

United States of America, Plaintiff

versus

Samatha Clark, Defendant

123 F.D. 456

Decided, April 20, 2008

Syllabus:

Defendant is a criminal defense attorney admitted to practice law in the state of Freedonia. Defendant was indicted in 2007 and charged with violating 18 U.S.C. § 1001 for lying to a federal prosecutor. After a jury trial, Defendant was found guilty of the sole charge in the indictment. Defendant moved to dismiss the charges on the grounds that: a) §1001 does not apply to defense attorneys' conversations with federal prosecutors and b) If it were to apply, §1001 would be unconstitutional as applied to this case because it violates the criminal defendant's right to a fair trial. Both of Defendant's contentions are rejected. Nothing in the legislative history or case law suggests that Congress meant to exempt criminal defense attorneys from the scope of §1001 and this court sees no grounds upon which to judicially create an exception. §1001 is not unconstitutional as applied as the Constitutional right to competent representation does not include the right to have your attorney lie to the authorities. The defendant's conviction is upheld.

Haas, J.

This case presents a difficult matter of first impression in this circuit. This court has been charged with deciding whether a criminal defense attorney may be criminally prosecuted for lying to federal authorities during plea negotiations on behalf of a client. Because I do not believe that I have the authority to judicially create exceptions to federal laws and because I see nothing

unconstitutional about the manner in which the statute was applied in this case, I am forced to answer this question in the affirmative.

I - Background

Samantha Clark has been a practicing criminal defense attorney in the state of Freedonia since 1989. On January 20, 2008, Thomas Vail was arrested in Free City for identity theft. He was accused of stealing at least four credit cards and using them to make more than \$50,000 in purchases between March and July of 2006. After being arrested, Vail promptly called Ms. Clark to help him with his defense.

Between January 20 and March 27, Vail and Clark had at least four meetings and an untold number of phone conversations. On March 27, Clark met with Assistant United States Attorney Patrick Muss, who was assigned to prosecute the case, to discuss the possibility of a plea agreement between Vail and the government.

At that meeting, the discussion turned to a \$5,000 charge allegedly made by Vail on April 29, 2006 while using the credit card of one Mr. Benjamin Florentino. All parties agree that the relevant part of the conversation went like this:

Muss: Sam, listen, that \$5,000 charge was a serious theft. Florentino ended up spending months and a lot of heartache trying to erase that fraudulent charge from his card. Tell me the truth, did your client make that charge?

Clark: Tom didn't make that charge at all. That charge was made in Free City. That week Tom was away in Minneapolis on vacation.

Muss: Come on, Sam, we're putting all cards on the table, right? I'm willing to play ball, but you have to be forthcoming with me. What's the real story? Did he make the

charge?

Clark: Listen, Pat, I'm not saying that we deny all of the accusations necessarily, but I'm telling you, Tom did not make that particular charge.

Muss: Sam, let's back up a sec...

Clark: Pat, I've been working on cases against you for what, 15 years now? We've opposed each other a lot and I think we've worked well together. Haven't we? The one thing you know is that I don't lie to you. Well, I'm telling you now that my client did not make that charge!

The conversation went on another several minutes. Eventually, the negotiations were successful and Vail pled guilty to various fraud charges in exchange for a sentence recommendation of no more than 18 months in prison by the U.S. Attorney's office.

At his allocution, Vail admitted to making the charge on Benjamin Florentino's credit card on April 29, 2006. Later, when asked by the federal authorities, he told them that he had admitted to Clark the first time they had met that he was guilty of making that charge.

Clark was subsequently arrested and indicted on one count of making a false statement to a federal authority, in violation of 18 U.S.C. §1001, which provides, in relevant part:

Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

...

(2) makes any materially false, fictitious, or fraudulent statement or representation;

...

shall be fined under this title, imprisoned not more than 5 years...

Clark moved to dismiss the indictment, but her motion was denied. After a trial over which I presided, Ms. Clark was convicted on the sole count of the indictment. After the verdict, she filed a motion to reverse her conviction and to have the charge against her dismissed, which is the motion now before this court.

II- Legal Issues

Defendant does not challenge the jury's verdict in that Defendant acknowledges that she lied to Assistant US Attorney Muss in the court of the above referenced conversation.

Defendant's contentions rest on two central ideas:

1) Defendant argues that Congress could not have meant to include defense attorneys in the scope of §1001 because it is clear that defense attorneys owe a client the duty of loyalty. This duty prevents defense counsel from disclosing confidential information. Therefore, defendant argues, there must be an exception for defense attorneys in the court of their representation of criminal defendants. If Congress did not explicitly create this exception, defendant argues, it is because they were not thinking of every possible scenario. Therefore, Defendant urges this court to judicially create an exception to §1001 for defense attorneys in the course of a representation of a criminal defendant.

2) Defendant argues that if §1001 were applicable to this case, it would be unconstitutional, as applied. Defendant points out that each criminal defendant has a duty of loyalty and zealousness to his or her client. Defendant argues that the specter of prosecution for making false statements during plea negotiations would prevent defense attorneys from zealously representing their clients in such negotiations.

Because the Defendant's arguments raise questions of law and not fact, this court need give no deference to the jury's verdict. All questions raised are to be reviewed *de novo*. See United States v. O'Keefe, 128 F.3d 885 (5th Cir. 1997). This is a matter of first impression in this circuit and, so far as I can tell, in the United States. I will address each of Defendant's contentions, in turn.

III- Discussion of First Legal Issue

It is well settled that §1001 should not be interpreted narrowly or technically. United States v. Adler, 380 F.2d 917 (2d Cir. 1967). In addition, §1001 was clearly meant to apply to oral and unsworn statements as well as written or sworn statements. United States v Massey, 550 F2d 300 (5th Cir. 1977). §1001 has been held to apply specifically to lies told in the course of negotiations with the government. Spivey v. United States, 109 F.2d 181 (5th Cir. 1940).

§1001 was meant to punish lying to federal authorities in the hope of receiving some sort of benefit as a result of the false statement. United States v. Mitchell, 397 F. Supp. 166 (D.D.C. 1974). In our case, a lie was told for the purpose of obtaining a benefit. Defendant made a statement that she knew was false for the purpose of trying to obtain a benefit; to wit, the government's agreeing to a reduced sentence for her client. Therefore, I believe that Clark's actions in this case represent a classic case of the fraud Congress was trying to prevent by passing section 1001.

In addition to the requirement that the defendant make a false statement, §1001 requires that the false statement be "material." Paritem Singh Poonian v United States, 294 F2d 74 (9th Cir. 1961). Defense contends that Clark's statement was not material because a prosecutor would not normally rely on a statement by a defense attorney that his or her client is innocent.

This court rejects this argument. For the materiality element of §1001 to be met, the false statement must only be "capable of affecting or influencing government function." Such statement need not have actually influenced action of government agency. See United States v McGough, 510 F2d 598 (5th Cir. 1975).

I also note that recent court decisions have applied §1001 to lies told to federal prosecutors by defendants themselves. See Brogan v. United States, 522 U.S. 398 (1998), United States v. Wiener, 96 F.3d 35 (2d Cir. 1996). I see no reason that defense attorneys negotiating on behalf of clients should be entitled to greater protection than defendants themselves negotiating on their own behalf.

IV- Discussion of Second Legal Issue

Defense further maintains that the Constitutional guarantee of effective assistance of counsel demands that defense attorneys not be subject to prosecution. Defense argues that in this case, Defendant was asked a direct question as to her client's guilt. She argues that staying silent was not an option as such would implicitly admit his guilt. She argues that telling the truth was also not an option because she was ethically prohibited from divulging her client's guilt. She asserts that allowing her conviction in this case would force defense attorneys in this scenario to choose between the "cruel trilemma" of (1) violating client confidentiality (2) remaining silent and implicitly admitting guilt, and (3) subjecting oneself to prosecution. Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964).

This court, of course, acknowledges the importance of allowing criminal defendants loyal and competent defense counsel. Strickland v. Washington, 466 U.S. 668 (1984). However, I cannot conclude that this right of a criminal defendant requires that we give defense counsel *carte blanche* to lie to federal officials on behalf of their client. In the absence of authority allowing me to do so, I refuse to take this drastic step, even in defense of the right to counsel guaranteed by the Sixth Amendment to the Constitution.

Defendant further argues that under the rules of attorney ethics, she was required to deny her client's guilt since silence would have been a tacit admission of guilt. As such, even silence would have violated the attorney's duty of confidentiality to his client. See MRPC Rule 1.6 ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed

consent.”)

Defense points to the comments to Rule 1.6, which provide:

2. A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation... The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

4. Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer *that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.*

Defense argues that were her conviction to be upheld, defense attorneys would not be able to deny a client's guilt when asked, point blank, whether the client is guilty. As such, clients would be heavily discouraged from admitting guilt to their attorneys, for fear that their attorneys would be required to tacitly admit to prosecutors that they were guilty.

In addition, Defense argues that remaining silent in the face of a point blank question as to a client's guilt violates the spirit of the rule as expressed in comment 4, since silence would naturally lead the prosecutor to believe in the client's guilt and be less amenable to disposing of the case in a manner favorable to the defendant.

However, I need not inquire as to whether the conviction of the Defendant in this case would

violate the Model Rules of Professional Conduct. The Model Rules, even if enacted by states, are not federal law and must yield if contradicted by federal law, under the Supremacy Clause of Article VI of the United States Constitution.¹ Therefore, even if attorney ethics rules enacted by the state would require Defendant to act exactly as she did in this scenario, any such rule would be overridden by §1001 and would be void as to this case.

VI- Conclusion

For the foregoing reasons, all of Defendant's arguments are rejected and her challenge to her conviction under §1001 is dismissed.

¹ "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."