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United States v. Jordan Linn Graham: Can we try this again?

Connor Walker

Nos. DA 14-30062 and DA 15-30079 Ninth Circuit Court of Appeals

Oral Argument: Tuesday, November 3, 2015 at 9:00 AM in the Pioneer Courthouse, Portland, Oregon.

I. QUESTIONS PRESENTED

Did the District Court err in denying Defendant Jordan Linn Graham's motion to supplement the record with draft jury instructions?

Did the District Court err in denying Graham's motion to withdraw her guilty plea because the prosecution's plea deal was offered in bad faith?

II. FACTUAL AND PROCEDURAL BACKGROUND

On Sunday, July 7, 2013, Jordon Linn Graham pushed her husband Cody Johnson to his death over a ledge in Glacier National Park.¹ They had been married for only eight days.² Graham initially told her friends, family, and investigating police that her husband had left in an unfamiliar dark car.³ Several days into the missing persons investigation, she fabricated an email from "Tony" in an attempt to misdirect suspicion from herself.⁴ After being confronted with the multiple contradictions in her story, Graham finally confessed on July 16th to causing Cody's death.⁵

Graham was charged in federal court with both first- and second-degree murder.⁶ On the fourth day of a jury trial, Graham accepted a plea offer and pled guilty to second-degree murder.⁷

The parties negotiated the plea deal while proposed jury instructions were being prepared concerning a recorded statement that Graham had made to FBI investigators. When the recorded statement was introduced, the defense objected that it was "both incomplete and unfairly obtained."⁸ While allowing the statement into the record, the

¹ Defendant's Sentencing Memorandum, *United States v. Jordan Linn Graham* (D. Mont. Mar. 18, 2014) (No. 9:13-cr-13-37-M-DWM) [hereinafter Defs.' Sentencing Mem.].

² Opening Brief of Defendant-Appellant, June 5, 2015, No. 15-30079.

³ Government's Sentencing Memorandum, 5-6, *United States v. Jordan Linn Graham* (D. Mont. Mar. 8, 2014) (No. 9:13-cr-13-37-M-DWM) [hereinafter Govt's Sentencing Mem.].

⁴ Govt's Sentencing Mem., at 7.

⁵ Def.'s Sentencing Mem., at 23.

⁶ Opening Br. of Def.-App., at 2.

⁷ Opening Br. of Def.-App., at 2.

⁸ Opening Br. of Def.-App., at 3.

trial court ruled that it would give cautionary instructions to the jury concerning the completeness of the recordings.⁹ The Court prepared two draft jury instructions and shared them with counsel.¹⁰ At this late stage of the trial, the parties agreed to the plea deal and the jury was discharged.

At sentencing, the United States recommended life imprisonment,¹¹ claiming Graham had likely planned the murder.¹² The prosecution argued that Graham’s “nine-day campaign to lie as to her involvement” during the murder investigation further supported an enhanced sentence.¹³ Though she had no prior criminal record, her “calculating behavior” and her young age increased the danger of recidivism.¹⁴ The defense countered that by pleading guilty to second-degree murder, it was “conclusively established” that the murder was unintentional.¹⁵ Graham’s false statements to investigators were a product of her fears, not an intentional campaign to deceive.¹⁶ Because the facts were unique, general deterrence should not be considered, and a 10-year sentence with five years of supervised release would be most appropriate.¹⁷ The trial court sentenced her to a 365-month term¹⁸, which is the maximum recommended sentence under Federal sentencing guidelines.¹⁹ At sentencing, the judge said Graham is a dishonest person who showed little remorse for killing her husband and has been “impervious to the human consequences of what she did.”²⁰ The defense then filed a motion to withdraw her guilty plea,²¹ which was denied.²²

Graham appeals her conviction and sentence for the second-degree murder of Cody Johnson and the denial of her motion to supplement the record.

III. ARGUMENTS

⁹ Answering Br. of Appellee, 1, July 22, 2015, No. DA 15–30079.

¹⁰ Opening Br. of Def.-App, 4.

¹¹ Gov’t’s Sentencing Mem., at 2.

¹² Gov’t’s Sentencing Mem., at 22.

¹³ Gov’t’s Sentencing Mem., at 24.

¹⁴ Gov’t’s Sentencing Mem., at 26–27.

¹⁵ Defs.’ Sentencing Mem., at 37.

¹⁶ Defs.’ Sentencing Mem. at 39–40.

¹⁷ Defs.’ Sentencing Mem. at 42.

¹⁸ Judgment, *United States v. Jordan Linn Graham* (D. Mont. Mar. 27, 2014) (No. 9:13–cr–13–37–M–DWM) [hereinafter Trial Judgment].

¹⁹ U.S. SENTENCING GUIDELINES MANUAL § 2A1.2 (2014).

²⁰ Alice Miller, *Judge sentences bride to 30 years for Glacier Park murder*, Missoulian (March 27, 2014, 10:00 PM MDT), <http://perma.cc/8KZ3-5BM7>.

²¹ Defendant’s Motion to Withdraw Plea of Guilty, *United States v. Jordan Linn Graham* (D. Mont. Mar. 25, 2014) (No. 9:13–cr–13–37–M–DWM) [hereinafter Def’s Mot. to Withdraw Plea].

²² Def’s Mot. to Withdraw Plea.

Issue 1: The defense seeks to amend the record by including the draft jury instructions that were circulated to counsel before the plea deal was reached.

Issue 2: Graham appeals her judgment, based on the District Court's denial of her motion to withdraw the guilty plea.

A. Issue 1: The draft jury instructions

1. Arguments

The District Court denied Graham's motion to modify the record to include the draft jury instructions.²³ She argues that these instructions show "inferentially" that the plea agreement was offered in bad faith.²⁴ The proposed jury instructions made the prosecution fear they would gain only a third-degree murder conviction—or even that they would lose outright—if either instruction were given to the jury. This, the defense argues, is the rationale behind the prosecution's "11th hour" plea offer.²⁵

The prosecution's alleged concern underpins Graham's second argument: the prosecution wanted to "have its cake and eat it too" by arguing for premeditation at sentencing while avoiding the risk of an acquittal on the first-degree murder charge.²⁶ Thus, the plea agreement was offered with bad faith because the prosecution intended to achieve a first-degree murder sentence by arguing premeditation at sentencing, even though a jury had not found premeditation. Graham further argues that this bad faith violated her constitutional due process protections, since a jury must find for all elements of the crime, and premeditation is an element of first-degree murder.²⁷

The prosecution counters that because Graham had pled out before the jury heard any instructions, there was no reason to include the draft instructions in the record.²⁸ Additionally, the Court's ruling that there would be cautionary instructions *was* a part of the record, rendering amendment superfluous.²⁹ The prosecution's reasons for entering into the plea are irrelevant to her appeal and therefore Graham's entire motion is "irrelevant and immaterial."³⁰

²³ Order Denying Motion to Supplement as to Jordan Linn Graham, *United States v. Jordan Linn Graham* (D. Mont. Mar. 9, 2015) (No. 9:13-cr-13-37-M-DWM) [hereinafter Order Denying Mot. To Supp.].

²⁴ Opening Br. of Def.-App., at 6.

²⁵ Opening Br. of Def.-App., at 6–7.

²⁶ Opening Br. of Def.-App., at 8.

²⁷ Opening Br. of Def.-App., at 12.

²⁸ Answering Br. of Appellee, at 1–2.

²⁹ Answering Br. of Appellee., at 2.

³⁰ Answering Br. of Appellee., at 5.

2. *Analysis*

The issue to be addressed at oral argument is whether the draft instructions should be considered in the appeal, even though the district court had not actually used them to instruct the jury. The defense claims to be “settling the record as to what happened” rather than introducing substantive proceedings.³¹ The defense wants the draft jury instructions in the record because they believe this information supports a review of their motion to withdraw the guilty plea. For that review, the defense intends to show that the prosecution acted in bad faith when offering the plea deal. Expect questions by the Court concerning the bad faith argument.

B. Issue 2: Appeal of Conviction/ Withdrawal of Guilty Plea

1. Arguments

Graham makes four arguments in support of her appeal: (A) the prosecution breached the plea agreement by arguing for an enhanced sentence; (B) the defendant cannot now be sentenced fairly; (C) the prosecution unfairly used the threat of a mandatory life sentence to coerce the defense into accepting the plea; and (D) without a jury finding, the prosecution’s argument at sentencing about premeditation violates constitutional due process protections.

1. The government breached the plea agreement

Graham claims that the prosecution breached the plea agreement when, after accepting a plea to second-degree murder, they then argued for a sentence consistent with a first-degree murder judgment.³² This is in essence a request for the Court to reject their own plea deal by sentencing the defendant as a first-degree murderer anyway.³³ Graham’s contention that the prosecution wants “to have its cake and eat it too” refers to this claim.³⁴ The prosecution claims that its reasons for entering into the plea are irrelevant.³⁵ Graham counters that it is relevant because a plea deal is “contractual in nature” and that a reasonable defendant in Graham’s position would not have accepted the plea deal knowing that a 365-month sentence would be handed down.³⁶

A. Analysis

³¹ Opening Br. of Def.-App., at 10.

³² Def.’s Mot. to Withdraw Guilty Plea, at 2.

³³ Def.’s Mot. to Withdraw Guilty Plea, at 2.

³⁴ See *supra* FN 26.

³⁵ Answering Br. of Appellee, at 5–6.

³⁶ Reply Br. of Def.-Appel., at 5.

This claim underpins Graham's appeal. Her theory is that the prosecution acted in bad faith, and that this bad faith directly caused the trial court to give Graham an excessive sentence. Their motion to include the draft instructions in the record is intended to add evidence in support of this theory. The prosecution does not even attempt to rebut the allegation of bad faith, dismissing it as "irrelevant."³⁷ This will likely be a subject raised at the oral argument.

II. Defendant cannot be sentenced fairly

Graham's second claim is that the prosecution was allowed to make what would have been its closing arguments at trial to the judge by including them in the sentencing papers.³⁸ Because the prosecution introduced the premeditation element at sentencing but not at trial, there is no way she can now be sentenced fairly to the lesser charge.³⁹ Therefore, Graham has a "fair and just reason" to withdraw her plea.⁴⁰ The prosecution responded that this claim lacks all merit.⁴¹

A. Analysis

The fourth claim concerning due process (below) is directly related to this claim, because the defense is implying that the trial court judge was not able to sentence Graham fairly after the prosecution raised premeditation in sentencing. The standard for reviewing a sentence is "substantive reasonableness."⁴² Since Graham's sentence for second-degree murder was within the sentencing guidelines⁴³, the defense must make an exceptionally persuasive oral argument for the appeals court to question the trial court's judgment.

III. The prosecution unfairly used the threat of a mandatory life sentence

Graham alleges misconduct when the prosecution "unfairly used the onerous threat" of a mandatory life sentence for first-degree murder to coerce the defendant into accepting the second-degree murder plea, only to argue for premeditation as a sentencing factor.⁴⁴ The prosecution

³⁷ Reply Br. of Def.-Appel., at 5.

³⁸ Def.'s Mot. to Withdraw Plea, at 2.

³⁹ Def.'s Mot. to Withdraw Plea, at 2.

⁴⁰ Def.'s Mot. to Withdraw Plea, at 2, citing Fed. R. Crim. P., Rule 11(d)(2)(B).

⁴¹ Government's Response in Opposition to Defendant's Motion, *United States v. Jordan Linn Graham* (D. Mont. Mar. 26, 2014) (No. 9:13-cr-13-37-M-DWM) [hereinafter Govt.'s Resp. in Opp.].

⁴² *United States v. Booker*, 543 U.S. 220 (2005).

⁴³ Trial Judgment; see also U.S. SENTENCING GUIDELINES MANUAL § 2A1.2 (2014).

⁴⁴ Def.'s Mot. to Withdraw Plea, at 2-3.

denies misconduct and asserts Graham had ample reasons of her own to accept the plea offer.⁴⁵

A. Analysis

At oral arguments, this issue will probably not be prominent since the Court will likely only reach this issue if it is already persuaded that the prosecution breached the plea agreement.

IV. The prosecution's sentencing proposal violates due process protections

Graham claims that the prosecutions sentencing arguments have “contaminated the entire sentencing process.”⁴⁶ Since their plea offer was “nothing but an empty promise” and a way to avoid a possible manslaughter verdict, Graham’s rights were violated since a jury did not determine her guilt or innocence.⁴⁷

A. Analysis

This claim is the key to Graham’s appeal, and will likely be a subject for scrutiny at oral arguments. The defense does a difficult dance to avoid directly accusing the trial court of error, but the substance of the claim is that the trial judge was unduly biased by the prosecution’s sentencing recommendation. The alleged bias must have influenced Graham’s sentencing to a degree that the imposed sentence was substantively unreasonable. The chain of reasoning is speculative at best.

⁴⁵ Govt.’s Resp. in Opp.

⁴⁶ Def.’s Mot. to Withdraw Plea, at 3.

⁴⁷ Def.’s Mot. to Withdraw Plea., at 3.