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SECOND CIRCUIT REVIEW

Expert Analysis

Perjured Statements as a Basis for Sentencing Enhancement

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This month, we discuss *United States v. Peña*, in which the U.S. Court of Appeals for the Second Circuit considered a defendant's appeal of a two-level sentencing enhancement for obstruction of justice under the U.S. Sentencing Guidelines §3C1.1, based upon the defendant's giving of perjured testimony. More specifically, the court considered whether a district court's findings discrediting a defendant's sworn statement in support of a suppression motion were sufficient to satisfy the test articulated in *U.S. v. Dunnigan*, 507 U.S. 87 (1993), and progeny. *Dunnigan* holds that perjured testimony can form the basis for a §3C1.1 enhancement where the court makes specific findings of fact sufficient to support a finding of perjury under the law and finds that the defendant willfully perjured himself on a material matter.

In a per curiam opinion by Judges Dennis Jacobs and Rosemary S. Pooler of the Second Circuit and Judge Nelson S. Román of the Southern District of New York (sitting by designation), the court granted defendant's appeal, finding that his sworn statements, discredited by the district court, did not demonstrate a willful obstruction of justice. The decision delineates the line between a sentencing enhancement that advances valid sentencing goals and one that violates a defendant's constitutional and statutory rights to testify.

Background

After arriving at John F. Kennedy Airport in New York on a flight from the Dominican Republic in 2012, Oneil Peña was arrested when an X-ray conducted pursuant to a tip that Peña was smuggling drugs revealed that he had ingested pellets of cocaine. Peña moved to suppress the pellets as evidence, alleging that officers lacked reasonable suspicion to search, that the consent to X-ray had been procured under duress, and that his subsequent confession was the result of improper interrogation by customs officers.

In support of his suppression motion, Peña submitted a written declaration, stating in relevant part that "1) prior to giving consent for the x-ray, he requested a lawyer at least seven times; 2) the officers extracted the consent by threatening physical force; [and] 3) he confessed after the x-ray in response to questioning by *customs officers* (as opposed to confessing *later*, after questioning by *DEA agents*)."[1] At the suppression hearing, the government presented testimony from three customs officers, one of whom testified that Peña never requested a lawyer. Two others testified that Peña did seek assistance of counsel, but one could not recall how many times he had requested an attorney and the other was not asked how many times he requested an attorney. Having heard this testimony, the district court credited the officers' testimony and specifically found that Peña had only requested an attorney once, to Peña's sworn statement.

On the issue of whether the consent to X-ray Peña was obtained with the threat of force, a customs officer testified that "at least one of the officers told Peña that if he did not sign the consent form, they had 'other ways' to 'make this happen.'"[2] The district court made a second finding that, contrary to his sworn statement, Peña did not provide consent through threat of physical force.

The court denied Peña's suppression motion. Peña thereafter pleaded guilty to one count of conspiracy to distribute and possess with intent to distribute at least 500 grams of cocaine, in violation of 21 U.S.C. §846. At sentencing, Chief

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Judge Loretta A. Preska of the Southern District of New York, to whom the case was transferred, specifically noted the prior district judge's two findings of falsity and applied an enhancement under §3C1.1.

Section 3C1.1 allows for a two-level enhancement to a defendant's offense level if: "(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense."[3] Such an obstruction can take the form of perjured testimony if the district court finds that the defendant "(1) willfully (2) and materially (3) committed perjury, which is (a) the intentional (b) giving of false testimony (c) as to a material matter."[4] The enhancement raised Peña's guidelines range from 30-37 to 37-46 months' imprisonment; Preska sentenced Peña to 37 months in prison.

Peña challenged on appeal the application of the sentencing enhancement on the ground that the statements in his affidavit in support of his suppression motion did not demonstrate a willful intent to commit perjury.

Related Precedent

On appeal, the Second Circuit considered the Supreme Court's precedent in *Dunnigan*, as well as its own precedent interpreting *Dunnigan* in *U.S. v. Lincecum*, 220 F.3d 77 (2d Cir. 2000), and *U.S. v. Agudelo*, 414 F.3d 345 (2d Cir. 2005). In *Dunnigan*, the Supreme Court reversed a U.S. Court of Appeals for the Fourth Circuit decision holding that an enhancement under §3C1.1 premised on allegedly perjured testimony impermissibly infringed on a defendant's right to testify under 18 U.S.C. §3481 and the U.S. Constitution.

The circuit court had reasoned that "every defendant who takes the stand and is convicted [would] be given the obstruction of justice enhancement" and that, in combination with some of the other risks of testifying, an "automatic §3C1.1 enhancement" might convince the defendant that testifying was not "worth the risk."[5]

> The Peña decision delineates the line between a sentencing enhancement that advances valid sentencing goals and one that violates a defendant's constitutional and statutory rights to testify.

The Supreme Court rejected this rationale, noting that although §3C1.1 overlaps with the perjury laws in deterring false testimony, it is actually driven by a separate and permissible sentencing aim of addressing a defendant's "criminal history," willingness to "accept the commands of the law and the authority of the court," and "character in general."[6] The court held that so long as a district court makes specific factual findings to support an obstruction charge based on the willful giving of "false testimony concerning a material matter[ ], rather than as a result of confusion, mistake, or faulty memory,"[7] there is no risk that §3C1.1 will be applied whenever a defendant testifies and does not prevail.

Drawing on the Supreme Court's precedent in *Dunnigan*, the Second Circuit addressed §3C1.1 in two notable decisions, which guided the court's decision in *Peña*. In *Lincecum*, the defendant challenged the application of §3C1.1 premised on a finding that the following statements in his suppression motion affidavit were false: (1) "I asked for permission to call a lawyer…at least once while I was at the house, and possibly a second time…. The agents told me I could make such a call 'later.'"; (2) "While in the automobile I was advised of my right to remain silent and of my right to have an attorney. I again asked for permission to call an attorney. I was again told that I could do that 'later.'"; and (3) "While in the interview room I again asked Agent Flowers for an opportunity to call a lawyer that I knew. He told me that I could do that when I went 'downtown'…."[8]

In response, the government offered testimony from all of the agents present at G.H. Lincecum's arrest, who testified that "at no time had Lincecum requested an attorney."[9] On appeal, the Second Circuit agreed with the district court's finding that the affidavit was "so detailed that I am persuaded by clear and convincing evidence that Mr. Lincecum when he signed it had to have known it was false."[10]

In contrast, in *Agudelo*, the Second Circuit held that the defendant's affidavit in support of his suppression motion was not sufficiently detailed to support an obstruction of justice enhancement under §3C1.1. Luis Agudelo stated in his suppression motion affidavit that "at one point, I told the agents that I wanted to speak to a lawyer but they did not cease their questioning. Instead, they told me, in substance, that I would be able to see a lawyer at a later point in time."[11] The district court credited the testimony of the law enforcement agent that Agudelo did not ask for a lawyer, and applied a §3C1.1 enhancement based on this finding of allegedly false testimony.

On appeal, the Second Circuit found that, unlike *Lincecum*, where the "three detailed statements reeked of fabrication because [the defendant] could not have simply misremembered so much detail,"[12] Agudelo's statements were more vague and could have reflected a simple misunderstanding or mistake about the sequence of events. The court noted that an agent had testified that he "told Agudelo[ ] that he would be able to have a lawyer with him for his initial appearance."[13] The court noted the risks "inherent in extending *Lincecum* [ ] to Agudelo's vague affidavit" included "the troubling prospect that future defendants might either be deterred from pressing arguably

meritorious Fourth Amendment claims or unfairly punished when they do."[14]

The Second Circuit's Decision

In its decision in *Peña*, the Second Circuit noted that "[t]he circumstances here walk a line between *Agudelo* and *Lincecum*," finding ultimately that Peña's statements were "more akin to *Agudelo* than to *Lincecum*."[15] The court reasoned that "the verisimilitude in the Lincecum statements (describing the when, where and the response of police) supported an inference that the affiant must either be telling the truth or committing perjury," whereas Peña's "claim of (at least) seven requests does not support such an inference [because there were] no details[,] multiple requests could have been made to different persons[,] and [Peña] had plenty on his mind other than counting his requests for counsel."[16]

The court also held that while it was not clear error for the district court to find that there was not a threat of physical force when an officer told Peña that there were other ways to "make this happen"[17] if Peña did not consent to an X-ray, it was clear error to find that Peña's interpretation of this statement as threatening was necessarily false. Similarly, the court found that Peña's statement that he was subjected to impermissible questioning by customs officers was not clearly false because "Peña was handcuffed to the medical center's bed and the customs officers frequently came in and out of the room. It may well be, as the district court found, that Peña was responding to questions put by the medical personnel; at the same time, however, Peña had sufficient reason to believe they were connected in some capacity to the customs officers…."[18]

Implications

Peña is an interesting development in the Second Circuit's line of precedent regarding the use of perjured statements as a basis for a §3C1.1 sentencing enhancement. The decision reflects a more nuanced analysis than was followed in the *Lincecum* and *Agudelo* decisions. For example, the analyses in *Lincecum* and *Agudelo* suggest that the test for the application of the enhancement is focused on whether the specificity in the defendant's testimony "supported an inference that the affiant must either be telling the truth or committing perjury."[19]

> In 'Dunnigan,' the Supreme Court reversed a Fourth Circuit decision holding that an enhancement under §3C1.1 premised on allegedly perjured testimony impermissibly infringed on a defendant's right to testify under 18 U.S.C. §3481 and the U.S. Constitution.

The court in *Peña* focuses more on the strength of the government's evidence weighed against the defendant's statements. The Peña court found that the statement that Peña asked for a lawyer "at least seven times" was not sufficiently detailed to support a finding of perjury. While this statement does not provide the "when, where and the response of police" details that *Lincecum* provided, it is clearly much more detailed than the Agudelo statement of "at one point, I told the agents that I wanted to speak to a lawyer."

The Peña court, however, instead focused on the fact that the government's witnesses gave conflicting testimony and were not all asked the specific question of how many times Peña asked for a lawyer. The court found it persuasive that there was not an overwhelming body of evidence directly contradicting Peña's specific statement, even though the district court ultimately credited the officers.

It also is interesting that the court considered Peña's subjective impression of the events for the purpose of evaluating falsity, where the district court discredited the defendant under an objective standard. On the question of whether Peña submitted false testimony about being physically threatened, the court considered the possibility that Peña subjectively felt the statement was threatening while simultaneously finding that it was not clear error by the district court to find that these statements were objectively not threatening.

Similarly, the court found that while the district court may have been correct in finding that Peña was questioned by medical personnel and not customs officers, Peña's subjective belief to the contrary was not clearly false. This reasoning could serve as an important check against a per se application of the enhancement whenever a defendant's testimony is discredited under an objective standard.

The Peña decision reflects an effort by the court to avoid the risks involved with broadly interpreting *Lincecum*. The careful consideration of both the specificity of the affidavit and the entire body of evidence leading to the district court's crediting of the government's position demonstrates the Second Circuit's commitment to *Dunnigan's* instruction that the court not apply the enhancement where the discredited testimony may merely be the "result of confusion, mistake or faulty memory."[20] The court in *Peña* has provided much-needed guidance on this issue. Defendants and prosecutors now have a median point between *Lincecum* and *Agudelo* to reference when evaluating a §3C1.1 enhancement.

1. *U.S. v. Peña*, No. 13-1787, 2014 WL 1797464, *1 (2d Cir. May 7, 2014) (emphasis in original).
2. Id.
3. U.S.S.G. §3C1.1; Peña, 2014 WL 1797464, *2.
4. *Peña*, 2014 WL 1797464, *2.
5. *U.S. v. Dunnigan*, 507 U.S. 87, 91 (1993).
6. Id. at 94.
7. Id. at 94–95.
8. *U.S. v. Lincecum*, 220 F.3d 77, 79 (2d Cir. 2000).
9. Id. The government also introduced a "waiver-of-rights form that had been signed by Lincecum; in it he had stated that he did not want an attorney." Id.
10. Id.
11. *U.S. v. Agudelo,* 414 F.3d 345, 349 (2d Cir. 2005).
12. Id. at 350.
13. Id.
14. Id.
15. *Peña*, 2014 WL 1797464, *3.
16. Id.
17. Id., at *4.
18. Id.
19. Id., at *3.
20. *Dunnigan*, 507 U.S. at 94.