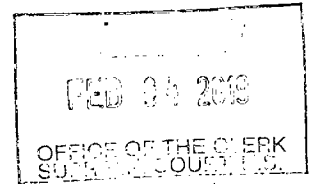


NO.

19 - 5362

IN THE
SUPREME COURT OF THE UNITED STATES



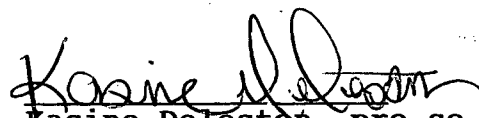
KASINE DELESTON,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT.

On Petition for Writ of Certiorari
To The Second Circuit Court of Appeals
Case No. 18-837

PETITION FOR WRIT OF CERTIORARI


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QUESTION(S) PRESENTED FOR REVIEW

Mr. Deleston is serving a 144 month sentence pursuant to 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 922(g). However, the Petitioner and the Government entered into a stipulated plea with a sentencing range of 92 to 115 months.

The Question Presented is:

Whether a Plea Can be Ambiguous, and Ultimately Breached if it Contains an Unfulfillable Sentencing Stipulation and the Government Fails to Offer the Defendant an Opportunity to Withdraw his Plea?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINION BELOW

Unpublished opinion and judgment of the United States Court of Appeals for the Second Circuit entered December 10, 2018, denying motion for rehearing and reconsideration. (Appendix A). Order of the United States Court of Appeals for the Second Circuit entered December 18, 2018, denying request for COA. (Appendix B). And the United States District Court for the Southern District of New York order was entered on March 7, 2018. (Appendix C).

JURISDICTION

The date on which the United States Court of Appeals for the Second Circuit decided this case and denied rehearing en banc, was December 10, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury, except in cases arising in ...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense."

STATEMENT OF RELEVANT FACTS

On or about February 27, 2015, an Indictment charged Mr. Deleston with one count of possession with intent to distribute cocaine, heroin, and marijuana in violation of 21 U.S.C. § 841; one count of possession of a firearm in connection with a narcotics offense in violation of 18 U.S.C. § 924(c); and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g). (Docket #6).

On or about November 20, 2015, Deleston entered into a stipulated plea of guilty to Count One of the Indictment, possession of narcotics with intent to distribute, and to Count Three, felon in possession of a firearm. (Docket #46). At the plea hearing, Mr. Deleston confirmed that he had the opportunity to discuss the charges with his lawyer and to consider his options. *Id.* at 4. He also agreed that he was satisfied with his lawyer's representation and that he was voluntarily entering into the plea.

During the plea colloquy the Court acknowledged that Deleston had entered into a stipulated plea agreement with a Guideline range of 92 to 115 months, but the district court explained that it had its own independent obligation to calculate the correct Guideline range, which could vary from the terms of the plea agreement. (*Id.* at 11-12). The Court stated:

I want to know that any prediction, calculation or estimate that anyone had given you, including your own lawyer, as to what sentence I might give you is not binding on the Court and if it turned out to be wrong, you will not be permitted to withdraw your guilty plea."

(Id. at 11).

In entering his plea of guilty, Mr. Deleston agreed that he possessed narcotic drugs and a firearm in his apartment. (Id. at 15-16).

Prior to Deleston's sentencing, the Probation Office prepared a Presentence Report ("PSR") that concluded that Mr. Deleston had an offense level of 30 and that he fell within Criminal History Category IV. (PSR at ¶ 88). By contrast, in the stipulated plea agreement, Deleston's attorney and the government agreed that Deleston had a combined offense level of 26, which included a three-point reduction for acceptance of responsibility. (Plea Agrm't at 5). This four level difference was based on the Probation Office's conclusion that Mr. Deleston used or possessed firearms in connection with his narcotics distribution offense. (PSR ¶ 20-27). Based on Deleston's offense level and criminal history category, the Probation Office calculated that the term of imprisonment fell within a range of 135 to 168 months under the advisory Guidelines. (PSR at ¶ 88).

At sentencing on or about February 26, 2016, the district court asked the parties to address the Probation Office's calculation of Mr. Deleston's sentence. (Docket # 55 at 7). Deleston's counsel argued that the four-level enhancement was inappropriate because it was based on a "coincidental proximity of guns and drugs in the same location." (Id. at 9). The Court questioned the Government concerning the enhancement. The interaction proceeded as follows:

THE COURT: ...I guess what I found rather interesting in the government's submission is they didn't merely say that they stand by their plea agreement. They said they stand by their plea agreement and they object to the enhancement.

MR. BEATY: Your Honor, as I understand the plea agreement requires the government to object to a calculation of the guidelines that is inconsistent with it and that is the basis for --

THE COURT: I see. So you are not urging that the facts don't support the enhancement. You are arguing that you are bound by your plea agreement, which does not include the enhancement? (Sentencing Trans. at 7, Ln. 3-17).

MR. BEATY: Your Honor, in response to that I am aware of the case law that you are referring to and I certainly concede that the facts here are sufficient to support that conclusion. (Id. at 8, Ln. 18-21).

The district court concluded that the four level enhancement was appropriate, and calculated an advisory Guidelines range of 135 to 168 months of imprisonment. (Id. at 10-11). This range was higher than the parties stipulated guideline range of 92 to 115 months.

The district court sentenced Mr. Deleston to 144 months of imprisonment.

Mr. Deleston filed a timely Notice of Appeal of his conviction and sentence. See United States v. Deleston, 2015 U.S. Dist LEXIS 107341 (July 24, 2015). The Second Circuit denied Deleston's appeal and declined to consider his claim of ineffective assistance of counsel on direct appeal, and stated that his ineffectiveness claim could be raised in a collateral proceeding under § 2255. (Id.).

On or about May 8, 2017, Mr. Deleston filed a timely motion under 28 U.S.C. § 2255. In his motion, Deleston asserted

that during plea negotiations, his attorney did not provide the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). Specifically, he asserted that his attorney was ineffective because his plea agreement with the government contained a stipulated Guideline range that was lower than the sentence imposed by the court. (Appendix C, at 1). The district court denied this issue stating in relevant part:

"...the record conclusively shows that Deleston was aware of his actual sentencing possibilities. At his plea allocution, the Court advised Deleston of the possible statutory maximum sentence for each of the two counts to which he pleaded guilty, and Deleston confirmed his understanding....

Deleston's plea agreement, which was signed and dated November 20, 2015, similarly provided that the Guidelines stipulation was not binding on the Court or the Probation Office.

(Id. at 7-8). The district court ultimately denied the motion under § 2255 on March 7, 2018.

Mr. Deleston filed a timely Notice of Appeal on May 3, 2018. The Second Circuit Court of Appeals denied the request for COA on September 25, 2018. Deleston then requested rehearing which was denied on December 10, 2018. This prayer for writ of certiorari now follows.

I. REASON(S) FOR GRANTING THE WRIT

WHETHER A PLEA AGREEMENT CAN BE AMBIGUOUS, AND ULTIMATELY BREACHED, IF IT CONTAINS AN UNFULFILLABLE SENTENCING STIPULATION AND THE GOVERNMENT FAILS TO OFFER THE DEFENDANT AN OPPORTUNITY TO WITHDRAW HIS PLEA?

A. The Second Circuit's decision in this case is in error in several respects, and conflicts with decisions of the Supreme Court, and the mandatory language of the plea. See S.Ct. R. 19(a)(c).

The Supreme Court has stated that the law of contracts may be useful as an analogy in construing plea agreements. See Ricketts v. Adamson, 483 U.S. 1, 15, 97 L.Ed. 2d 1, 107 S.Ct. 2680 (1987); Blackledge v. Allison, 431 U.S. 63, 75 n.6, 52 L.Ed. 2d 136, 97 S.Ct. 1621 (1977). In the context of plea agreements, the Supreme Court has explained that a consensual plea entered into by one fully aware of its direct consequences must stand unless induced by threats (or promises to cease harassment), misrepresentation (including unfulfilled or unfulfillable promises), or promises that have no proper relationship to the prosecutor's business. See Mabry v. Johnson, 467 U.S. 504, 509, 81 L.Ed. 2d 437, 104 S.Ct. 2543 (1984) (quoting Brady v. United States, 397 U.S. 742, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970)). Thus, due process requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promises must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 30 L.Ed. 2d 427, 92 S.Ct. 495 (1971). "When the prosecution breaches its promise with respect to an executed plea agreement, the

defendant pleads guilty on a false premise, and hence his conviction cannot stand[.]" Mabry, 467 U.S. at 509.

On this record, Mr. Deleston, through his attorney, bargained and negotiated for a stipulation¹ in the plea for a sentence of 92 to 115 months in order to secure dismissal of more serious charges, Count Two - a violation of 18 U.S.C. § 924(c), but also on the stipulated condition that no sentence over 115 months would be advocated for by the prosecution. However, when the Government stated "[y]our Honor, in response to that I am aware of the case law that you are referring to and I certainly concede that the facts are sufficient to support that conclusion," (See Sentencing Trans. at 8, 18-21), the government violated the principles of Santobello, the sentencing stipulation, and breached the plea agreement.

It has long been established by the Supreme Court that the Government cannot make a promise that it cannot fulfill. Santobello, at 262. In this case, the government stipulated to a sentence of 92 to 115 months. However, this plea was ambiguous and knowingly unfulfillable for at least two reasons.

First, the language in the plea was ambiguous because the government knowingly stipulated to a specific sentence of 92 to 115 months, and then stated in the agreement that "neither the Probation Office nor the Court is bound by the above Guidelines

1. **Stipulation:** (1) A material condition or requirement in an agreement; esp., a factual representation that is incorporated into a contract as a term; (2) A voluntary agreement between opposing parties concerning some relevant point: esp., an agreement relating to a proceeding, made by attorneys representing adverse parties to the proceeding. A stipulation relating to a pending judicial proceeding, made by a party to the proceeding or the party's attorney, is binding without consideration. Black's Law Dictionary, 8th Edition, at 1455.

stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts."

[] "It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. ...This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive." (See Appendix C, at 8).

Black's Law Dictionary makes clear that "[a] stipulation relating to a pending judicial proceeding, made by a party to the proceeding or the party's attorney, is binding without consideration. (Id. at 1455). The Supreme Court has also long recognized that litigants "[a]re entitled to have [their] case tried upon the assumption that...facts, stipulated into the record, were established." H. Hackfeld & Co. v. United States, 197 U.S. 442, 447, 25 S.Ct.456, 49 L.Ed. 826 (1905). This entitlement is the bookend to a party's undertaking to be bound by the factual stipulations it submits. See Post, at --, 177 L.Ed. 2d, at 877 (Alito J., dissenting) (agreeing that "the parties must be held to their Joint Stipulation"). As the leading legal reference summarizes:

"--[Factual stipulations are] binding and conclusive ..., and the facts stated are not subject to subsequent variation. So, that parties will not be permitted to deny the truth of the facts stated, ... or to maintain a contention contrary to the agreed statement, ... or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. 83 C.J.S., Stipulations 93 (2000) (footnotes omitted).

The Supreme Court has refused to consider a party's argument that contracted a joint "stipulation [entered] at the outset of the litigation." Board of Regents of Univ. of Wis, System v. Southwest, 529 U.S. 217, 226, 120 S.Ct. 1346, 146 L.Ed. 2d 193 (2000).

Therefore, when the Government knowingly entered into a stipulated sentencing agreement that was binding without consideration, and then ambiguously stated "[t]his office cannot, and does not, make any promise or representation as to what sentence that the defendant will receive," the language in the plea agreement became ambiguous because the government could not fulfill the sentencing promise - 92 to 115 months - the sentence that induced Deleston into pleading guilty and waiving a plethora of constitutional rights. This is so because the government "ordinarily has certain awesome advantages in bargaining power," and any ambiguities in the agreement must be resolved in favor of the defendant. United States v. Padilla, 186 F.3d 136, 140 (2d Cir. 2000) (quoting United States v. Ready, 82 F.3d 551, 558-59 (2d Cir. 1996)).

Next, the stipulated sentence of 92-115 months was unfulfillable. Specifically, the Government knew that it could not stipulate to a specific sentence because the district court was not bound by a sentencing range of 92 to 115 months.²

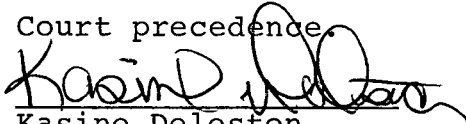
2. Platt v. United States, 163 F.2d 165 (10th Cir. 1947) (Parties may not stipulate findings of fact upon which conclusions of law and judgment of court are to be based; parties may by stipulation establish evidentiary facts to obviate necessity of offering proof, but based thereon court must itself find ultimate facts upon which conclusions of law and judgment are based.); Fed. R. Crim. P. 11(c)(1)(B) (establishing that Government's recommendation of particular sentence in plea agreement does not bind court); and United States v. Mankiewicz, 122 F.2d 399, 403 n.1 (7th Cir. 1997) ("[A]s the Guidelines themselves make clear, although the plea agreement binds the parties, it does not bind the Court.").

Stipulations are made for a reason - to resolve disputed issues conclusively, without trial or further dispute. Rivers v. Commercial Life Ins. Co., 160 F.3d 1164, 1173 (7th Cir. 1998). A party cannot avoid such a stipulation by saying merely that it thought the Court was going to err by ruling against it. "To hold anything else would be to reduce stipulations to mere inconsequential gestures." (Id., quoting United States v. Sandles, 80 F.3d 1145, 1148 (7th Cir. 1996)). Therefore, where the government entered into the stipulated sentencing agreement, it violated Deleston's due process and fair trial rights under the Fifth and Sixth Amendments. Mabry, 467 U.S. at 509; Santobello, 404 U.S. at 262. See also United States v. Randolph, 230 F.3d 243, 250-51 (6th Cir. 2000) (If a prosecutor's promises is illusory, then a plea is involuntary and unknowing); and Palermo v. Warden, Green, 545 F.2d 286 (2d Cir. 1976) ("A guilty plea induced by misrepresentation, including unfulfilled or unfulfillable promises, cannot stand.").

Therefore, this Court must grant this writ to resolve the inconsistencies in the Second Circuit and in the fact of Supreme Court precedence. The Supreme Court has already held that plea agreements are governed by contract law, therefore, the Court must also resolve this conflict and conclude that pleas are ambiguous and ultimately breached if they contain an unfulfillable sentencing stipulation if the Government fail to offer the Defendant an opportunity to withdraw his plea.

CONCLUSION

For the foregoing reasons, Mr. Deleston's prayer is that this Honorable Court will grant his writ to resolve the inconsistencies within the Second Circuit compared to Supreme Court precedence.



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