11-17-1999

Appellant's Reply Brief - U.S. v. Garcia-Valenzuela, Docket No. 99-50175 (232 F.3d 1003 (9th Cir. 2000)

NO. 99-50175

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RAFAEL GARCIA-VALENZUELA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Honorable Judith N. Keep, District Judge

APPELLANT'S REPLY BRIEF

BENJAMIN P. LECHMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL RULES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 99-50175
	)	
Plaintiff-Appellee,	)	U.S.D.C. No. 98CR2038-JNK
	)	
v.	)	
	)	
RAFAEL GARCIA-VALENZUELA,	)	
	)	
Defendant-Appellant.	)	
	)	

I. PRELIMINARY STATEMENT

Appellant, Mr. Garcia-Valenzuela, respectfully submits this reply brief, pursuant to Rule 28(c) of the Federal Rules of Appellate Procedure, to address arguments raised by the government in its response brief ("GB")[1].

II. THE DISTRICT COURT ERRED IN DENYING THE GOVERNMENT'S RULE 48(a) MOTION TO DISMISS

In his opening brief, Mr. Garcia-Valenzuela argued that the district court abused its discretion in denying the government's motion under Federal Rule of Criminal Procedure 48(a) to dismiss counts against Mr. Garcia-Valenzuela. In its response, the government makes two arguments: first, Mr. Garcia-Valenzuela failed to preserve his right to challenge this issue by virtue of his guilty plea to counts Five and Six of the indictment; and

[1] "GB" refers to the Government's Brief; "AOB" refers to the Appellant's Opening Brief.

(2) Mr. Garcia-Valenzuela, not his counsel, objected to the government's 48(a) motion, thus it was not error for the district court to deny the motion. However, Mr. Garcia-Valenzuela did not waive his right to appeal the denial of the government's 48(a) motion to dismiss because the district court lacked jurisdiction to accept his plea; thus, his plea is void and cannot function as a waiver. Furthermore, Mr. Garcia-Valenzuela himself had no personal right to object to the government's motion to dismiss; because he was without power to object, he cannot have waived the issue for appeal. The government's contentions are addressed more fully seriatim.

The government correctly notes that a guilty plea normally precludes appellate review of pre-plea rulings not specifically preserved for appeal. Tollett v. Henderson, 411 U.S. 258, 267 (1973). This rule, however, gives way when the government exercises its executive prerogative to terminate criminal prosecution. This Court has recognized that such a decision is the exclusive province of the executive branch. See United States v. Gonzalez, 58 F.3d 459 (9th Cir. 1995). When the district court decided to continue the prosecution of Mr. Garcia-Valenzuela it violated the doctrine of separation of powers and everything which followed (including Mr. Garcia-Valenzuela's guilty plea) is void. The district court lost jurisdiction when

it violated the separation of powers. Once the government decides to call it quits, the case is, for all practical matters, over. The district court usurped the executive's prerogative to dismiss this case; nothing which happened after that could right that constitutional wrong.

The tripartite structure established by the Constitution reflects the conferral of separate and distinct powers on the President, the Congress and the Judiciary. The framers of our Constitution embraced "Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches," was essential to the preservation of liberty. Myers v. United States, 272 U.S. 52, 116, (1926). Thus the departments of government were organized on the principle that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self- appointed, or elective, may justly be pronounced the very definition of tyranny." Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring in judgment) (quoting The Federalist No. 47, at 324 (J. Madison) (J. Cook ed. 1961)); See also, Separation of Powers, The Role of Law, and the Idea of Independence, 30 Wm. & Mary L.Rev. 301, 316-17 (1988).

The Separation of Powers prohibits arrogations of power to one branch of government which "disrupt the proper balance between the coordinate branches," Nixon v. Administrator of General Services, 433 U.S. at 443, 97 S.Ct. at 2790, or "prevent one of the branches from accomplishing its constitutionally assigned functions," Id. (citing United States v. Nixon, 418 U.S. at 711-12, 94 S.Ct. at 3109-10).[2]

In this case, the district court usurped one of the most basic functions of the executive: the power to begin or terminate a criminal prosecution.

> The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

---

[2] A minority view of the doctrine has also reflected the more structural, Madisonian concern that one branch should not be permitted to share in the most substantial powers of another. See Reid v. Covert, 354 U.S. 1 (1957) (act giving President power to alter substantive law violates separation of powers).

Once a coordinate branch of government oversteps the constitutional separation of powers, it acts without jurisdiction or authority and its actions are void. Earth Island Institute v. Christopher, 6 F.3d 648 (9th Cir. 1993) (Congressional statute requiring executive to negotiate with foreign governments violates separation of powers and is thus void); In re Application of the President's Commission on Organized Crime, 763 F.2d 1191 (11th Cir. 1985).[3] As noted supra, in determining whether an act of one branch disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents another branch from accomplishing its constitutionally assigned functions. Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). A judicial refusal to grant a government motion to dismiss criminal charges violates the separation of powers by usurping the executive's power to

[3] In President's Commission on Organized Crime, the Eleventh Circuit concluded that the appointment of Article III judges to an executive enforcement committee violated the Constitutional separation of powers. 763 F.2d at 1197. Generally, a violation of the separation of powers invalidates any action subsequently taken. See, e.g., Earth Island Institute, 6 F.3d 648 at 653; Covert, 354 U.S. at 15-17. However, the Eleventh Circuit found that the bare appointment of Article III judges to a much larger organization did not invalidate every action ever taken by the Committee (at issue were the issuance of subpoenas unrelated to either of the two federal judges on the committee); the actions of the committee could be upheld under a severance theory commonly used to uphold non-offensive portions of unconstitutional statutes. 763 F.2d at 1201 (Fay, concurring). No such option is available here as there is no possible severability of the district court's denial of the government's motion to dismiss.

prosecute criminal matters. In re Richards, 52 F. Supp. 2d 522 (D.C. Virgin Islands (Appellate Division) 1999).

In Richards, the Appellate Division for the Virgin Islands Federal District Court granted a writ of mandamus reversing the decision of a district judge who refused to grant a government motion to dismiss serious criminal charges to facilitate a guilty plea to a lesser charge. Id. at 524-26. In granting the writ, the court concluded that the district judge's refusal to grant the government's motion to dismiss was an usurpation of the executive's prerogative to terminate criminal charges. Id. at 530-31. Even in light of the leave of court requirement in Fed. R. Crim. P. 48(a) (the applicability of which was uncertain), the court violated the separation of powers in denying the dismissal motion because it was not clearly contrary to the public interest (as required under Rule 48(a)). Id. The same is true in the case at bar.

Similarly, in United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987), the district court halted a criminal prosecution under the doctrine of primary jurisdiction (over government objection) and referred the case to the Armed Services Board of Contract Appeals (ASBCA). This Court reversed the order of the district court, concluding that the district court's halting of the prosecution violated the separation of powers.

Id. at 1366. Because the stay of the litigation was a violation of the separation of powers, so was the subsequent referral of the case to the ASBCA, and thus the referral was void. Id. In this case, the same is true. The district court's refusal to grant the government's motion to dismiss was an usurpation of the executive prerogative to prosecute and a violation of the separation of powers. At that point, the district court lost jurisdiction of the case and any subsequent actions are void. Thus, the court's subsequent acceptance of Mr. Garcia-Valenzuela's guilty plea (like the ASBCA referral in General Dynamics) was void and without legal effect.

As this Court has previously noted,

> It cannot be disputed that under our system of separation of powers, the decision whether to prosecute, and the decision as to the charge to be filed, rests in the discretion of the Attorney General or his delegates, the United States Attorneys. The Executive Branch has exclusive and absolute discretion to decide whether to prosecute.

United States v. Edmonson, 792 F.2d 1492, 1497 (9th Cir. 1986). "The district court has no power to deny the United States Attorney his prerogative under the separation of powers doctrine." Id. at 1497. Thus, when the district court denied the government's Rule 48(a) motion to dismiss it exceeded its constitutional authority in continuing the prosecution of Mr. Garcia-Valenzuela. Because the district court violated the

separation of powers it was without authority to accept Mr. Garcia-Valenzuela's guilty plea, and thus, his plea does not bar him from appealing to this Court.

The government's second argument, that Mr. Garcia-Valenzuela himself objected to the government's dismissal motion and thus it was not error for the court to deny the motion, is equally unavailing. Under Rule 48(a), the consent of a defendant is only required after trial has begun and jeopardy has attached. The reason for this is to prevent a defendant from harassment by being repeatedly placed in jeopardy. Here, the government's motion came well in advance of trial, thus Mr. Garcia-Valenzuela's objection is of no moment. No matter how loudly a defendant may be heard to complain, his or her objection simply does not matter if the government's 48(a) motion comes before trial. United States v. Valencia, 492 F.2d 1071 (9th Cir. 1974).

Additionally, counsel for Mr. Garcia-Valenzuela specifically indicated to the district court that he had no objection to the dismissal. [ER 85-87]. The decision to object or not to the government's motion was a tactical decision unequivocally left to counsel, not Mr. Garcia-Valenzuela himself. See e.g., Strickland v. Washington, 466 U.S. 668, 687 (1984) (tactical decisions left to counsel, not client). This Court has suggested that the ABA standards for Professional Conduct may in some

situations require an attorney to ignore his or her client's wishes when they are not in the client's best interest. See Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993), and opinion reissued by, sub nom., 114 F.3d 1484 (9th Cir. 1997).[4] Thus, the district court was not required to note a defense objection to the 48(a) motion. It was a decision left to counsel, and counsel indicated no objection.[5]

---

[4] The ABA's Standards of Criminal Justice, Part V, entitled Control and Direction of Litigation, provide:
"Standard 4-5.1. Advising the defendant
"(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all
aspects of the case, including a candid estimate of the probable outcome.
"Standard 4-5.2. Control and direction of the case
"(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
"(i) what plea to enter;
"(ii) whether to waive jury trial; and
"(iii) whether to testify in his or her own behalf.
"(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client."
ABA Standards for Criminal Justice 4-5.1, 4-5.2 (2d ed. 1980 and Supp.1982).

[5] It is the government, not defense counsel, that is subject to waiver based on the record developed below. The government made the 48(a) motion to the district court. This Court should not now allow the government to take a position inconsistent with the position it took below. See United States v. Singleton, 987 F.2d 1444 (9th Cir. 1993) (government may not take inconsistent positions); United States v. Bagley, 772 F.2d 482 (9th Cir.1985), cert. denied, 475 U.S. 1023 (1986) (same); United States v. Issacs, 708 F.2d 1365 (9th Cir.), cert. denied, 464 U.S. 852 (1983). At the district court level, the government sought to dismiss the charges against Mr. Garcia-Valenzuela; the government should be precluded from arguing on appeal that it didn't really mean what it said below.

After making these meritless waiver arguments the government fails to address the merits of Mr. Garcia-Valenzuela's claim that the district court vested itself of jurisdiction in erroneously denying the government's 48(a) motion. There is a reason for this: the law is clear; the district court abused its authority and this Court should vacate Mr. Garcia-Valenzuela's conviction and remand the case to the district court with instructions to grant the government's Rule 48(a) motion. That is the only remedy that makes sense in this context.

III. THE DISTRICT COURT ERRED IN ACCEPTING MR. GARCIA-VALENZUELA'S INVOLUNTARY GUILTY PLEA

In his opening brief, Mr. Garcia-Valenzuela contended that the district court erred in accepting his guilty plea because there was sufficient indicia before the court that the plea was not the product of a voluntary choice. The government, in its response, argues (1) that Mr. Garcia-Valenzuela is precluded from raising this issue on appeal because he never filed a motion to withdraw his plea before the district court; and (2) the district court's Rule 11 colloquy was sufficient to ensure that the plea was voluntary. However, the law does not require a defendant to file a motion before the district court to withdraw his or her plea in order to preserve for appeal the voluntariness of the plea. Additionally, defense counsel's concurrence with the

government's 48(a) motion is sufficient to preserve the issue for appeal; this Court does not require a defendant to make futile challenges to preserve issue for appeal. The government's arguments are addressed more fully below.

Preliminarily, the government appears to misstate the proper analysis for this issue within the standard of review section of its brief; the government cites to United States v. Baker, 790 F.2d 1437 (9th Cir. 1986), for the proposition that absent a request before the district court to withdraw a plea "a plea will not be set aside absent manifest justice." [GB 11]. Subsequent decisions of this Court and others show that such a heightened standard only applies in the context of collateral attacks brought under 28 U.S.C. § 2255. See United States v. Martinez-Martinez, 69 F.3d 1215 (1st Cir. 1995); United States v. Jaramillo-Suarez, 857 F.2d 1368, 1370 (9th Cir. 1988). Thus, Mr. Garcia-Valenzuela is only required to show on appeal that there was a "substantial defect" in the plea. See United States v. Miranda-Santiago, 96 F.3d 517 (1st Cir. 1996). A guilty plea that was not the product of a voluntary choice meets this "substantial defect" standard. Id. at 522 n.8.

The government argues that Mr. Garcia-Valenzuela is precluded from raising this issue on appeal because he never filed a motion to withdraw his plea before the district court.

However, Mr. Garcia-Valenzuela's failure to file a motion with the district court to withdraw his plea does not foreclose him from appealing this issue. See United States v. Parra-Ibanez, 936 F.2d 588, 593 (9th Cir. 1991) (challenge to guilty plea not waived by failure to raise issue in district court). In fact, the only case of this Court on point located by counsel is United States v. Daniels, 821 F.2d 76 (9th Cir. 1987). In that case, this Court did allow the defendant to challenge for the first time on appeal the voluntariness of his plea.[6] Thus, Mr. Garcia-Valenzuela may properly challenge his plea below before this Court.

Additionally, the government apparently argues that it was prejudiced by Mr. Garcia-Valenzuela's failure to raise this claim below because the government ostensibly would have "presented new evidence or made new arguments." [GB 13]. This claim is without merit. The government's statements to the district court at the sentencing hearing, as well as its statements within its brief

---

[6] This Court allowed the challenge in Daniels for two reasons: (1) the defendant had filed a motion to withdraw his plea (on other grounds) and thus the court was apparently at least on notice of the "general issue...of voluntariness"; and (2) the district court had an independent interest under Rule 11 to inquire into all the other circumstances surrounding the plea. 821 F.2d at 81. Similar considerations are present here. Based on the record below, the court was clearly on general notice as to the involuntary nature of Mr. Garcia-Valenzuela's plea and should have undertaken a more careful treatment of the issue (perhaps by granting the government's Rule 48(a) motion to dismiss the charges. By deferring to the executive's charging decision, the district court could have satisfied the policies to be vindicated through Rule 11: knowing and voluntary pleas).

before this court demonstrate that it would not, could not and has not, made any "new arguments" challenging the fact that Mr. Garcia-Valenzuela's plea was involuntary.[7]

It is also unclear why Mr. Garcia-Valenzuela himself should have to move to withdraw his plea before the same district court that refused to dismiss the charges upon motion of the government. Put another way, if the district court refused to relent to the executive's absolute prerogative to dismiss the charges, what evidence is there to even remotely suggest that the district court would have relented to a subsequent request by Mr. Garcia-Valenzuela to withdraw his plea? Thus, it contravenes common sense to force Mr. Garcia-Valenzuela to make a clearly futile motion to preserve an issue for appeal; his counsel had joined in the government's Rule 48(a) motion to dismiss; that was sufficient to preserve the issue for appeal. See, e.g., United States v. Alvarez, 584 F.2d 694, 697 (5th Cir. 1978) (ruling that since "[t]he trial court had already ruled adversely to

---

[7] It is difficult to understand how the government could be prejudiced or feel somehow sandbagged by Mr. Garcia-Valenzuela's claim of involuntariness on appeal. The government agreed below that the plea was involuntary but could simply do nothing about it (except make very generous sentencing recommendations) since the district court denied the government's motion to dismiss; these are the statements of the AUSA at the sentencing hearing: "I've never been in this position where a defendant has made such demands upon the Government for a greater sentence or minimum mandatory counts. It is self-destructive on his part, and I think that he's motivated by the threats that were made by the co-defendant. And I think that's an unfortunate thing. [ER 165-166].

Here, Mr. Garcia-Valenzuela pleaded guilty due to coercion by his codefendant. Mr. Garcia himself (not counsel) irrationally objected to the government's dismissal of more serious charges. Mr. Garcia-Valenzuela insisted on pleading guilty to only the counts in which his co-defendant, Renteria, was named. These were five-year minimum mandatory counts (if the court had granted the government's dismissal motion, the only remaining count would not carry a minimum mandatory sentence and call for a sentencing guideline range of 18-24 months). The two defendants' courtroom demeanor, the self-destructive actions of Mr. Garcia and the in and out-of-court statements of Mr. Renteria regarding Mr. Garcia-Valenzuela further demonstrate that Mr. Garcia-Valenzuela acted due to the intimidation of his co-defendant.[9] The facts of Castello facts are absolutely nothing like the case at bar; Castello provides no guidance whatsoever in the instant case.

The government's argument that the district court's colloquy was sufficient to guard against the court accepting an involuntary plea is based simply on the court asking Mr. Garcia-Valenzuela if he was pleading guilty because he had been

---

[9] As outlined in Mr. Garcia-Valenzuela's opening brief, Mr. Renteria demanded that Mr. Garcia-Valenzuela should plead guilty "for everything." [AOB 6-10]. Mr. Renteria also made a statement (related to the undercover agent by Mr. Garcia-Valenzuela prior to apprehension) that Renteria would kill Garcia-Valenzuela if the drug deal was unsuccessful.

threatened. [GB 14]. While the district court did spend several minutes questioning Mr. Garcia-Valenzuela if he had been threatened, this alone provides little assurance that the plea was indeed voluntary. The government's argument is premised on the fallacy that a threat might induce an individual to resist dismissal of serious criminal charges, and might further induce an individual to plead guilty under oath to those same serious charges, but the threat would somehow be insufficient to induce the same individual to falsely claim during a Rule 11 colloquy that there was no threat. The government's position is counter-intuitive and should be rejected.

Because Mr. Garcia-Valenzuela's plea was not entered voluntarily, this Court should vacate his conviction. However, this Court should not stop there; it can also decide the merits of the Rule 48(a) issue regarding the government's motion to dismiss based on the record developed below. This Court should vacate Mr. Garcia-Valenzuela's conviction, and remand this case to the district court with instructions to grant the government's Rule 48(a) motion to dismiss.

IV. MR. GARCIA-VALENZUELA QUALIFIED FOR RELIEF UNDER THE SAFETY VALVE

In its response brief, the government argues that Mr. Garcia-Valenzuela is not entitled to safety valve relief

because he "withheld information regarding his codefendant Renteria." [GB 22]. Mr. Garcia-Valenzuela respectfully refers the Court to the arguments made within his opening brief as to this issue.

V. CONCLUSION

Mr. Garcia-Valenzuela respectfully requests that this Court vacate his conviction and remand his case to the district court with instructions to grant the government's Rule 48(a) motion to dismiss, or at a minimum, vacate his sentence and remand this case back to the district court with instructions to resentence Mr. Garcia-Valenzuela, granting relief under the safety valve.

Respectfully submitted,

DATED: November 15, 1999

BENJAMIN P. LECHMAN
Federal Defenders of San Diego, Inc.
Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/ ~~answering/ reply/ cross-appeal~~ brief is

_____ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

__X__ Monospaced, has 10.5 or fewer characters per inch and contains __4254__ words or __471__ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text)

11-15-99
Date

Signature of ~~filing~~ party

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 99-50175
	)	
Plaintiff-Appellee,	)	U.S.D.C. No. 98CR2038-JNK
	)	
v.	)	PROOF OF SERVICE
	)	
RAFAEL GARCIA-VALENZUELA,	)	
	)	
Defendant-Appellant.	)	
	)	

I, the undersigned, say:

1) That I am over eighteen years of age, a resident of the County of San Diego, State of California, and not a party in the within action and that my business address is 225 Broadway, Suite 900, San Diego, California, 92101-5008;

2) I mailed an original and fifteen copies of the Reply Brief for Defendant-Appellant to the United States Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, CA 94119-3939;

3) I served the within Reply Brief for Appellant on counsel for Plaintiff-Appellee by mailing a copy to:

Gregory A. Vega, United States Attorney
Assistant U.S. Attorney: MICHAEL G. WHEAT
880 Front St.
San Diego, CA 92101

4) That I caused additional copy(ies) to be delivered to Defendant-Appellant, and the same were delivered and deposited in the United States mails, first class postage prepaid, at San Diego, California, on November 15, 1999.

I certify under penalty of perjury that the foregoing is true and correct. Executed on November 15, 1999 at San Diego, California.

Francina Fernandez

FRANCINA FERNANDEZ