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Recap: *United States v. Jordan Linn Graham*

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RECAP; *United States v. Jordan Linn Graham*: Oral Arguments

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. SUMMARY

At oral argument, the main issue was the appellant's justification for withdrawing her guilty plea. Appellant contended that the trial court abused its discretion by denying the motion. She claimed the prosecution's sentencing memorandum, which argued for an upward variance in sentence, violated the plea agreement. She further contended that this violation caused the trial judge to impose a sentence that she could not reasonably have expected to receive when making her plea, and therefore she had a fair and just reason to withdraw the plea.

II. MICHAEL DONAHOE FOR THE PETITIONER

The questions came before Mr. Donahoe had finished his opening statement. Judges Watford and Berzon both asked if there was an express agreement beyond the written plea agreement, where the prosecution had agreed to drop the first-degree murder and obstruction charges. Mr. Donahue replied that there was no explicit agreement about sentencing. "Then it seems to me you're out of luck," Judge Watford responded. Judge Berzon asked if Mr. Donahue was arguing that there was an implied agreement, and he affirmed that his argument included that point.

Judge Berzon wanted to be clear what the 'fair and just reason' was for withdrawal of the plea. She offered that if there was an implied agreement then he might argue the fair and just reason standard would be lower. Mr. Donahue responded that the trial judge considered voluntariness of the plea when applying the fair and just reason standard, and that was disallowed as a consideration by case law. The response went more to the judge's standard than a clear articulation of the appellant's reason for withdrawal of the plea.

Judge Fischer said he could understand the implicit agreement argument, but reiterated the question: what was the fair and just reason? Mr. Donahue replied that it is a question of degree, from breach on one end of the scale and fair and just reason on the other. The overall context of the plea discussion is important to understanding the reason, he said.

But the quid pro quo was the withdrawal of the first-degree murder charge, Judge Watson countered, and appellant's argument is that the United States couldn't introduce *any* factors that might make the sentence higher. Mr. Donahue responded that the Court should look not only at the defendant's benefit in the bargain but also at the disadvantage the prosecution was removing from their own outcome. Judge Berzon noted that if there had been an actual conviction for second-degree murder rather than a plea, the United States could have argued exactly as it did.

At the end of Mr. Donahue's time, Judge Berzon summarized that in finding an abuse of discretion for a 'fair and just reason' the court would also have to find that the United States breached the plea agreement.

III. ZENO BAUCUS FOR THE UNITED STATES

Mr. Baucus opened by informing the panel that he was personally present when the plea agreement was made and that there had been no agreement concerning sentencing recommendations.

Just as he had with the appellant, Judge Watford challenged Mr. Baucus right away. Watford suggested that the prosecution had violated the spirit if not the letter of the agreement if there were an implicit understanding that the sentencing recommendation would be consistent with second degree murder. Mr. Baucus asserted that there was no implicit understanding. He said the prosecution relied on the trial court's discretion at sentencing, and there was nothing in the record or the law to "bind the hands of the United States to argue the facts "as they saw fit.

On further questioning, Mr. Baucus claimed that the court had advised the defendant and she understood that the United States could argue for upward variance at sentencing. Again, Judge Watford challenged Mr. Baucus, asking if it wasn't part of the benefit of the bargain that the United States would recommend a sentence more consistent with second-degree murder. Mr. Baucus replied that the defendant's benefit was to not be exposed to a mandatory life sentence.

The most challenging line of questioning for the United States came when Judge Fischer again pressed to find if there was an explicit understanding about this benefit at sentencing and Mr. Baucus replied that it was implicit. Judge Fischer then said that the appellant had a different understanding of what was implicit. The judge's statement went to the theory of an implicit agreement that Judge Berzon introduced when questioning Mr Donahoe. If the prosecution admits that they had an implicit understanding, while the appellant had a different implicit understanding, would that misunderstanding be a fair and just reason to withdraw the plea? Mr. Baucus, understanding the implications, replied that there's no law to support that argument. If the court followed that

reasoning, he argued, prosecutors would be obligated to submit sentencing recommendations to defense counsel before they were made to the court.

Finally, Judge Berzon asked Mr. Baucus the same question she had asked Mr. Donahoe at the end of his time: what standard applies for a fair and just reason to withdraw a plea? Mr. Baucus said that it was a vague concept that included many factors, such as competence of counsel, intervening events, adequacy of the hearing, or changes in law. He asserted that the appellant's position is basically a sentencing argument—they wanted a downward variance, and the prosecution argued for an upward variance.

III. REBUTTAL BY MR. DONAHOE

Mr. Donahoe asked the court to look to *United States v. Ortega-Ascanio*[1], which included a 'fair and just reason' definition.[2] Though that case was factually dissimilar, he conceded, the fair and just reason standard from that case could be applied.[3] Mr. Donahoe claimed that the trial court did not apply the standard properly because it considered the voluntariness of the plea. This was an error of law, he asserted, and at a minimum the issue should be sent back to the trial court to apply the correct standard.

Judge Berzon again asked what the appellee's fair and just reason was to withdraw the plea. Mr. Donahoe responded that the "parties had agreed to lay down arms." The repeated questions on this point likely indicate that this will be a central issue addressed in the panel's decision.

Judge Berzon didn't seem to accept the Appellant's position that the trial judge was unfairly biased by the prosecution's sentencing memorandum. She observed that the sentence didn't rely on premeditation; rather, the trial court was concerned with the defendant's lies and attempts to mislead investigators. In closing, Judge Berzon reiterated that to find an abuse of discretion there would have to be a finding that the prosecution breached the plea agreement.

IV. PREDICTIONS

The first question out of the gate set the tone. The judges were looking for an explicit breach of the plea agreement and found none.

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[1] *United States v. Ortega-Ascanio*, 376 F.3d 879 (9th Cir. 2004).

[2] *Id* at 883. (The definition includes the phrase "any other reason that did not exist when the defendant entered the plea" and the opinion suggested that the standard "should be applied liberally.")

[3] *Id*. (The issue in *Ortega-Ascanio* concerned an intervening Supreme Court decision after a pretrial plea entry.)

Judge Berzon's observation at the end will likely control—without an explicit breach, there is no abuse of discretion. The court will probably rule against the appeal on this basis.

An issue presented in the appeals briefs but never reached in the oral arguments was a motion to amend the record to include the draft jury instructions.[4] This motion is likely moot. By making that motion the defense already put the draft instructions before the eyes of the appeals court. It is doubtful that this issue will have any independent impact since it is merely a supporting element in the defense's argument that the United States breached the plea agreement.

Judge Berzon seemed interested in the secondary argument that an implied breach occurred, which was an adequate foundation for a fair and just reason to withdraw the plea. It would be an original finding if the Ninth Circuit were to decide on this basis. However, Mr. Baucus' concerns about such a finding have merit because it would be a heavy burden on the court system to adjudicate implied agreements without additional evidence. It is unlikely the court will open this can of worms.

The final opinion will likely consider the fair and just reason standard. The judges repeatedly asked for a definition of the fair and just reason standard, and neither counsel could respond to the panel's satisfaction. Appellant's argument at rebuttal that the trial court improperly considered voluntariness deserves some consideration. Expect a definitive answer.

[4] Our Precap gives fuller treatment to the defense's motion, and can be read at http://www.montanalawreview.org/precap-united-states-v-jordan-linn-graham-can-we-try-this-again.html