ORIGINAL

In the

Supreme Court of the United States

WINFIELD L. ROBERTS,

PETITIONER,

V.

UNITED STATES,

RESPONDENT.

No. 78-1793

Washington, D. C.
January 14, 1980
January 15, 1980

Pages 1 thru 51

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

WINFIELD L. ROBERTS, Petitioner,	:	
v.	:	No. 78-1793
UNITED STATES, Respondent.	:	

Washington, D. C.,

Monday, January 14, 1980.

The above-entitled matter came on for oral argument at 2:13 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALLAN M. PALMER, ESQ., 1707 N Street, N. W., Washington, D. C. 20036; on behalf of the Petitioner

STEPHEN M. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 78-1793, Roberts v. United States.

Mr. Palmer, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ALLAN M. PALMER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PALMER: Mr. Chief Justice, and may it please the Court:

Perhaps the most important transcript aside from the sentencing one that is relevant to disposition of this case did not become available until after the brief and the appendix of petitioners were filed. The Court of Appeals for the D.C. Circuit sends it over here on December 5th and the briefs were filed on November 15th, as I recall.

Now, the transcript we refer to is a 40-page transcript concerning a so-called Miranda hearing held in the District Court and that transcript indicates that there was a wiretap in the District and during the course of it someone named Win was overheard.

QUESTION: And this is an argument that isn't in the briefs?

MR. PALMER: Oh, it is in the briefs, Your Honor, because although the full transcript was not available we in fact summarized the gist of it from other source material.

QUESTION: All right. Thank you.

MR. PALMER: Win was heard on a wiretap and then a green Jaguar he was alleged to deliver $50 or $100 worth of drugs in was observed at the situs of the tap. The young lady who owned the car was summoned in, subpoenaed to the U.S. Attorney's office. At this point there was no indictments or criminal charges pending. She was asked who drives the car. She said the only other person that drives it is her male friend, Winfield Roberts and he is right outside the door.

Impressed with their good fortune, the District Attorney and the police officers there invited him in to discuss the matter. And as the District Attorney, Mr. McSorley, said, as soon as he walked in the door, the defendant or potential defendant -- he was not a defendant at that time -- was read his Miranda rights pursuant to the PD-47, which is a compilation of those rights, except the one that indicated that he was under arrest because clearly he was not. He was advised that he had the right to remain silent, anything he said might be used against him.

QUESTION: Do you make any point of impropriety in giving him the Miranda warning too soon rather than too late?

MR. PALMER: No, sir. He did it out of an

abundance of caution, so to speak.

QUESTION: I see.

MR. PALMER: And he was told that, if you want to answer any questions now with a lawyer present, you have the right to stop answering at any time, you also have the right to stop answering at any time until you talk to a lawyer. This is is the standard PD-47 warning.

Now, as the District Attorney testified at this hearing at transcript 38, he said the petitioner fully understood his rights and the trial court agreed. Now, initially the petitioner was vague about any involvement in the case until an actual tape of his voice was played indicating "Win," his own voice, the Jaguar, et cetera. At that point he admitted what was on the tape to the extent of on two occasions he delivered drugs worth $50 or $100 to this Charles "Boo" Thornton in a Jaguar.

At that point, the prosecutor pressed him and said, well, where did you get the drugs from and, as the testimony indicated, at that point, the police officer testified at transcript 12, the petitioner gave an evasive answer, he refused to tell us, the prosecutor testified. He clamped up and the conversation ended because he wouldn't go any further than that. He was advised to come back in two or three days, think it over. He did so and he said I can't help you any more and he

left.

Now, obviously the defendant who was not advised by counsel at that point, was not under arrest, only admitted that which the government knew. When he heard his own voice on the tapes, two deliveries, he said yes, I was involved in that. As to any further involvement in a conspiracy of the persons he may be involved with he relied pursuant to his warning to remain silent, and indeed this is the very consequence envisioned by this Court in the Miranda opinion, where it indicated that if the individual indicates in any manner at any time prior to or during questioning that he wants to rely on the warnings, rights, at this point he has shown that he intends to exercise his Fifth Amendment privilege. This is precisely what this petitioner did.

He was then indicted, arrested and indicted. He was arrested about a month later and indicted about two months after that. Here again, after the indictment, on three or four occasions -- now there is a transcript, a remand transcript of 28 January '77 that was sent to this Court also on December 5th which is alluded to in the government's brief.

On three or four occasions, personally the prosecutor spoke to his attorney for cooperation. He wanted his cooperation to testify in open court against

the codefendant and to identify the other people he was involved with, places, locations, the full conspiracy, so to speak. And as the prosecutor testified at the remand hearing, "This was rejected out of hand. There was never any indication that Mr. Roberts would assist us." And indeed throughout the course of this three-year litigation, Mr. Roberts, the petitioner consistently relied on his right to remain silent until at the sentencing hearing the prosecutor urged this non-cooperation as a basis for increasing the penalty or as a sentencing aggravating factor, and the court relying thereon and enunciated this as one of the reasons for the consecutive setence, at that point Mr. Roberts, the petitioner was penalized for relying on his Fifth Amendment rights which, the government concedes at brief 37, it could not do, the court that is could not penalize him.

Now, the government in its brief argues a waiver theory, that this was never actually urged by petitioner during the course of the three years or the sentencing hearing. He says, at page 35 of the brief, "Petitioner or his counsel never said that non-cooperation was based on constitutional rights and immunity was never sought by petitioner or his counsel." And it further goes on to say at point two that at no time during the sentencing hearing did in fact counsel allude to Fifth Amendment

rights.

Now, these are important considerations and we are going to answer them fully, as we have in tbe brief, we believe.

Insofar as the three-year --

QUESTION: Is it true, Mr. Palmer, that there was a colloquy at least before the trial when defense counsel agreed to withdraw their motion to recuse Judge Pratt if he would agree to concurrent sentences?

MR. PALMER: We filed a memorandum. We previously filed a memorandum. There was a mandamus petition we served to the judge, we would ask you to recuse yourself because under the Gregg opinion of this Court you have already sentenced the man, you have read the presentence report, out of an abundance of caution to preserve the issue of fairness, the appearance of fairness, we think the court should recuse itself. In fact, if the court does recuse itself -- well, it didn't recuse itself, but if it did not recuse itself, if it gave concurrent sentences we would withdraw that claim, that is true, in the footnote. We did indicate that upon consent and advice of the defendant.

Now, in many cases petitioners are asked to cooperate. It happens all the time in district courts. And it is understood by all experienced counsel, defense

counsel that if the man says no, obviously he is relying on Fifth Amendment rights. He does not have to confess, say anything to the government at all. And indeed in this case, the petitioner was not brought into court during the three-year period and say, well, why have you not confessed, laid out the scheme for the benefit of the prosecutor. It was understood by the prosecutor and defense counsel that by not cooperating the defendant simply relied on his right to remain silent as he had throughout the proceedings.

So when the government says that the defense never came forward during these three years and said, well, we were relying on the Fifth Amendment as such or he never asked for cooperation, that argument is -- the brief in that regard is long in argument and short in experience because it is generally understood that there is no right for the government to compel this incriminating statement from the defendant.

Furthermore, we are not familiar with any instance where the general practice where the defendant says I would like immunity, prosecution, please give us immunity. The government knows what to do. If it wants to, it could put the man before the grand jury; if he claimed his Fifth Amendment right, then give him immunity. It is not up to the defendant to ask for it. It is up to the prosecution to confer it if it deems fit.

Now, at the time of the sentencing or prior thereto, from day one, 13 June '75, when the defendant walked into the prosecutor's office, through the morning of the sentencing hearing, not one time in writing or otherwise did the government ever urge non-cooperation as a sentencing factor for aggravation or as any factor at all.

QUESTION: Do you think cooperation could be used and is it sometimes argued as a reason for moderating a sentence?

MR. PALMER: Of course, it happens all the time.

QUESTION: Then it is just a one-way street in your view?

MR. PALMER: On these facts, it is a one-way street in the sense that the man is consciously giving up the right to self-incrimination if he cooperates. In a narcotics case especially there is a danger to one's safety, there is a danger to one's life, his family, and he consciously gives up these factors, these rights, the right to silence, the right not to endanger himself or his family. And for that reason, when a man cooperates he does so voluntarily, fine. Courts have indeed given benefit to that. But the converse is not true, because if he doesn't cooperate there are many valid reasons, such as in this case, his reliance on the right of self-incrimination, why he did not cooperate. In fact, Judge Lombard, in

considering the issue in the Ramos and DiGiovanni case, a most experienced federal appellate judge, has indicated that it is a one-way street in that regard, that is quite true, Your Honor.

Now, in its first allocution after the first sentence, the government in discussing the confession, the statement the defendant made, indicated that he did not cooperate with the government in an historical sense, just laying out the facts, did no say suggest or intimate that that was the reason for the court to take into account on sentence. In fact, it was not urged at allocution and it was not urged by the court in sentencing.

Now, we came to the second sentence that is now before us, here again the government wrote a written allocution and never once did it ever suggest, intimate or anything else say that lack of cooperation is a sentencing factor. It never said it.

QUESTION: Well, are the prosecutors supposed in the District of Columbia Circuit, do the prosecutors get into the act with recommendations?

MR. PALMER: Well, Your Honor, it is interesting. Prior to 1970 or '71, prosecutors never recommended sentences. It is only a recent occurrence, having started in about '70 or '71, this report -- for example, I was there prosecuting cases up until '68, the government stood mute

at every sentencing and never said a word. It is a recent innovation, so to speak.

QUESTION: It occurs around the country.

MR. PALMER: Yes. I remember I once served as a student in the Second Circuit a long time ago, many years ago, and it was fully allocuted. I remember the prosecutors allocuted there.

QUESTION: Mr. Palmer, do you think it would be permissible for a district judge to have a policy that when he takes a plea that he tells the defendant that he in his own sentencing practice, if the defendant cooperates he will probably get one year, if he does not cooperate he will probably get two years, assuming it fits the normal pattern of a certain kind of offense?

MR. PALMER: I don't believe so, because it is forcing the defendant to give up Fifth Amendment rights which still adhere after the plea, as in this case, for example.

QUESTION: But you did acknowledge, if I understood your responses to the Chief Justice, that the judge could have such a policy, that if the man cooperates he will only sentence him a year instead of an otherwise appropriate sentence of two?

MR. PALMER: I think he could so sentence the man if he cooperates, but I don't think the judge can get

involved in that decision insofar as the defendant is concerned. I think if the judge gets involved with it, he is coercing the man to give up his Fifth Amendment rights. That is where the danger lies.

QUESTION: Supposing he had ten very similar cases and in the first one the man cooperates, he says I'm only giving you one year because you cooperated, the next man he gives two years, he didn't cooperate, he says nothing about it, but he establishes a pattern by what he actually did, so the lawyer now knows based on a series of cases that if his client cooperated he will get one year and if he doesn't cooperate he will probably get two. I take it the lawyer could tell the defendant.

MR. PALMER: That's a fact of life in the trial courts all the time, that's true.

QUESTION: But it is a fact of life that the judge cannot tell the defendant.

MR. PALMER: I think at that point he is coercing the defendant to give up his Fifth Amendment rights which he can't do, and I am going to get into that a little further in even broader detail, if the Court will.

Now, the government erroneously suggests that the reason why the government urged this lack of cooperation in its brief, it indicates at page 814 and 841 of its brief that what the government was really responding to

petitioner counsel's argument to the effect that the courts should consider his cooperation or limited statement as to involvement as a mitigating factor and the government responded tit-for-tat, so to speak. At brief 8 of its brief, the government says, in addition, prosecutor responded to defense counsel's remarks about the extent of petitioner's cooperation with the government.

We never alluded to his cooperation as such as a mitigating factor. What we did, when you read the sentencing transcript, is to allude to the facts of the statement he gave to show that the case was not as large or serious as urged by the government, because insofar as the facts were concerned in the statement the defendant gave, he said that on two or three occasions he delivered drugs worth $50 or $100 for Mr. Charles Thorton's own personal use. And indeed when the search warrants were executed, six of them, found in Thornton's house were bottle-top cookers and syringes, indicia of personal use.

Furthermore, we urge that Thornton, a previously convicted narcotic felon, who pleaded to gambling and narfotic law violations, was sentenced to probation by another federal judge in the very same case in which this petitioner was charged. So --

QUESTION: If it wasn't a very big deal, as you were suggesting --

MR. PALMER: No, sir.

QUESTION: -- doesn't that undercut your argument or his argument, I should say, that he was liable to be murdered and liquidated if he cooperated with the prosecution?

MR. PALMER: Well, whose argument is Your Honor referring to? I don't --

QUESTION: Well, I thought you were telling us that this wasn't a very big narcotics operation.

MR. PALMER: It was not very big insofar as this petitioner was concerned, as we saw it. Notwithstanding that fact, someone gave him the drugs who was a person in more of a distribution type of role to that person, whether you call it a small amount distributed or not, the individuals who supplied from above are very concerned about their liability and the danger comes from them, I would think, as the case would indicate. In any event --

QUESTION: Do you think the judge in those circumstances is not entitled to take into account the damage that the use of drugs does to a great many people, that drug peddlers should be put away for quite a while?

MR. PALMER: Of course, the judge can take that into account.

QUESTION: I thought that is what he did here.

MR. PALMER: Well, he took into account several factors, Your Honor. Now, if this judge never talked about cooperation, he never alluded to it, possibly the sentence he gave might have been a viable one. The fact is that, theory aside, he specifically alluded to lack of cooperation as a sentencing factor, and I am going to now refer to that more specifically.

Now, the real reason the government alluded to non-cooperation was this: We urged in writing and orally that when you have pleas or verdicts concerning two phone counts, two so-called phone counts -- now, there are about 16 judges in the District Court here who are active and hear criminal cases. No judge in the District of Columbia has ever given consecutive sentences for two or more telephone counts.

QUESTION: Mr. Palmer, a moment ago you said that if the judge had not alluded to the absence of cooperation, the sentence he gave might have been a viable one, was the word used. And then you mentioned sentencing factors. Is there some case from this Court that holds absent a constitutionally statutory violation, a sentence is to be reviewed by an appellate court on the basis of sentencing factors the judge took into consideration?

MR. PALMER: Well, the Grayson case itself so holds as we read it. In Grayson, the court said one of the

reasons may be impermissible that I am going to sentence this man for, this 438 U.S., page 44. And the court said, Mr. Grayson, I'm going to sentence you to a prison term because, one, to deter you and, two, it is my view that your defense was a fabrication and doesn't have the slightest merit whatsoever, and I feel it is proper for me to mention the second factor because if it is an improper factor, I want the Court of Appeals to know it so they can reverse me.

Of course, the Court of Appeals did reverse him, then it came to this Court which upheld that sentencing factor.

QUESTION: But that was the District Court's view, that sentencing factors could be taken into consideration even though the sentence imposed was within the limits prescribed by law.

MR. PALMER: I think if the factor was improper or an impermissible one, it is a basis upon which to reverse the sentence.

QUESTION: How do you know whether it is improper or impermissible?

MR. PALMER: Well, we look at it and if it strikes us in the realm of human experience as an improper factor that he shouldn't consider, I think the reversal is required. For example, if he had said, well, Mr. so-and-so, you are of

a particular ethnic group or you are of a particular race --

QUESTION: Well, that would be a constitutional claim, would it not?

MR. PALMER: It would indeed, and we think in this sense the use of the improper factor has always been understood or has always been a basis upon which to at least reverse the sentence even though it has been within the proper --

QUESTION: Do you define improper factor as being a violation of some constitutional claim?

MR. PALMER: In this case there was such a violation of constitutional claim, the Fifth Amendment.

QUESTION: So that is what you mean when you say improper factor?

MR. PALMER: Yes, sir, that was the critical or most important factor in this case, the violation of the Fifth Amendment and the right to remain silent which was penalized on the facts of this case. That is true, that is the outstanding reason.

Now, as we indicated, no federal judge before in this jurisdiction has ever given consecutive sentences --

QUESTION: Can't a federal district judge in this district give consecutive sentences, despite what you said?

MR. PALMER: I'm not sure, it has never been --

QUESTION: What is to stop him from doing it?

MR. PALMER: Well, it is the rule of lenienty. We urge that you have a wiretap case. The lead count here was a wiretap of several --

QUESTION: You say that a judge can't give two consecutive sentenes

MR. PALMER: On these facts, I'm not sure.

QUESTION: Suppose a man is caught with $18 billion worth of dope and is handing it out to children on the corner, could he be given two consecutive sentences?

MR. PALMER: I guess in those aggravating circumstances. I am just looking at the facts of this case and where there was a conspiracy and four overt acts. Two of the overt acts were also substantive counts, use of a telephone. Our point was under the rule of lenienty we made an argument that the main count is a lead conspiracy count. If pursuant to that you have 200 phone calls, does that mean the man can get 800 years consecutively for each of the phone and 15 years for the conspiracy?

QUESTION: If he made them to children?

MR. PALMER: I don't know about children. There were no children involved in this case, if it please the Court.

QUESTION: I know, but --

MR. PALMER: Hard facts make different circumstances, I would submit.

QUESTION: Mr. Palmer, where do we get the -- where do we find this data that you mentioned on judges never giving consecutive sentences?

MR. PALMER: WE urged it in our statement of facts prior to sentencing. The district attorney at sentencing --

QUESTION: I am talking about documenting it. Where is that recorded?

MR. PALMER: It was based on (a) my experience over 17 years in the District Court, having conferred with drug agents, et cetera, and the government conceded that at the sentencing. It was never controverted in the Court of Appeals and indeed not controverted here. In fact, the prosecutor said that in asking for consecutive sentences, at appendix 34 and 35, we realize we are going against custom and practice in this courthouse and I would like to explain why we are doing so, as not to appear as a Simon Lagree. And then he launched for three pages into the argument that this lack of cooperation should move the District Court to do what no other District Court had ever done before, that is impose consecutive sentences for the two telephone counts.

Now, after he allocuted, the court turned to us and said do you want to make a response, Mr. Palmer. And remember, at this point the issue had not been joined, because the government had never until that moment urged

this as a sentencing factor, and for a brief paragraph we -- when you are dealing with allocation, you are trying to dissuade somebody, it is not a legal argument, and we said to the court, well, apparently in this situation the co-defendant Thornton got probation, this defendant is before the court, he hasn't cooperated, the government is obviously mad at him, let's give him the time we can, as much as we can while we've got him before us, and then I went on to another matter. And in these circumstances we don't think we can be faulted for not raising the issue, having -- we never thought about the issue, the implications of the right to remain silent, the Miranda warnings, et cetera. The Courts of Appeal are divided on the issue and in fact that is why we are here today. So we can't be faulted for not raising it at that time, and indeed the issue only came into the case when the judge in imposing sentence said that is one of the factors I am relying upon. After that, the case went on appeal and we researched the law and presented it to the Court of Appeals and the case ultimately wound its way here.

Now, since the record below was silent in effect as to the reasons for the lack of cooperation, other than this Fifth Amendment issue which is clearly there, it was impermissible for the court to penalize for lack of cooperation when lack of cooperation could just as easily

have been, as Judge Lombard said in his opinions, from fear of harm, danger to himself or his family, or other like reasons. In other words, there is no reason to say that failure to cooperate on these facts was because the man was not amenable to rehabilitation.

Now, there is a further consideration here and that is the fact that in this case the prosecutor urged consecutive penalties because petitioner failed to cooperate over the entire course of the case. At appendix 36, he said, throughout the long process that has occurred, from June of 1975 when he first came into my office up until today, he still has refused to cooperate.

Now, at the stage where the defendant was in the prosecutor's office and he refused to cooperate, the defendant was then penalized in part because at that point, unrepresented by counsel, he didn't confess everything the government wanted to know, indicated where he got the drugs from and things of that nature, and we think that is clearly impermissible.

Secondly, between the indictment and the plea, as we understand it, the defendant has pleaded not guilty, he has no duty to confess, cooperate with the government, his Fifth Amendment rights have not been waived in any shape or form, and yet the defendant was penalized in this case during this phase also because he never came and said,

prosecutor, I want to lay my soul bare to you. I think that is impermissible.

And in line with the questions Justice Stevens asked, for example, under Grayson we think a judge could probably say to a defendant, you are going to testify, the Supreme Court has said if you do and do so falsely and you are convicted, I am going to take that into account when I impose sentence. But we don't think that prior to disposition of the case the defendant can be brought into the court room and the judge say to him, now, Mr. Defendant, you know, I've heard you haven't cooperated in here, the government wants you to testify against your codefendant, you haven't done that, you haven't indicated whom you got the drugs from, and I think that is something that should be done and if you don't do it, if you are convicted, when the sentencing comes about I'm going to penalize you. I think that is totally impermissible, coercive, collides with the fundamental rights of a defendant in a criminal case.

For these reasons, we think the sentencing in this case on these facts is improper. I have about five minutes to go and I would like to reserve those for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

I think we won't ask you to take two minutes today and the rest tomorrow.

We will resume at 10:00 o'clock in the morning.

(Whereupon, at 2:38 o'clock p.m., the argument was in recess, to reconvene on Wednesday, January 16, 1980, at 10:00 o'clock a.m.)

- - -