attemptto avoid apprehension for committing bank robbery —Page 4whereby the defendant did, by force, violence, and intimidation,take from the person and presence of a victim teller approximately$821 . . ." in violation of 18 U.S.C. § 2113(a) and (e).

The parties dispute whether the "forcible accompaniment" discussed in18 U.S.C. § 2113 (e) constitutes an element of the offense of CountII (the Government's position, see Government's MemorandumRegarding "Forcible Accompaniment" as an Element of the Offense Allegedby Count II ("Government's Memo")), or merely a sentencing enhancement(defendant's position, see Defendant's Memorandum Regarding Needfor Jury Trial at 2). Defendant suggests that because he intends to pleadguilty to Count I, and section (e) can be determined by the Court as asentencing enhancement, there is no need for a jury trial on CountII.[4]

The Government reads section (e) as increasing the possible maximumpenalty, and therefore, according to United States Supreme Courtprecedent, and the Due Process Clause of the Fifth Amendment, the"forcible accompaniment" must be submitted to a jury and proven beyond areasonable doubt. See Government's Memo at 4 (citing Jonesv. United States, 526 U.S. 227 (1999)). Defendant concurs thatsection (e) increases the statutory minimum, but argues thatsection (e) does not impact the statutory maximum unless thedefendant is accused of killing another while committing any offensedefined in this section.Page 5

In United States v. Peitras, 501 F.2d 182, 187-88 (8th Cir.),cert. denied, 419 U.S. 1071 (1974), the defendant was convictedof bank robbery in violation of 18 U.S.C. § 2113(a). He was alsoconvicted of putting lives in jeopardy during the commission of therobbery in violation of 18 U.S.C. § 2113(d), and kidnapping in anattempt to avoid apprehension in violation of 18 U.S.C. § 2113(e)).He was sentenced separately for each offense, and challenged such"pyramid" sentencing on appeal.

The reviewing court held that "Count II [putting lives in jeopardyduring the commission of robbery in violation of 18 U.S.C. § 2113(d)]must be considered merely an aggravated version of the same offensecharged in Count I, and it cannot itself support a separate sentence."Id. The court also noted that 18 U.S.C. § 2113 prohibitedthe imposition of more than one sentence for violations of its severalprovisions, including subsection (e). Id. The court upheld thesentence of 25 years for the violation of § 2113(e).[5]

Defendant argues that Peitras supports his argument that the"forcible accompaniment" is only a sentencing enhancement, and not anelement of the offense.[6]Page 6The government analogizes to Jones v. United States,526 U.S. 227 (1999), a carjacking case, in which the Supreme Courtinterpreted a somewhat similar statute, and held that the statuteestablished three separate offense. Id. (addressing18 U.S.C. § 2119). The relevant sections of 18 U.S.C. § 2113 provide: (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; Shall be fined under this title or imprisoned not more than twenty years, or both. * * * (e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

Given the plain language of the statute, to establish that defendantviolated 18 U.S.C. § 2113(e), the government must prove beyond areasonable doubt that defendant forced an individual to accompany himwithout that person's consent.[7] However, a conviction under thissubsection does not, given the facts alleged in this case, lead to apossible sentence of life imprisonment or death. The plain language ofthe statute precludes the government's suggested interpretation. Asentence of death or lifePage 7imprisonment is authorized, or required, by the statuteonly if "death results." This case does not involve such anallegation. Therefore, if the government proves beyond a reasonable doubtthat defendant forced either the minor, or the taxi driver, to accompanyhim, defendant "shall be imprisoned not less than ten years."

It is clear by the language of the statute that section (e), by itsplain language, impacts the mandatory minimum. It does not, however,provide for a sentence of life imprisonment or death in this case.Instead, the statutory maximum of twenty years, announced in §2113(a), applies.[8]

ORDER

Based on the foregoing, all the records, files, and proceedings herein,IT IS HEREBY ORDERED that Defendant's motion in limineto exclude evidence of prior convictions [Docket No. 53] isGRANTED as to use of such evidence in the government'scase-in-chief; and DENIED WITHOUT PREJUDICE as to the use ofsuch evidence for impeachment purposes.

IT IS FURTHER ORDERED that Defendant's request to be granteda trial without a jury [Docket No. 52] is DENIED.

1. The government has moved to quash a subpoena duces tecumand, in a related motion, has moved to exclude evidence regardingdefendant's mental health. These motions were not discussed at theJanuary 29th status conference and the

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Court reserves ruling on themotions.

2. Defendant sought the services of a forensic psychologist.Although it appears that defendant was evaluated by a psychiatristpursuant to this Court's order, defendant represents that sufficientfunding was not approved by the Chief Judge of the Eighth Circuit toenable preparation of a written report and/or expert testimony at trial.Counsel for defendant represents that defendant has significant mentalhealth issues that are likely to make it difficult for him to communicatewith the jury. For the purposes of this motion, the Court accepts as truecounsel's descriptions of defendant's health problems.

3. The Court in Singer rejected the defendant's request fora trial without a jury. The Court noted, `We find no constitutionalimpediment to conditioning a waiver of this right on the consent of theprosecuting attorney and the trial judge when, if either refuses toconsent, the result is simply that the defendant is subject to animpartial trial by jury — the very thing that the Constitutionguarantees him." 380 U.S. at 36. The Court concluded that it "need notdetermine in this case whether there might be some circumstances where adefendant's reasons for wanting to be tried by a judge alone are socompelling that the Government's insistence on trial by jury would resultin the denial to a defendant of an impartial trial"

4. Because the Court denied defendant's motion to dismiss Count III,and denied defendant's request for a jury trial due to compellingcircumstances, defendant is free to reconsider his construction of thestatute on whether "forcible accompaniment" is an element of theoffense.

5. At the time, section (e) read Whoever, in committing any offensedefined in this section, or in avoiding or attempting to avoidapprehension for the commission of such offense, or in freeing himself orattempting to free himself from arrest or confinement for such offense,kills any person, or forces any person to accompany him without theconsent of such person, shall be imprisoned not less than ten years, orpunished by death if the verdict of the jury shall so direct."Peitras, 501 F.2d at 186 n.3. The Government also relies on acase interpreting this previous version of the statute. Clark v.United States, 281 F.2d 230, 233 (10th Cir. 1960).

6. The Court's research reveals that the Peitras court wasnot unique among the circuits. See, e.g., United States v.Drake, 250 F.2d 216, 217 (7th Cir. 1957). (`We believe it to be nowsettled that Section 2113 of Title 18 U.S.C.A. creates a single offensewith various degrees of aggravation permitting sentences of increasingseverity").

7. This is certainly not to say that this is the onlyelement of the offense.

8. A statutory maximum of twenty-five years applies in cases inwhich the government proves beyond a reasonable doubt the defendantassault[ed] any person, or put[] in jeopardy the life of any person bythe use of a dangerous weapon or device." 18 U.S.C. § 2113(d). Theindictment does not implicate section (d).