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Expert Analysis

Paying Plea Agreements More Than Lip Service

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Sometimes after a difficult negotiation, defense counsel succeeds in convincing the government to accept certain concessions in a plea agreement, only to see those concessions have less than the hoped-for impact on the court at sentencing. Although the form of plea agreement commonly used in the New York federal courts reserves latitude for sentencing advocacy, the issue may arise whether a prosecutor's arguments go so far in communicating that the court should impose a more severe sentence as to deny the defendant the benefit of his or her plea bargain. *United States v. Wright*, an appeal to the U.S. Court of Appeals for the Second Circuit brought by a co-defendant in the well-publicized fraud prosecution of former sports radio personality Craig Carton, presents the question whether, though purporting to accept the terms of a plea agreement, a prosecutor's advocacy may cross the line into a breach of that agreement. Wright's recent withdrawal of this well-presented appeal, however, leaves further development of this important area of criminal law to another day. The facts of *Wright* nevertheless provide a useful case study and should sound a note of caution to prosecutors.

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Applicable Legal Principles

Plea agreements are construed in accordance with principles of contract law. Because, however, "plea bargaining requires defendants to waive fundamental constitutional rights, [courts] hold prosecutors … to the most meticulous standards of both promise and performance." *United States v. Lawlor*, 168 F.3d 633, 636 (2d Cir. 1999) (citation omitted).

"[I]n order to preserve the integrity of plea bargaining procedures and public confidence in the criminal justice system, a defendant is generally entitled to the enforcement of a plea agreement without showing a tangible harm resulting from a breach." *United States v. Vaval*, 404 F.3d 144, 155 (2d Cir. 2005) "Moreover, to avoid even the appearance of such harm," when a breach is found, the Court of Appeals will remand for resentencing before a different judge. Id. A limited exception exists, however, where the government's "violation is so minor that it does not cause the defendant to suffer any meaningful detriment," which is determined by focusing on "what the defendant reasonably understood to be the terms of the plea agreement, and whether his or her reasonable expectations have been fulfilled. Id. at 155.

Key Decisions and the Evolution of Plea Agreement Forms

Over the years the local U.S. Attorney's offices' standard plea agreement practices and forms have evolved in ways that appear to respond to some notable Second Circuit rulings. For example, in *United States v. Lawlor*, the defendant pleaded guilty to assault of a corrections officer pursuant to an agreement whereby the parties stipulated that §2A2.3 of the Sentencing

Guidelines (Minor Assault) applied, resulting in an offense level of six. The presentence report, however, applied §2A2.4 (Obstructing or Impeding Officers) including a three-level enhancement for striking the officer, resulting in an offense level of nine. At sentencing, the court asked the government if it wished to respond to defense counsel's letter objecting to the three-level enhancement, and the prosecutor responded that "the Presentence Report was appropriately scored in the first instance." Applying the enhancement, the district court sentenced Lawlor to the one-year statutory maximum. The Second Circuit vacated and remanded for resentencing, holding that "the government was bound not to disavow" its agreement that §2A2.3 applied, and thus the prosecutor's statement was a breach of the plea agreement. In more recent years, the form of plea agreement commonly used by local U.S. Attorneys' offices has come to include language apparently designed to help the government avoid the result in *Lawlor*: it provides that if either the court or the probation office "contemplates any Guidelines adjustments, departures or calculations different from those stipulated to … the parties reserve the right to answer any inquiries and make all appropriate arguments concerning the same."

In *United States v. Vaval*, the defendant pled guilty to robbery of federal property with a dangerous weapon pursuant to a plea agreement. The plea agreement stated that the maximum sentence was 25 years, and included the government's agreement that it would "take no position concerning where within the Guidelines range determined by the Court the sentence should fall" and "make no motion for an upward departure." At sentencing, the court calculated the applicable Guidelines range to be 135 to 168 months, consistent with the calculation contained in the presentence report. Thereafter, following defense counsel's argument for a sentence at the bottom of the range, the government, after noting that it had waived the government's right to argue for a particular sentence within the Guidelines range, proceeded to denounce Vaval in vivid terms, calling his contrition "completely disingenuous" because he had "over and over and over again" violently robbed people at gunpoint, characterizing him as "ring leader" of a robbery that entailed lying in wait and abduction, and concluding by asking the court "to consider all of that" when sentencing Vaval. The district court sentenced Vaval to 168 months' imprisonment, the top of the range.

Vaval appealed and the Second Circuit reversed and remanded for resentencing. The panel found that although the plea agreement permitted the government to advise the court of "information relevant to sentencing," many of the government's statements, which argued the significance of facts already before the court, did not fall within that clause of the agreement. Because the government's statements occurred after the sentencing court had calculated Vaval's Guidelines range, the Second Circuit concluded that the government's statements had no relevance other than to address where in the range the sentence should be, and thus violated the plea agreement. Although the government prefaced its remarks by noting that it had agreed not to take a position on the appropriate sentence within the range, and that it intended to comply with that agreement, the Second Circuit ruled that "[s]uch statements do not, however, insulate the government against a finding of breach if in fact what was said constituted an argument about where within the range to sentence appellant … ." 404 F.3d at 153.

Once again, the current standard form of plea agreement seems intended to help the government steer clear of another *Vaval*. It includes language that "nothing in this agreement limits the rights of the parties to … make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced … ."

'U.S. v. Wright'

In September 2017, Michael Wright and Craig Carton were arrested on charges that they defrauded a hedge fund, Brigade, with respect to solicitation of funds that were to be invested in bulk ticket purchases and resold on the secondary market. The complaint alleged that after the defendants obtained the

funds, they misappropriated them to pay off personal debts and repay prior investors in another scheme. Wright later entered into an agreement to plead guilty to a single count of wire fraud. The agreement provided for a Guidelines offense level of 16, which included a two-point reduction for Wright's having played a minor role in the offense. The stipulated sentencing range was 21-27 months' imprisonment.

Wright's plea agreement provided that neither party would seek an upward or downward departure, nor any Guidelines adjustment different from the stipulation, but that either party could seek a sentence outside the stipulated Guidelines range based on the sentencing factors set forth in 18 U.S.C. §3553(a). The parties also reserved the right to argue where within the Guidelines range Wright should be sentenced. The probation office's presentence report agreed with the parties' agreed-upon Guidelines calculations, including the minor role adjustment, and included a below-guidelines sentencing recommendation of one year and a day in prison.

Wright submitted a sentencing memorandum seeking a non-custodial sentence, focusing on Wright's limited involvement in Carton's schemes. At his guilty plea, Wright had allocuted on a conscious avoidance theory regarding his knowledge that the agreement with Brigade, which Wright played no role in negotiating, required that Brigade's funds be used only to purchase tickets and prohibited other use of the funds. In his sentencing memorandum, Wright maintained that position, and also asserted that he was unaware that Carton was using fabricated documents to induce Brigade to invest.

The government submitted a sentencing memorandum noting its agreement with the presentence report's Guidelines calculation and requesting a sentence within that range. The government argued that "Wright was a full, knowing participant in the scheme," including "directly participating in misappropriating [Brigade's] $2 million investment," and spent pages marshaling evidence claimed to demonstrate his knowledge and participation. The government characterized as "incredible" Wright's assertion "that he was less than fully aware that he was not entitled to use [Brigade's] investment to repay Carton's gambling debts and to pay his own personal expenses."

Two business days later, Chief Judge McMahon notified the parties that she intended to reject the presentence report's recommendation of a two-point minor role adjustment. The court's notice stated that "there is no way that the activity described in the Government's sentencing memorandum—activity about which the Court heard considerable testimony at Mr. Carton's trial—qualifies him as a 'minor participant.'"

Prior to sentencing, Wright submitted a letter arguing that the substance of the government's argument and characterization of the facts constituted a breach of the plea agreement's minor role stipulation. At sentencing, the court rejected that argument, asserting that "the government had every right to argue against [Wright's] practically entirely exculpatory sentencing memorandum." After Wright did not take up the court's offer of a hearing to address factual disputes, the court ruled that Wright was not entitled to the two-point minor role reduction. Nonetheless, crediting defense counsel's skilled advocacy, the court then granted a two-point downward variance based on §3553(a) factors, and sentenced Wright to 21 months in prison, the bottom of the range stipulated by the parties.

Wright appealed, arguing that the government breached the plea agreement because its arguments were wholly incompatible with the minor role stipulation. Wright addressed the various factors that the applicable Guidelines section states must be considered in determining whether a defendant is entitled to a minor role adjustment, and pointed out how the government's sentencing brief undermined each of those factors. Relying on the Second Circuit's decision in *Vaval*, Wright argued that although the government paid lip service to the plea agreement, "in fact what was said," including in particular the government's assertion that he was a "*full*, knowing participant in the scheme," constituted an argument against the minor role stipulation, and thus violated the plea agreement.

In opposition, the government relied on the plea agreement's language allowing either party to argue based

on the §3553(a) factors, and asserted that its arguments were "well within this reservation of rights." The government also contended that its brief "articulated 'facts' showing Wright's participation in the scheme that were responsive to mitigating arguments made by Wright." Finally, the government argued that the de minimis breach exception applied, because Wright received a sentence at the low end of the Guidelines range to which he agreed.

Both parties in *Wright* also addressed *United States v. Robinson*, 634 F. App'x 47 (2d Cir. 2016), an unpublished decision finding a government breach in closely analogous circumstances. In *Robinson*, the defendant pleaded guilty to narcotics conspiracy pursuant to a plea agreement that stipulated to a Guidelines range of 57-71 months' imprisonment based on an agreed weight of narcotics, and which included no role enhancement. The agreement otherwise contained the same standard clauses as the agreement in *Wright*. In its sentencing submission, however, without expressly seeking role enhancement, the government argued that the evidence showed that Robinson "was an active, managing member" of the drug conspiracy and "held a managerial role." At sentencing, the district judge recalculated the applicable drug weight, and, based on the government's submission, added a two-point enhancement for managerial role, and sentenced Robinson to a 120-month prison term.

The Second Circuit reversed, holding that though the case presented "a close call," the government's use of the Guidelines term of art "manager" to describe Robinson's conduct, despite its disclaimers, was "in effect to argue for that enhancement" in violation of the plea agreement. In response to the government's assertions that its comments were permitted by the plea agreement's terms permitting the government to argue pursuant to the §3553(a) factors and to present facts relevant to sentencing, the Second Circuit stated that "[h]ad the government confined itself to a recitation of the facts—or even to a §3553(a) argument based on the facts—there would have been no breach of the plea agreement … ." But the "gratuitous reference to Robinson's 'managerial role' divorced from any facts concretely describing his actions" had no relevance to sentencing other than to suggest a role enhancement. Id. at 50-51. The *Robinson* court contrasted these circumstances to those in *United States v. Tokhtakounov*, 607 F. App'x 8 (2d Cir. 2015), where the Second Circuit found that the government did not breach a plea agreement by describing the defendant as a "leader" even though "leader" status supports a role enhancement under the Guidelines, because that description prefaced a description of the facts.

Conclusion

Just before the April 2, 2020 scheduled argument date for Wright's appeal, he withdrew it, citing his imminent expected release to a halfway house and his desire to avoid the stress of a potential resentencing. As a result, we will not learn whether the Second Circuit would view Wright's case as analogous to the circumstances in *Robinson* and *Vaval*, or perhaps would have relied on the "de minimis" exception on the rationale that, notwithstanding Wright's hopes and the Probation Office's below-Guidelines recommendation, Wright ultimately received a sentence at the bottom of the range to which he agreed.

Nevertheless, Wright's appeal should serve as something of a cautionary tale to prosecutors who prefer to avoid claims of violating their own plea agreements: they can be found to have done so when, despite claiming adherence, they make arguments that in fact undermine its terms. Notably, in *Wright*, as in *Vaval*, the sentencing judge well knew the evidence from having presided over a codefendant's trial, so little need appears to have existed for the government to edge over the line in its sentencing advocacy.