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Waiver of Double Jeopardy Protection and Guilty Plea: How Final is a Bad Deal?

by Daniel Blinka

United States
v.
Ray C. Broce
(Docket No. 87-1190)

Argument Date: October 4, 1988

The term "plea bargaining" conjures up images of lawyers haggling over the worth of their case like merchants at some Near Eastern rug bazaar. The deal-like atmosphere extends to notions that once a deal is struck, the parties must live up to their word. A deal is a deal.

Criminal defendants sometimes make deals that they come to regret. Later events may occur that transform what appeared to be a good deal into a rather bad one.

This case presents such a situation. When defendants pled guilty to two counts of conspiracy arising out of very similar conduct, it appeared to be an efficacious way to avoid a plethora of other potential charges. But defendants came to regret the deal when other defendants successfully argued that multiple conspiracy charges could not be legally charged because in fact there had been only one (very large) conspiracy. The question is whether these defendants can renege on their earlier deal and reap the benefits of the later ruling?

ISSUE

The issue before the Court is whether a defendant who has pled guilty to two indictments alleging two different criminal conspiracies is entitled to a factual hearing on whether the two conspiracies alleged were actually parts of a single conspiracy. The defendants had pled guilty to the charges as part of a plea bargain and first raised this contention long after the guilty plea and sentencing had taken place.

FACTS

Ray Broce, the president of Broce Construction Co. in Kansas, was indicted along with the corporation for conspiring to violate the Sherman Antitrust Act and committing mail fraud. The subject of this indictment was a conspiracy to rig Kansas highway construction bids on the "Meade County

project." Broce and the corporation were represented by counsel, who entered into a plea bargain with federal prosecutors.

It was agreed that Broce and the corporation would plead guilty to charges of conspiracy to rig bids on the Meade County project. The government would also file another indictment charging defendants with conspiracy to rig bids on a Barton County (Kansas) project; defendants agreed to plead guilty to this charge as well. Broce himself also agreed to plead guilty to the mail fraud charge contained in the first indictment.

In exchange for the plea, the prosecution agreed (1) not to charge defendants with other antitrust violations in Oklahoma and Kansas, (2) to dismiss the remaining mail fraud charge against the corporation and (3) to recommend a \$1,500,000 fine against the corporation.

Defendants pled guilty in accordance with this negotiation in early 1982. The guilty plea procedure appears to have been constitutionally antiseptic. At the later sentencing hearing, the court fined the corporation \$1,500,000 and sentenced Broce to imprisonment for two years (plus a \$50,000 fine) for each of the Sherman Act conspiracies and fined him \$1,000 on the mail fraud count.

Neither Broce nor the corporation filed an appeal. Broce served his prison term and paid all of his fines. The corporation has paid one-half of its fine, according to the United States' brief.

In February, 1983, more than a year after the guilty pleas were entered, defendants filed motions asking the court to vacate their sentences on the charges contained in the second indictment (stemming from the Barton County project). Defendants asserted that other related litigation culminating in the decision in *United States v. Beachner* (555 F. Supp. 1273 (D. Kan. 1983)) established that the bid rigging scandal in Kansas, which included Broce's escapades, constituted a single, overarching conspiracy to rig bids; it was not a constellation of separate, smaller conspiracies aimed only at individual highway projects.

In short, they complained that the Double Jeopardy Clause precluded separate conspiracy charges stemming from defendants' effort to rig bids on the different highway projects. Both were part of one criminal conspiracy, not two conspiracies; therefore, the prosecution could not chop up one crime into smaller bits and charge defendants with multiple conspiracies.

After a series of appellate maneuverings, the court of appeals agreed with defendants' position. It upheld the

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factual finding made by the district court that the Kansas bid rigging network constituted only one, on-going conspiracy, not multiple, separate conspiracies. It also rejected the government's argument that defendants had waived any double jeopardy claims by pleading guilty and sitting on their hands while other appellate remedies expired.

BACKGROUND AND SIGNIFICANCE

Guilty pleas are the lifeblood of the criminal justice system. Over 90% of all charges are disposed of in this manner. Most guilty pleas are the product of plea bargaining between the parties in which the defendant trades away various rights in exchange for concessions (real or imagined) from the prosecution. Most often defendants seek the dismissal of pending charges or binding commitments not to issue still other charges (thus reducing the exposure to prison time), or promises by the prosecutor to recommend lighter sentences.

The prosecution also receives benefits from this practice. Besides securing a certain conviction, the prosecutor often extracts information from the defendant about other criminal activity or secures the defendant's testimony against the other criminals as well. (Here, Broce testified for the government in other cases concerning the bid rigging scandal.)

Guilty pleas carry with them two other alluring features, in addition to those just described: they bring certainty and finality to criminal proceedings. When a case is tried to jury, the outcome is always uncertain until the verdict is returned. Regardless of the advocate's skill in presenting evidence and confidence in the outcome, there are no guarantees of a favorable verdict. Although a bargained guilty plea generally falls short of the ideal outcome hoped for by each side, it is a sure thing upon acceptance by the court (which is usually the case). The other seductive attraction, particularly for the prosecution, is the finality of the guilty plea. Once the plea is accepted and sentence pronounced, the case is literally finished. Competent defense counsel are often able to attack charges with myriad challenges, factual and legal, which can make the task of trying the case exceedingly difficult and open the door to years of appellate wrangling about alleged errors; victory at trial may be bittersweet or short-lived for the prosecutor. Where the defendant pleads guilty, however, he waives nearly all challenges to the charges, thus effectively precluding later appellate attacks on just about everything but the plea and sentencing procedures themselves.

In this case the parties bargained over the charges and disposition. Broce and the corporation pled guilty to the two separate indictments which alleged on their face the existence of two distinct conspiracies. Defendants did not object to this characterization either at the time of the guilty plea or the sentencing. Moreover, they passed up their primary rights to appeal; this challenge came more than a year after the guilty pleas, as a "collateral" attack on the sentence. Although the issue of whether defendants' original attorney effectively represented them during the guilty plea procedure is not before the Court, the record contains evidence

that the original lawyer never thought of the double jeopardy issue. It was only when defendants in other related bid rigging cases identified and successfully litigated the multiple conspiracy issue that Broce brought this challenge.

The essence of the government's position is that defendants had the opportunity to raise the issue but willingly surrendered it in exchange for various concessions. Moreover, by pleading guilty to the charges in the indictments, the defendants agreed that there were two separate conspiracies; therefore, they are not entitled to litigate this issue only after the guilty plea. Regardless of the outcome of the other bid rigging cases, the defendants should not be allowed to escape the deal they made with the prosecutor simply because others did better later on.

This case presents, then, the finality of the guilty plea procedure and the question of what escapes, if any, are available to a defendant who entered into a deal and later wants it changed. It must be borne in mind that Broce's case is narrowly focused on a double jeopardy issue which is further complicated by the vagaries of federal conspiracy law. This is not an instance where a defendant simply changes his mind about the deal or attempts to reopen the matter following successful trials by his confederates who opted for their chances at trial. The latter problems are rather easily resolved under present law.

The Court will be called upon to decide how a guilty plea affects the waiver of double jeopardy rights. It may decide that if the face of the indictments reflect separate charges, then any later challenges are waived. Or the Court may consider whether special steps should be taken at the guilty plea proceeding to specifically advise defendants about their double jeopardy right and that the plea works a "waiver" of those rights. In particular, the Court may elaborate upon its holding in *Ricketts v. Adamson* (No. 86-6, June 22, 1987; *Preview*, 1986-87 term, pp. 350-352), which held defendants to the consequences of their voluntary choice to plead guilty in the double jeopardy context. Adamson had pled guilty to reduced murder charges in exchange for his testimony against other accomplices. When Adamson later wretched on his promise to cooperate with the prosecution, the government reopened and dismissed the reduced charges against him and then charged him with even more serious offenses. The Court held that this scenario did not violate the double jeopardy clause, as defendant had violated the terms of the deal and was aware that such a breach allowed the prosecution to refile the original charges.

ARGUMENTS

For the United States of America (Counsel, Charles Fried, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)

Respondents (Broce and Broce Construction Co.) were not entitled to invalidate convictions, following guilty pleas pursuant to plea agreements, on double jeopardy grounds:

A. Respondents were not entitled to litigate factual question after pleading guilty.

B. Respondents were not entitled to repudiate their guilty pleas after inducing the government to rely on those pleas.

*For Ray C. Broce and Broce Construction Co., Inc.
(Counsel of Record, Glenn E. Casebeer II, 215 West Eighth
Street, Coffeyville, KS 67337; telephone (316) 251-6530)*

Respondents did not waive their double jeopardy right by entering a plea of guilty:

- A. The vague indictments brought by the government require a factual determination of their validity.
- B. The government's requirement as part of a plea agreement that the defendant enter a plea of guilty to two indictments does not invalidate the double jeopardy claim.