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The Defender

Newsletter for CJA Panel Attorneys

Eternal Vigilance Issue*

Why We Do What We Do.

Recently, a local drug task force arrested about a dozen young black men for federal drug charges. The sweep involved the use of paid informants, who were wired to make drug buys.

This office was appointed to represent a number of these defendants. Several defendants were indicted under wrong names. Although, the transactions preceded the arrests by several months, no photographic or physical lineups had been done. Audiotapes that purported to contain incriminating conversations were merely static.

These lapses are not the reason I am writing about this. In one of these cases, except for the diligence of our investigator, Dan Stankoski, an innocent man came very close to conviction. I was appointed to represent Curtis Carson (indicted as "Curtis Banks"), at his initial appearance. At the time, Carson was in state custody awaiting transfer to 90 days in "boot camp" in an unrelated drug case.

The next week, I received discovery consisting of a videotape and a report describing the activity on the video. The evidence was fairly convincing. The subject of the video did appear to have consummated a drug deal with the confidential informant.

I was then unable to see my client for several weeks. By some mixup, he had been transported upstate to attend boot camp. I next saw him at the courthouse when he was produced for his "Probation Office Conference."

Since I had seen the video, I was prepared to cross-examine him about various aspects of the charges. He denied knowing the location of the transaction nor the car that the subject on the video drove.

I went back to my office and retrieved the video. One of the Deputy Marshal's helped wheel a television and VCR in front of the holding cell. It was apparent to me, to Carson, and to the other guy in the cell, that Carson was not on the video. The subject was taller, thinner and darker complected.

I saw the AUSA almost right after this. I told her the problem. She promised to talk to the case agent (a Prichard Police Officer) as soon as possible.

Dan Stankoski reviewed the video. Although of poor quality, he was able to run the tape over and over until he could make out most of the license plate on the subject's car. He checked that plate and it came back to a man that lived several blocks from the crime scene. He then ran that man's local records and found that he had been arrested for drugdealing a week after Carson's alleged crime. The other man was now serving a state sentence.

Dan went to the man's former bondsman and borrowed a Polaroid mug shot. I had several people in the office watch the video and compare the Polaroid. There was no doubt it was the same man. As final confirmation, Dan staked out the home of the other man until he saw the man's mother driving around in the car that was on the video.

Before these events unfolded, I got a letter from the prosecutor. She had called the officer into her office to see whether any identification was originally done. The officer told her that he thought there had been some kind of photo identification by the informant. She explained to him, in no uncertain terms, that she had a duty to turn such evidence over.

A couple days later, I got a call to come and pick up the photo lineup evidence that the officer had left with the AUSA's secretary. The informant had purportedly selected Carson's picture. I asked the secretary to call and find out when the lineup had been done. It turned out the officer created the lineup two days after his meeting with the prosecutor (five months after the alleged crime).

*"The condition upon which God hath given liberty to man is eternal vigilance..." John Philot Curran (1790).

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By this time, I had all the evidence exonerating Carson and incriminating another man. I sent it over to the prosecutor. She did the right thing and dismissed the case. However, up to that point, the officer and the informant had no qualms about accusing Carson.

Maybe a jury would have been able to see Carson was not the man on the video. However, had the informant and officer remained adamant, the resemblance of the two men, and the poor quality of the video, would have made it too close for comfort.

Advanced CJA Seminars

The Administrative Office of the U.S. Courts is sponsoring "More Strategies for Success in Federal Criminal Defense Practice," in four cities. Enrollment is limited to CJA Panel Attorneys. Tuition and materials are free.

The cities and dates are: Houston May 16-18, Milwaukee August 1-3, Salt Lake City Sept. 19-21, and tentatively, Orlando Nov. 7-9. For an application, call this office or the Defender Services Division at (202) 273-1670 (Linda Risley).

Attorney Position

This office recently received authority from the Defender Services Division to hire an additional attorney. Southern District of Alabama Federal Defenders Organization is an Equal Opportunity Employer. Applicants must be capable of trying federal criminal cases. Persons who have previously applied may call to indicate whether they still wish to be considered. All others must submit a resume by April 30, 1996.

Relevant Conduct

There still seems to be confusion about the application of U.S.S.G. §1B1.3. This is the section of the Guidelines that you must thoroughly understand if you represent a client who is accused of committing more than one crime (whether they are charged or not), or has acted in concert with others (whether the case is charged as a conspiracy or not).

A dramatic example of the effect of this section is as follows: A defendant is charged in a two-count indictment. Count One alleges he conspired with others to distribute 100 kilos of crack. Count Two alleges the defendant distributed a .44 gram rock of crack - which occurred as part of the conspiracy. The defense lawyer then negotiates a plea agreement for the client to plead only to Count Two. What benefit will the client receive?

In all likelihood, the lawyer has merely saved the client from paying a $50.00 special assessment on Count One. §1B1.3 (1) requires that the defendant's guideline range be based on all acts committed by the defendant, or all reasonably foreseeable acts in furtherance of jointly taken criminal activity.

The above is not meant to be a comprehensive explanation of §1B1.3. It is one of the most litigated areas of the Guidelines. This is simply to scare everyone into reading this section whenever a case involves multiple acts or joint activity.

Reversible Errors

The United States Supreme Court unanimously held that a defendant may not be punished for both conspiracy and operation of a continuing criminal enterprise on the basis of a single course of conduct. Rutledge v. United States, 58 Crim. L. Rptr. 2075 (March 27, 1996). The Eleventh Circuit came to the same conclusion, six days earlier in United States v. Harvey, 1996 WL 96860 (March 21, 1996).

In United States v. Garcia, 1996 WL 115486 (April 1, 1996), the Eleventh Circuit reversed a conviction for traveling in foreign commerce with intent to facilitate the importation of cocaine. Since the defendant had been previously acquitted of "knowingly" conspiring to do the same, the government was collaterally estopped from a second prosecution.

A defendant's conviction was reversed when his counsel was prevented from discussing general principles of reasonable doubt during closing argument. United States v. Hall, 77 F. 3d 398 (11th Cir. 1996). Further, possession of a firearm and its ammunition can only yield a single sentence.

In United States v. Taylor, 77 F. 3d 368 (11th Cir. 1996), the defendant was allowed to withdraw his guilty plea when the government failed to unequivocally recommend a sentence named in the plea agreement.

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