U.S. v. ESTRADA

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RULING ON HECTOR GONZALEZ' MOTION TO DISMISS THE INDICTMENT

Hector Gonzalez ("Gonzalez") has moved to dismiss the third supersedingindictment (the "Connecticut Indictment") arguing that it violates theDouble Jeopardy Clause of the Fifth Amendment. Specifically, Gonzalezargues that the Connecticut Indictment, in which he ischarged in separate counts with conspiracy to possess with intent todistribute heroin and with conspiracy to possess with intent to distributecocaine base or "crack," seeks to punish him for the same conduct that wasthe subject of a prior indictment returned in the Eastern District of NewYork, to which Gonzalez pled guilty in 1997 (the "New YorkIndictment").[1] The Government opposes Gonzalez' motion, andargues that the two indictments charge distinct conspiracies and thatGonzalez' double jeopardy rights, therefore, would not be infringed byrequiring Gonzalez to stand trial on the charges in the ConnecticutIndictment.

For the following reasons, the court concludes that Count 12 of theConnecticut Indictment is distinct from the conspiracy charged in the NewYork Indictment. The court further concludes, however, that theconspiracy charged in Count 13 of the Connecticut Indictment is the sameas that charged in the New York Indictment, but that Count 13 should notbe dismissed because the Government did not know, and could notreasonably have known, of the facts supporting the conspiracy charged inCount 13 at the time Gonzalez was charged in the New York Indictment.

DISCUSSION

A defendant moving to dismiss an indictment charging conspiracy ondouble jeopardy grounds bears the initial burden of demonstrating thatthe two charged conspiracies are in fact the same. United States v.Reiter, 848 F.2d 336, 341 (2d Cir. 1988). A defendant meets this burdenby making a "nonfrivolous showing that two indictments charged only oneconspiracy." United States v. DelVecchio, 800 F.2d 21, 22 (2d Cir.1986); see also Grady v. Corbin, 495 U.S. 508, 523 n. 14 (1990) ("Allnine Federal Circuits which have addressed the issue have held that `whena defendant puts double jeopardy in issue with a non-frivolous showingthat an indictment charges him with an offense for which he was formerlyplaced in jeopardy, the burden shifts to the government to establish thatthere were in fact two separate offenses.'"), overruled on othergrounds, United States v. Dixon, 509 U.S. 688 (1993). Such a showing canbe made by "demonstrating sufficient facts of similarity betweenseparately charged conspiracies to put [the defendant's] double jeopardyrights in issue." Id.

Gonzalez has met his initial burden of demonstrating sufficientsimilarity between the two indictments. First and foremost, it isundisputed that, at the time he was arrested, Gonzalez was in New York topurchase drugs for sale in Connecticut with the proceeds from priorConnecticut drug sales. Two cooperating witnesses have already testifiedin trials of Gonzalez' co-defendants in this action, that "Gonzalezact[ed] as a lieutenant in the [Estrada] organization and was responsiblefor, among other things, collecting drug trafficking proceeds at theorganization's headquarters in the P.T. Barnum Housing Project andtraveling to New York to obtain more narcotics." (Govt's Supp. Memo. at2.) The Government has also expressed its intent to use thecircumstances of Gonzalez' New York conviction at Gonzalez' trial on theConnecticutIndictment, and has opposed Gonzalez' motion to exclude evidence of theNew York conviction under Federal Rule of Evidence 404(b).

Second, the two indictments, on their face, display at least someoverlap. Specifically, the entire time frame of the conspiracy chargedin the New York Indictment ("on or about May 30 through June 4, 1997")[2]is contained within the times charged in the Connecticut Indictment("some time in or about 1991 . . . up to and including May 2001," for theheroin conspiracy and "some time in or about 1995 . . . up to andincluding January 2001," for the cocaine base or crack conspiracy).Although the two indictments name different co-defendants, eachindictment also alleges that Gonzalez conspired with unnamed "others."The indictments can be plausibly read as alleging: (1) the unnamed"others" in the New York indictment include some of the named defendantsin the present indictment; (2) the unnamed "others" in the presentindictment include Gonzalez's co-defendant in the New York indictment;and/or (3) that the unnamed "others" in both indictments include some ofthe same persons, although they are not named in either indictment.Finally, both indictments charge the same statutory offense, conspiracyto possess with intent to distribute a controlled substance.

Based on the foregoing, the court concludes that Gonzalez has presentedsufficient evidence to sustain his initial burden and put his doublejeopardy rights at issue. See United States v. Abbamonte, 759 F.2d 1065,1067 (2d Cir. 1985) (where information presented indicated thatpreviously prosecuted conspiracies were simply distribution phases ofoverall narcotics conspiracy charged, there was sufficient information toshift the burden to the government), overruled on other grounds, UnitedStates v. Macchia, 41 F.3d 35 (2d Cir. 1994).

Because Gonzalez has met his initial burden, the burden thus shifts tothe government "to rebut the inference of unity." Reiter, 848 F.2d at341. The Government must establish distinct conspiracies by apreponderance of the evidence. United States v. DelVecchio, 800 F.2d 21(2d Cir. 1986). In determining whether successively charged conspiraciesamount to the same offense, the Second Circuit considers the followingfactors, gathered in United States v. Korfant, 771 F.2d 660, 662 (2dCir. 1985) (collectively the "Korfant factors"): "(1) the criminaloffenses charged in successive indictments; (2) the overlap ofparticipants; (3) the overlap of time; (4) similarity of operation; (5)the existence of common overt acts; (6) the geographic scope of thealleged conspiracies or location where overt acts occurred; (7) commonobjectives; and (8) the degree of interdependence between allegeddistinct conspiracies." United States v. Macchia, 35 F.3d 662, 667 (2dCir. 1994).

The court considers the "Korfant factors with the lively awareness thatno dominant factor or single touchstone determines" whether successiveconspiracy prosecutions "appear in fact and in law the same." Id. at668. "[T]here is no litmus test fordetermining whether one conspiracy is part of another conspiracy [;rather] the answer in each case depends on all of the pertinentcircumstances." Abbamonte, 759 F.2d at 1069. Applying the Korfant factorsto the pertinent circumstances of this case, the court concludes that theGovernment has met its burden of showing that the conspiracy charged inthe New York indictment is distinct from the conspiracy charged in Count12 of the Connecticut Indictment. The Government has not, however, metits burden of showing that the conspiracy charged in the New Yorkindictment is distinct from the conspiracy charged in Count 13 of theConnecticut Indictment.

As a preliminary matter, it is important to note that Gonzalez assertsthat both Counts 12 and 13 of the Connecticut Indictment are duplicativeof the conspiracy charged in the New York Indictment. The Government hasoverwhelmingly met its burden of demonstrating that the conspiracycharged in Count 12 of the Connecticut Indictment is distinct from thatcharged in the New York Indictment. Although both indictments chargeGonzalez with conspiracy to possess with intent to distribute acontrolled substance, the controlled substances he is alleged to haveconspired to possess differ. Specifically, in Count 12 of theConnecticut Indictment, Gonzalez is charged with conspiracy to possesswith intent to distribute heroin. In the New York Indictment he ischarged with conspiracy to possess with intent to distribute cocaine. Itis undisputed that, at the time of his arrest in connection with the NewYork Indictment, Gonzalez was purchasing cocaine, not heroin.

Notwithstanding the Government's loose reference in its papers to the"Estrada organization," it is also clear from the face of the ConnecticutIndictment and the evidence adduced at the trial of Gonzalez'co-defendants in this case that the Estrada heroin conspiracy (charged inCount 12), and the Estrada cocaine base or "crack" conspiracy (charged inCount 13), are themselves distinct. Indeed, neither Gonzalez nor any ofhis co-defendants have challenged Counts 12 and 13 of the ConnecticutIndictment as duplicative. Thus, with respect to Count 12 of theConnecticut Indictment, the Government has demonstrated, by apreponderance of the evidence, that it is distinct from the conspiracycharged in the New York Indictment. Cf. Abbamonte, 759 F.2d at 1070("Though the prior conspiracy was alleged to involve cocaine and thepending charge concerns heroin, the evidence presented . . . amply showsthat the Government has reason to believe that there exists one overallnetwork . . . that distributes both heroin and cocaine. . . .").

In contrast, although the controlled substance charged in Count 13 ofthe Connecticut Indictment (cocaine base or "crack"), also differs fromthat charged in the New York Indictment (cocaine), that difference is ofno moment. Gonzalez was purchasing the cocaine in New York precisely sothat it could be converted into cocaine base or "crack" and sold inConnecticut. Thus, the difference in substances charged in Count 13 ofthe Connecticut Indictment and the New York Indictment, rather thansuggesting disunity, helps demonstrate the interconnectedness of thosetwo conspiracies.

The remaining Korfant factors, especially factors seven and eight (theexistence of common objectives and the interdependence between theconspiracies), also strongly support Gonzalez' claim of unity between theconspiracies charged in the New York Indictment and Count 13 of theConnecticut Indictment. Specifically, the undisputed fact that Gonzalezwas in New York solely to purchase cocaine to bebrought back to Connecticut demonstrates that the conspiracies shared acommon objective. The Government has presented no information indicatingthat Gonzalez was involved with Jairo Cano-Lopez ("Cano-Lopez"), hisco-defendant in the New York Indictment, for any purpose other than topurchase cocaine for conversion and sale as cocaine base in Connecticut.Nor has the Government presented evidence that Cano-Lopez was involved inany illegal activities other than to serve as a middleman for Gonzalez inthis purchase. Thus, the sole purpose of the conspiracy charged in theNew York Indictment was the purchase of cocaine for use in the broaderconspiracy alleged in Count 13 of the Connecticut Indictment: the sale ofcocaine base or "crack" in Connecticut. Those two conspiracies thus notonly share common objectives, but are also, for the same reasons,completely interdependent.

The overlap of time among the conspiracies charged in Count 13 of theConnecticut Indictment and the New York Indictment further confirms thatthe same conspiracy is at issue in both. The Government argues that thetwo indictments charge different time frames because Gonzalez'involvement in the conspiracy charged in Count 13 of the ConnecticutIndictment straddled his involvement in the conspiracy charged in the NewYork Indictment. This time frame, however, rather than reasonablysupporting the existence of a brief hiatus during which Gonzalezparticipated in a separate conspiracy, more reasonably suggests that hewas involved in the conspiracy charged in Count 13 of the ConnecticutIndictment at the time he engaged in the acts charged in the New YorkIndictment.

Furthermore, although the crime for which Gonzalez was charged in thetwo indictments does not require proof of an overt act, the Governmenthas expressly stated its intent to use the facts underlying Gonzalez'guilty plea to the New York Indictment at Gonzalez' upcoming trial toestablish his guilt in this action. The Government's position emphasizesthe overlap between the conspiracies charged in Count 13 of theConnecticut Indictment and the New York Indictment.

The Government correctly notes that the named participants in the twoconspiracies do not overlap at all, beyond Gonzalez himself. This factis, however, rendered significantly less probative in light of the factthat the Government candidly admits that Gonzalez was in New York topurchase drugs for conversion into cocaine base and sale in Connecticut asalleged in Count 13 of the Connecticut Indictment. Similarly, the factthat the geographic scopes of the two conspiracies do not overlap is notprobative because Gonzalez left Connecticut to purchase cocaine to bereturned to Connecticut and distributed in furtherance of the conspiracycharged in Count 13 of the Connecticut Indictment. Finally, neitherparty has submitted any information concerning purported similarities ordifferences of operation between the two charged conspiracies.

Thus, when the conspiracy charged in the New York is viewed for what itindisputably was, an attempted purchase of cocaine to supply the broaderconspiracy charged in Count 13 of the Connecticut Indictment, there islittle doubt that the charged conspiracies are the same. Cf. UnitedStates v. Rivera, 844 F.2d 916 (2d Cir. 1988) (no indication that thedrugs sold in the prior conspiracy were marketed by the same organizationalleged in the second conspiracy); United States v. McGowan, 58 F.3d 8,13 (2d Cir. 1995) (affirming conclusion that previously charged broadconspiracy "functionally encompassed" narrower conspiracy charged insubsequent case). This conclusion is consistent with the ultimate goalof the "[t]he Korfant inquiry [which is to] implement[] a policyforbidding the government from multiplying opportunities to prove aconspiracy, in derogation of the Double Jeopardy clause, by breaking up asingle conspiracy into multiple segments." Id. Thus, for the samereasons that "it would be preposterous to argue that, if several personscombine to sell drugs generally, that single venture breaks up into asmany separate ventures as there chance to be sales [because] [t]he salesare the conclusion and the fruit of the original plan, the very reasonfor its being. . .," United States v. Mazzochi, 75 F.2d 497 (2d Cir.1935), it would be improper to conclude that Gonzalez' attempted purchaseof cocaine as alleged in the New York Indictment was a distinctconspiracy from the overarching "single venture" to procure cocaine to beconverted and sold as cocaine base as alleged in Count 13 of theConnecticut Indictment. The Government's proposed splintering of theconspiracy charged in Count 13 of the Connecticut Indictment from theconspiracy charged in the New York Indictment thus runs afoul ofGonzalez' double jeopardy rights.

The court's conclusion that Count 13 of the Connecticut Indictment andthe New York Indictment charge the same conspiracy does not, however, endthe inquiry. "[W]hen application of . . . traditional double jeopardyanalysis would bar a subsequent prosecution, `[a]n exception may existwhere the State is unable to proceed on the more serious charge[3] atthe outset because the additional facts necessary to sustain that chargehave not occurred or have not been discovered despite the exercise of duediligence.'" Grady, 495 U.S. at 516 n. 7 (internal citations omitted);see Macchia, 35 F.3d at 674 (Newman, J. concurring). As Justice O'Connorexplained in her concurrence in Garrett v. United States, 471 U.S. 773,795-97 (1985), the "constitutional proscription [against double jeopardy]serves primarily to preserve the finality of judgments in criminalprosecutions and to protect the defendant from prosecutorialoverreaching." The "finality guaranteed by the Double Jeopardy Clause isnot absolute, but instead must accommodate the societal interest inprosecuting and convicting those who violate the law." Id. (collectingexceptions, including "[d]icta in Brown v. Ohio suggesting that the sameconclusion would apply where the later prosecution rests on facts thatthe government could not have discovered earlier through duediligence."). Thus, "absent governmental oppression of the sort againstwhich the Double Jeopardy Clause was intended to protect, the compellingpublic interest in punishing crimes can outweigh the interest of thedefendant in having his culpability conclusively resolved in oneproceeding." Id. (internal citations and quotations omitted).

In this case, the Government has presented uncontroverted evidence thatit didnot, and indeed could not, reasonably have known of the facts supportingthe conspiracy to possess with intent to distribute

cocaine base allegedin Count 13 of the Connecticut Indictment at the time Gonzalez was chargedin the New York Indictment.[4] For example, the agents' notesfrom the New York investigation indicate that law enforcement authoritiesthere were targeting Cano-Lopez, not Gonzalez or any of his co-defendantsnamed in the Connecticut Indictment. Furthermore, the informationpresented to the grand jury that returned the New York Indictment includesno mention of any connection of the attempted purchase to a broaderConnecticut-based conspiracy.

It is further undisputed that an FBI task force only beganinvestigating the conspiracies charged in the Connecticut Indictment in1998, after Gonzalez had already pled guilty to the New York Indictment.In fact, although the first indictment in this case was returned inNovember of 2000, Gonzalez was not named as a defendant until the secondsuperceding indictment was returned in June of 2001. The Government wasnot aware of Gonzalez' involvement in the conspiracies charged in theConnecticut Indictment until after a Connecticut state inmate voluntarilywrote a letter to the Assistant United States Attorney handling this caseindicating that he had relevant information concerning Estrada and hisalleged coconspirators. That cooperating witness was subsequentlyinterviewed, and the information he provided was corroborated withinformation provided by other cooperating witnesses.

This is clearly not, therefore, a case where the Government has, afterconcluding that Gonzalez' sentence for the charges in the New YorkIndictment was inadequate, sought to prosecute him for the "larger"conspiracy charged in the Connecticut Indictment. Macchia, 35 F.3d at672 (Newman, J., concurring) (discussing this possibility). Thus, byallowing the prosecution to proceed on the present indictment, the courtis not "unduly expos[ing] [Gonzalez] to oppressive tactics by theGovernment," because, under the circumstances of this case, theGovernment could not have "treat[ed] the first trial as no more than adry run for the [present] prosecution." Garrett, 471 U.S. at 795-97.Accordingly, although Count 13 of the Connecticut Indictment charges thesame conspiracy as that charged in the New York Indictment, andprosecution of Count 13 would, as a consequence, ordinarily be barred,dismissal is not appropriate because the Government did not know, andcould not reasonably have known, of the facts supporting the charges inCount 13 of the Connecticut Indictment at the time it charged Gonzalez inthe New York Indictment.

CONCLUSION

For the foregoing reasons, Gonzalez' Motion to Dismiss [doc # 806] isdenied.

It is so ordered.

1. Gonzalez is currently incarcerated as a result of pleading guiltyto the charges in the New York Indictment. Gonzalez has met his initialburden of showing that his double jeopardy rights are implicated by thetwo indictments.

2. Gonzalez' plea agreement in New York, however, covers conduct fromJanuary 1, 1997 to June 4, 1997. The Government

has met its burden ofestablishing that the conspiracy charged in Count 12 of the ConnecticutIndictment is distinct, but has not met that burden with respect to Count13 of the Connecticut Indictment.

3. Dismissal is not, however, appropriate because the Government didnot know, and could not reasonably have known, of the facts supportingthe conspiracy charged in Count 13 of the Connecticut Indictment at thetime Gonzalez was charged in the New York Indictment.

Although in one sense the charge in Count 13 of the ConnecticutIndictment is not more serious because it charges the same statutoryoffense, it is undoubtedly more serious when viewed within the frameworkof the Sentencing Guidelines, under which applicable penalties are basedon all of a defendant's relevant conduct. U.S.S.G. § 1B1.3.

4. Gonzalez does not, and indeed could not, argue that the currentprosecution violates the terms of his plea agreement in New York. On itsface, the New York plea agreement binds only the U.S. Attorney's Officefor the Eastern District of New York. See United States v. Salameh,152 F.3d 88 (2d Cir. 1998).