

17-2701

United States v. Bombino (Persico)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at 40 Foley Square, in the City of New York, on the 2nd day of May, two thousand eighteen.

Present: ROBERT A. KATZMANN,
Chief Judge,
JOHN M. WALKER, JR.,
Circuit Judge,
VICTOR A. BOLDEN,
*District Judge.**

UNITED STATES OF AMERICA,
Appellee,

v.

No. 17-2701

JAMES C. BOMBINO, ALICIA DIMICHELE, AKA
Alicia Garofalo, EDWARD GAROFALO, JR., AKA
Bobble, AKA Tall Guy, THEODORE N. PERSICO,
JR., AKA Skinny, AKA Teddy, THOMAS PETRIZZO,
LOUIS ROMEO, MICHAEL D. SCIARETTA, AKA
Mike LNU, ANTHONY PREZA, FRANCIS GUERRA,
AKA BF,

Defendants,

MICHAEL J. PERSICO,

Defendant-Appellant.

For Defendant-Appellant: MARC FERNICH, Law
Office of Marc Fernich (Sarita Kedia, Sarita Kedia Law
Offices, *on the brief*), New York, NY.

For Appellee: ALLON LIFSHITZ (Amy Busa, *on the
brief*), Assistant United States Attorneys, Of Counsel,
for Richard P. Donoghue, United States Attorney for
the Eastern District of New York, Brooklyn, NY.

Appeal from the United States District Court for the
Eastern District of New York (Irizarry, *C.J.*).

**ON CONSIDERATION WHEREOF, IT IS HEREBY
ORDERED, ADJUDGED, and DECREED** that the
judgment of the district court is **AFFIRMED**.

Defendant-Appellant Michael Persico appeals from a final judgment entered by the district court (Irizarry, *C.J.*) on August 25, 2017, following his guilty plea to a single count of conspiring to make an extortionate loan. On appeal, Persico principally challenges the denial of his motions to withdraw his plea on the grounds that the government breached his plea agreement, there was an insufficient factual basis for his guilty plea, and he did not adequately understand the charge to which he pleaded guilty. We review Persico's arguments concerning the plea agreement "*de novo* and in accordance with principles of contract law," *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002), while we review the district court's decision regarding the adequacy of the factual basis for Persico's plea allocation for "abuse of discretion," *United States v. Adams*, 448 F.3d 492, 498 (2d Cir. 2006). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

In pertinent part, Persico's plea agreement provided that the government would "take no position concerning where within the Guidelines range determined by the Court [his] sentence should fall" and "make no motion for an upward departure under the Sentencing Guidelines." App. 116. Persico first contends that the government breached these provisions by informing the Probation Department that it could prove criminal conduct for which Persico was not convicted by a preponderance of the evidence. Assuming *arguendo* that the government did so,¹ the plea agreement

¹ Persico provides no record citation as to where or when this supposedly occurred. As noted by the district court, "[t]he sole basis

nevertheless would not have been breached. The provisions of the plea agreement on which Persico relies refer only to advocating to the district court after it determines the applicable Guidelines range and make no mention of earlier communications with the Probation Department. More importantly, elsewhere the plea agreement provided that the government would “advise the Court and the Probation Department of information relevant to sentencing, including criminal activity engaged in by the defendant, and such information may be used by the Court in determining the defendant’s sentence.” *Id.* at 110. That is precisely what occurred.

The government also did not breach the plea agreement in connection with Persico’s *Fatico* hearing. Although Persico believes that the government somehow improperly “goaded” the district court into holding such a hearing, Persico Br. at 24, that is belied by the record. The government made clear that it was not requesting a *Fatico* hearing; instead, the hearing was ordered *sua sponte* by the district court. *See United States v. Persico*, 266 F. Supp. 3d 632, 634 (E.D.N.Y. 2017); *United States v. Persico*, No. 10 Cr. 147, 2015

for [this] argument appears to be a single line in the Pre-sentence Report which states, in pertinent part, that ‘the Government maintains it can prove by a preponderance of the evidence that Michael J. Persico was involved in several additional significant crimes.’” *United States v. Persico*, 61 F. Supp. 3d 257, 265 (E.D.N.Y. 2014) (quoting PSR at 14). Accordingly, like the district court, we assume for purposes of this appeal that the United States Attorney’s Office made such a representation to the Probation Department. *See id.*

WL 893542, at *6 (E.D.N.Y. Mar. 2, 2015). Once the district court did so, the government was entitled to provide it with relevant evidence and argument. *See United States v. Dykes*, --- F. App'x ---, 2018 WL 1083047, at *3 (2d Cir. 2018) (“[T]he government does not violate a plea agreement if it provides information in response to a sentencing judge’s request.” (citing *United States v. Goodman*, 165 F.3d 169, 173 (2d Cir. 1999) (finding no breach where “it was [the sentencing judge], not the Government, who raised questions” and “directed the Government to provide him with the pertinent information, which was clearly within his power”)); *cf. United States v. Vaval*, 404 F.3d 144, 154 (2d Cir. 2005) (“[T]he provision of requested legal and factual information to the court . . . is an essential function of the government at sentencing.”)).

Nor did the government implicitly advocate for an improper sentence through its choice of words in either submissions or oral arguments to the district court. Although the government may have engaged in some editorializing, it hewed to the plea agreement by consistently advising the district court that it was seeking a sentence within the Guidelines’ recommended range.

In arguing that the government implicitly engaged in improper advocacy, Persico primarily cites as examples phrases used by the government at his sentencing hearing and in a letter submitted to the district court on January 19, 2015. Yet that four-page letter reiterated no fewer than four times that the government was seeking a Guidelines sentence. Similarly, at Persico’s sentencing hearing the

government initially stated that it was “generally content to rely on the written records” in which it was “asking for a sentence in the guidelines range.” App. 305-06. It was only after a lengthy argument from Persico in favor of a sentence below the Guidelines range that the government responded with the language about which Persico now complains. Yet even at that juncture the government made clear that it was opposing Persico’s “requested sentence, a sentence below the guidelines range,” and concluded its remarks by arguing that “a sentence within the guidelines range is necessary.” *Id.* at 322. “[N]othing in the plea agreement barred the government from forcefully advocating for a sentence [within] the range” and it was “thus free to argue in a manner casting pejorative light on the defendant and his criminal activity,” particularly after the defendant “opened the door to this response when he attempted to characterize the criminal scheme in a manner favorable to himself.” *United States v. Amico*, 416 F.3d 163, 165-66 (2d Cir. 2005); *see also*, *e.g.*, *Riera*, 298 F.3d at 135-36 (finding that a letter “contain[ing] a few ill-advised descriptive words” that “did not explicitly advocate a departure” from Guidelines’ recommendation did not violate plea agreement where government “repeatedly told the district court that it had not intended and was not advocating a departure”).

Next, Persico argues that there was no factual basis for his guilty plea. *See* Fed. R. Crim.P. 11(b)(3). Persico pleaded guilty to conspiring in violation of 18 U.S.C. § 371, which requires “(1) an agreement between two or more persons to commit an unlawful act; (2) knowingly engaging in the conspiracy intending to commit those

offenses that were the objects of the conspiracy; and (3) commission of an ‘overt act’ by one or more members of the conspiracy in furtherance of the conspiracy.” *United States v. Reyes*, 302 F.3d 48, 53 (2d Cir. 2002). The unlawful act in question was the making of an “extortionate extension of credit,” which is defined as “any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment . . . could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.” 18 U.S.C. § 891(6); *see also* 18 U.S.C. § 892(b). “In making its factual-basis determination, the court is not required to rely solely on the defendant’s own admissions,” *United States v. Maher*, 108 F.3d 1513, 1524 (2d Cir. 1997), but rather it may also “look to answers provided by counsel for the . . . government, the presentence report, or whatever means is appropriate in a specific case—so long as the factual basis is put on the record,” *United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998) (internal quotation marks and alterations omitted)).

We find that there was a factual basis for Persico’s guilty plea. In particular, it was stated on the record at Persico’s plea allocution that he “arranged for someone to extend [a] \$100,000 loan” at “a rate of interest in excess of the annual rate of 45 percent per year” to debtors who “believed that Mr. Persico and his coconspirators had a reputation for the use of extortionate means to collect extensions of credit,” App. 141-42, and that “his coconspirators reasonably believed at the time that they . . . would use extortionate means to collect an extension of credit,” *id.* at 144.

These facts, which were not disputed, allowed the district court to conclude that Persico's conduct "is in fact an offense under the statutory provision under which he [pleaded] guilty." *Maher*, 108 F.3d at 1524.

Persico's arguments to the contrary are unavailing. First, he makes several assertions of fact that support his actual innocence. "These arguments could have been made to a jury if [he] had not pleaded guilty," but "they have been waived" for purposes of the appellate process because "[q]uestions that a defendant might raise as to which of competing inferences should or might be drawn, or whether there are innocent explanations for behavior that could be viewed as culpable, do not survive his plea of guilty." *Id.* at 1528-29.

Second, Persico argues that he did not expressly concede the facts proffered by the government at his plea allocution. But his express agreement with the government's representations was not necessary so long as he did not "actively contest[] a fact constituting an element of the offense." *United States v. Culbertson*, 670 F.3d 183, 190 (2d Cir. 2012).²

² The only aspect of the record that Persico challenged whatsoever at his plea allocution was what his counsel referred to as the superseding information's "extraneous language about the Colombo family," which was "not something that Mr. Persico agree[d] to or [was] allocuting to." App. 143. As an initial matter, merely declining to agree with the government's allegations—without providing a basis for any disagreement with the allegations or expressly denying them—is an ambiguously neutral position that falls short of active disagreement. *See Culbertson*, 670 F.3d at 190 & n.3. Moreover, Persico argued that such allegations were "extraneous" precisely because they were not

Third, Persico contends that there was no evidence that he had the requisite intent to have conspired in an extortionate extension of credit. Direct evidence of his intent was not necessary, however, as it could reasonably be inferred from the acknowledged terms of the loan itself. *See United States v. Lombardozi*, 491 F.3d 61, 71 (2d Cir. 2007) (“[A] jury may permissibly infer that someone who makes an unsecured loan and charges exorbitant interest rates surely intends to back up the loan with threats of violence.”).

Finally, Persico maintains that the district court failed to ensure that he understood the nature of the charge to which he pleaded guilty. Aside from a discussion regarding general propositions of law, the sum total of Persico’s argument concerning his lack of understanding consists of a single sentence that is written at a high level of generality. By failing to elaborate further, Persico has waived this contention. *See Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (“It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” (internal quotation marks omitted)). Even if that were not so, we would nevertheless find no flaw in the lengths to which the district court went at Persico’s plea allocution in order to comply with Fed. R. Crim. P. 11(b)(1)(G).

“part and parcel of the charge” to which he pleaded. App. 143. Accordingly, he cannot now argue that a factual basis was necessary for such “extraneous” allegations.

We have considered all of the defendant's arguments on this appeal and find in them no basis for vacatur. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
CLERK

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of July, two thousand eighteen.

United States of America,

Appellee,

v.

ORDER

Docket No: 17-2701

James C. Bombino, Alicia Dimichele,
AKA Alicia Garofalo, Edward Garofalo,
Jr., AKA Bobble, AKA Tall Guy,
Theodore N. Persico, Jr., AKA Skinny,
AKA Teddy, Thomas Petrizzo, Louis
Romeo, Michael D. Sciaretta, AKA Mike
Lnu, Anthony Preza, Francis Guerra,
AKA BF,

Defendants,

Michael J. Persico,

Defendant - Appellant.

Appellant, Michael J. Persico, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, 10-CR-147 (DI)
 Plaintiff,

 -against- United States
 Courthouse

 Brooklyn, New
MICHAEL J. PERSICO, Friday, July 21,
 Defendant. 2017, 2:15 p.m.
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR
SENTENCING BEFORE THE HONORABLE
DORA IRIZARRY
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by Stenographic machine
shorthand, transcript produced by Computer-Aided
Transcription.

MR. LIFSHITZ: There are people in this community who are able to maintain some sort of double-life, and I am sure the Court has sentenced people who have operated a legitimate business or have been successful in raising their family while at the same time committing very serious crimes..... It's now clear after the Fatico hearing that the loan sharking loan was made in the context of a long participation in racketeering with the Colombo family. That included violence, which included ordering the murder of Joseph Scopo, the ultimate crime....

For all of these reasons, the requested sentence, a sentence below the guidelines range would not be sufficient, and a sentence within the guidelines range is necessary to satisfy all of the purposes of Section 3553(a).

THE COURT: The offense that you pled guilty to is, indeed, a serious one. Perhaps it is not, as Mr. Fernich explained and as is discussed in the defense sentencing memorandum, completely typical of the way extortionate extensions of credit are handled in the types of cases that, certainly, I have handled myself and that have come through the court, and as described by the Government today and in its paper. It does not, in my view, make it a benign crime, a word that was used in the defense papers to describe the offense.

It is still a serious crime. It was clear from the Fatico hearing that Mr. Persico grew up and was involved in this kind of extortion, extensions of credit for a

sustained period of time, a factor that is relevant to the Court in fashioning a sentence here. And while much of what was the subject of the Fatico hearing occurred in the '90s, the offense conduct here occurred more or less about seven or eight years ago, during which time he was being a single dad to his two youngest daughters, engaging in his various businesses as described by the many letters that were submitted on his behalf, being a good friend and being a good neighbor.

And in many of those cases, ultimately there was a resort to violence when people did not pay. And you were responsible for that. And all of this is part of the racketeering enterprise. The Scopo murder was part of protecting your family and your family's role in the Colombo crime family. That is what that was about, and I am sure Mr. Scopo had a family of his own.

Did he have children?

MR. LIFSHITZ: Yes, he did.

THE COURT: So those children grew up without a father. There was a wife without a husband. I do not know what his extended family was.

And there was involvement in the other offenses that were the subject of the Fatico hearing, the stolen video games and so on. I have seen it often enough. As the Government says, that all too often people present two sides. It is like Dr. Jekyll and Mr. Hyde. The family and friends see one side, but there is the other side that engages in criminal conduct that the family cannot each fathom. It is unbelievable to them.

I have no reason to doubt the utter sincerity of the letters that have been written to the Court, especially the family letters. I have no doubt Mr. Persico may have been a wonderful dad. The success of his children certainly are a testament to that. Caring for his wife while she was suffering with cancer. And then being a single dad to his two youngest daughters because the other ones, I think, were much older then, but then finishing the process of raising the rest of the children on his own.

It is not clear to me to what extent he cares for his mother who is about 80 years old. Given that the letters seem to indicate that he is all over the place participating, helping people out establishing their businesses; making sure his daughters are driven to school or to work; helping people out in their time of need, whenever that may be. One thing is apparent, that with a busy schedule like that, with so many properties to look after and to be involved in, that certainly he is not with his mother 24/7 caring for her. So somebody must be caring for her. And there is nothing in the writings that indicate that she is that infirmed that she requires people do absolutely everything for her. In this court we have a number of judges who are over 90 and many more who are over 80 that come to work every day and they perform their duties. Age alone does not mean that a person cannot at least help themselves in some way. And I am not saying that she is not in need of assistance.

His daughters are grown. He has got grown children, adult children in their thirties. He has got two sisters. He has got other family members who can help with the

care of his mom. And one thing is very apparent, I agree with you Mr. Sercarz, that the letters do show that this is a very -- it is a large family. It is a closely knit family. And then there is the grander definition of family, the family that you grow from the community from your friendships.

There were letters from people who have been close to Mr. Persico for 30, 40 years. Some went to grammar school with him. Their children played together, have grown up together. And then there is the community in which he lives and works that attest to his philanthropy. And what I have to say to them is if you are indeed grateful to the good deeds that Mr. Persico has done, according to what you have attested to this Court, then it is time for you to step up to the plate for him. There are others who can be there to help with family. This is not a situation where family circumstances crying out for a nonjail sentence.

The guidelines here are 37 to 46 months. The statutory maximum is five years or 60 months. As to the uncharged or unconvicted crimes, as I said, not only do they show a pattern of continuing the same type of offense conduct as the offense of conviction, but the fact that to preserve the family's racketeering enterprise, which in a large part did rely on this loan sharking, that he would authorize a murder and facilitate a murder, in my view, in weighing the good deeds with all of that, that offense conduct outweighs the good deed. What value do you put on a human life? The sentence of the Court is that Mr. Persico will serve 60 months in custody of the attorney general followed by three years of supervised release.