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BY HAND

May 13, 2015

Diane M. Fremgen
Clerk of Supreme Court
110 East Main Street, Suite 215
Madison, WI 53701

Re: State of Wisconsin v. Rogelio Guarnero, 2013-AP-1753CR & 2013-AP-1754CR

Dear Ms. Fremgen:

In accordance with an order of the Supreme Court dated May 6, 2015 in the above-referenced consolidated cases, Defendant-Appellant-Petitioner Rogelio Guarnero (herein "Guarnero") respectfully submits this letter brief.

INTRODUCTION

The central issue in this appeal is whether Guarnero's conviction in federal court for a single count of racketeering conspiracy is sufficient as a matter of law to constitute a prior conviction under a "statute of the United States...relating to controlled substances" within the meaning of Wis. Stat. § 961.41(3g)(c).

For the first time during the oral argument in this case on March 10, 2015, the State referenced an admitted "scrivener's error" in the federal judgment of conviction (App. 165), suggesting that this misprint somehow established that Guarnero had been convicted of a controlled substance offense under 21 U.S.C. § 841(b)(1)(C). However, the State failed to advise the Court that this statute itself defines no offense, nor was Guarnero ever charged under 21 U.S.C. § 841(b)(1)(C), nor did he ever plead guilty under that statute.

No tenet of criminal procedure could be more fundamental than the notion that a defendant cannot stand convicted of an offense with which he was never charged. *Cole v. Arkansas*, 333 U.S. 196 (1948). The State's eleventh-hour argument flouts this bedrock principle and is utterly without merit. The State has also waived this argument by failing to raise it in any of its briefs before this Court or the Court of Appeals.

I. The Federal Judgment Of Conviction Unambiguously Shows A Conviction For Only The Single Offense Of Racketeering Conspiracy Under 18 U.S.C. § 1962(d).

The State conceded at oral argument that the federal Judgment of Conviction (App. 165) contained a scrivener's error in referencing a statute—18 U.S.C. § 841(b)(1)(C)—that does not exist in the United States Code.

Notwithstanding this admitted misprint, the Judgment of Conviction unambiguously shows that Guarnero was convicted of one offense only—racketeering conspiracy under 18 U.S.C. § 1962(d).

This conclusion is evident from the language of the Judgment of Conviction itself. Immediately under the caption, the Judgment of Conviction clearly states: "THE DEFENDANT: pleaded guilty to count[] Two (2) of the Indictment." (App. 165). As shown in more detail below, Count Two charges racketeering conspiracy under 18 U.S.C. § 1962(d)—and nothing else. The text immediately to the right further underscores that the nature of the offense is "Conspiracy to Commit Racketeer Influenced and Corrupt Organizations" and identifies the "Count" of the indictment as Count Two. *Id.* The Judgment similarly indicates that the offense ended "September 27, 2005," just as it had been charged in Count Two of the indictment. *Id. Compare* App. 137, ¶ 17. Finally, the Judgment orders that "Count(s) 20, 24, 25, 26...are dismissed on the motion of the United States."[1] (App. 165).

The State's argument is based on the observation that under the heading "Title & Section", the Judgment mistakenly identifies "18 U.S.C. §§ 1962(d) *and 841(b)(1)(C)*" (emphasis added). The State appropriately concedes—as it must—that there is no statute codified at 18 U.S.C. § 841(b)(1)(C). As such, the reference to § 841(b)(1)(C) is a nullity, and the Court should end its consideration of the State's argument here.

Undaunted, the State urges this Court to interpret this admitted scrivener's error as a reference to a statute *not* identified anywhere in the Judgment of Conviction—§ 841(b)(1)(C) of *Title 21*. This argument fails for many reasons.

As a threshold matter, the Judgment of Conviction contains no reference on its face to Title 21. But even if this section were from Title 21, the State's argument nonetheless falls wide of the mark. Remarkably, the State failed to advise the Court during oral argument that 21 U.S.C. § 841(b)(1)(C) does not itself define any "offense" whatsoever. Rather, this section merely provides a *penalty* for a person convicted of violating § 841(a).[2] 21 U.S.C. § 841(b)(1)(C)—which is contained in a subsection unmistakably titled "Penalties"—proscribes no conduct at all and therefore could not possibly constitute an "offense" for which Guarnero could ever have been convicted, even if he had been charged under that statute (which he was not).

There is no reference to § 841(a) anywhere in the Judgment of Conviction—whether under Title 18, Title 21, or otherwise. Moreover, as shown in more detail below, Count Two of the indictment nowhere charged Guarnero separately with a violation of 21 U.S.C. § 841 or any criminal statute other than the only offense of which he was actually convicted—racketeering conspiracy under 18 U.S.C. § 1962(d).

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[1] Dismissed counts 20, 24, and 26 had charged a violation of various firearms statutes. (App. 140-41, 143). Dismissed count 25 had charged a violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), and 18 U.S.C. § 2. (App. 142). Dismissed count 25 did not, however, reference 21 U.S.C. § 841(b)(1)(C).

[2] 21 U.S.C. § 841(a) makes unlawful, *inter alia*, for any person to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

II. Count Two Of The Federal Indictment Charges Only The Single Offense Of Racketeering Conspiracy And Does Not Charge A Violation Of 21 U.S.C. § 841(b)(1)(C) Or Any Other Crime.

Contrary to the State's argument, the federal Judgment of Conviction unambiguously reflects a conviction *only* under Count Two of the indictment. (App. 165). Count Two, in turn, unambiguously charges *only* the single offense of racketeering conspiracy under 18 U.S.C. § 1962(d).

The caption of Count Two unmistakably reads (in underlined, bold letters): "Conspiracy to Commit RICO" (App. 137), and says nothing of controlled substances. The indictment asserts various factual allegations (¶¶ 14-17), the crux of which is the charge that Guarnero "conspired to...conduct and participate, directly and indirectly, in the conduct of the affairs of [an] enterprise through a pattern of racketeering activity...." (App. 139, ¶ 17).

The indictment further identifies numerous offenses that are alleged to comprise the "pattern of racketeering activity." After the factual allegations, the Count concludes that the activities described therein were "[a]ll in violation of Title 18, United States Code, *Section 1962(d)*." (App. 139, text following ¶ 18) (emphasis added).

Sweeping this language aside, the State instead focused at oral argument on the final sentence of Paragraph 17 of Count Two which identifies "Title 21, United States Code, Sections 841 and 846" (App. 139, ¶ 17), erroneously suggesting that this reference showed that Guarnero had been somehow *convicted* under 21 U.S.C. § 841(b)(1)(C).

Once again, the State ignores controlling U.S. Supreme Court precedent and evidences a fundamental misunderstanding of federal RICO law. As Guarnero showed in the extensive briefing before this Court and at oral argument, the offenses that are alleged to constitute the "pattern of racketeering activity" are *distinct and separate offenses* from racketeering conspiracy, do *not* constitute elements of the racketeering conspiracy offense, and *need not be proven* beyond a reasonable doubt. *Salinas v. United States*, 522 U.S. 52, 63 (1997); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Richardson v. United States*, 526 U.S. 813 (1999). *See generally*, Pet. Br. at 10-15, Rep. Br. at 4-7. Nor must there be any proof that anyone—let alone Guarnero—committed any of these offenses. *Salinas*, 522 U.S. at 63, *United States v. Tello*, 687 F.3d 785, 792 (7th Cir. 2012).

The reference to 21 U.S.C. § 841 in Count Two merely identifies one of numerous offenses that were alleged to constitute the "pattern of racketeering activity." It is simply not a separate substantive charge as the State mistakenly suggests. Under the controlling caselaw identified above, a conviction under Count Two in no way constitutes a conviction under 21 U.S.C. § 841—or any of the other offenses alleged to be part of the "pattern of racketeering activity."

The State's last-minute argument is also foreclosed by the well-settled principle of criminal procedure that an indictment may not "join[] two or more distinct and separate offenses into a single count." *United States v. Mancuso*, 718 F.3d 780, 792 (9th Cir. 2013). *See also* Fed. R. Crim. P. 8(a) (restricting when an indictment "may charge a defendant *in separate counts* with 2

or more offenses...") (emphasis added). As shown throughout these proceedings, racketeering conspiracy is a *distinct and separate* offense from any of the offenses that allegedly comprise the "pattern of racketeering activity." Therefore, any charge under 21 U.S.C. § 841(b)(1)(C) (even if such a charge were possible) would necessarily appear, if at all, in another count of the indictment—which, of course, it did not.

Not even Count Twenty-Five—which was *dismissed* by the District Court—referenced 21 U.S.C. § 841(b)(1)(C). Rather, that dismissed count identified three statutes nowhere mentioned in the Judgment of Conviction—21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), and 18 U.S.C. § 2. (App. 142). And, of course, Count Twenty-Five was dismissed and is therefore without legal effect.

III. The Plea Agreement Contains A Guilty Plea To Racketeering Conspiracy Only And No Other Crime.

Although the Judgment of Conviction and indictment unambiguously show that Guarnero was charged with and convicted of the *single* offense of racketeering conspiracy under 18 U.S.C. § 1962(d), the language of the plea agreement further underscores this conclusion.

The plea agreement clearly provided that Guarnero "voluntarily agrees to plead guilty to Count Two of the indictment..." (App. 146, ¶ 4). As shown above, Count Two charged the single offense of racketeering conspiracy—and nothing else. The plea agreement recited various facts, the significance of which (and lack thereof) have been extensively briefed before this Court. (App. 146-48, ¶ 5). The parties specifically acknowledged the statutory elements for Count Two—which are unmistakably those elements required for a conviction for racketeering conspiracy. (App. 149, ¶ 9). *See* Seventh Circuit Pattern Criminal Federal Jury Instructions (App. 173). The parties also acknowledged the range of possible penalties under Count Two (App. 148, ¶ 6), which are set forth in the RICO statute at 18 U.S.C. § 1963. The government, in turn, agreed to move to dismiss the four remaining counts (20, 24, 25, 26) (*Id.* ¶ 8).

Nowhere does the plea agreement provide that Guarnero is pleading to any offense other than 18 U.S.C. § 1962(d). The plea agreement contains no reference to 21 U.S.C. § 841(b)(1)(C). Nor does the plea agreement identify any elements of that statute—which it could not because that statute does not define any offense. Nor does the plea agreement discuss possible penalties under 21 U.S.C. § 841(b)(1)(C), or otherwise identify or discuss that statute in any way.

Any contrary suggestion by the State that Guarnero was convicted of a statute that defines no crime, with which he was never charged, and to which he never pleaded is patently meritless.

IV. The State's Eleventh-Hour Argument Has Been Waived.

This Court has held that a party may not raise a new argument for the first time at oral argument that it has not argued in its brief. *City of Milwaukee v. Christopher*, 45 Wis. 2d 188, 190, 172 N.W.2d 695 (1969). Failure to make an argument in a party's briefs prior to oral argument constitutes a waiver of that argument. *Id. See also A. O. Smith Corp. v. Allstate Ins. Co.*, 222 Wis. 2d. 475, 493, 588 N.W.2d 285 (Ct. App. 1988) ("when an issue was not raised until oral argument, it was deemed waived").

The State had every opportunity in the Court of Appeals and before this Court to raise its opinions relating to the Judgment of Conviction. Instead, the State waited until the day of oral argument to mention the misprint at issue in this letter brief, leaving Guarnero with only five minutes to respond to the State's demonstrably meritless argument. Under these circumstances, the Court should reject the State's argument for the additional reason that it has been waived.

CONCLUSION

The State's eleventh-hour argument that a scrivener's error in the Judgment of Conviction purportedly establishes that Guarnero was convicted of 21 U.S.C. § 841(b)(1)(C)—when that statute defines no offense, and is a statute with which Guarnero was never charged and to which he never pleaded guilty—is meritless. It has also been waived as a result of the State's failure to brief this issue to the Court of Appeals and this Court.

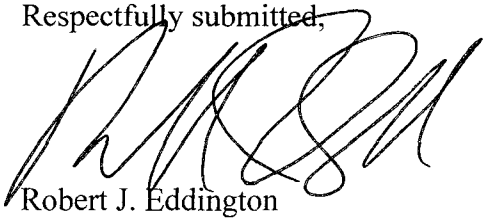
At bottom, the State invites this Court to conclude—on the basis of nothing more than what it concedes is a misprint—that Guarnero must necessarily have been convicted of an offense with which he was never charged, to which he never pleaded guilty, and for which he was never given the opportunity of a trial. This Court should reject such an invitation, as the State's argument upends the most fundamental notions of due process and flouts an admonition of the U.S. Supreme Court nearly seven decades old:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal...*It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.*

Cole v. Arkansas, 333 U.S. 196, 201 (1948) (emphasis added and internal citations omitted).

For all of these reasons, and the reasons in Guarnero's briefs before this Court, the State's argument should be rejected and the Court of Appeals should be reversed.

Respectfully submitted,



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