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Federal Judge Calls Cops Liars

By Benjamin Weiser

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The tip to the police was solid: An African-American man, in a striped shirt and a Yankees cap, was carrying a gun in a building in Upper Manhattan. Officers responded and made an arrest.

But where that information came from, and the lengths to which the police and law enforcement agents may have gone to conceal the source, turned a seemingly ordinary gun possession case into a flash point over legal ethics and a sharp dispute between a judge and federal prosecutors.

The judge found that the arresting officers had created a "story to justify" the stop of the man, and that federal agents endorsed falsehoods that were "contrived to protect" the identity of a supposedly anonymous source, who was actually a valuable confidential informant. "A decision was made to coordinate among all the witnesses not to tell the full truth," the judge said.

Sgt. Robert Nicholson testified at a suppression hearing that he received the informant's call and after hearing his information, told him to dial a police hot line that offers callers anonymity.

Two days later, when the complaint was sworn before a magistrate judge, it omitted any mention of the informant and said merely "an anonymous individual had placed a 911 call." But before the suppression hearing began, a prosecutor told the judge that he had uncovered the truth. He said that the original caller had not been anonymous but was a known informant. Also the complaint stated falsely that the defendant, when he saw the police, immediately began to run. But, he added, that an officer who had seized the gun and arrested the defendant, now recalls that he saw "a bulge" in the defendant's waistband — a detail that had not been in the complaint.

After the hearing, the judge said: *"The idea that [the defendant] turned and began to run is nonsense."* And, *"I give no credibility to [the officer's] statement that he saw a bulge."* And *"A decision was made to tell perhaps the truth but not the whole truth."* And *"Special agents were taken in with the story and implemented it knowing that it was less than truthful,"* And the observations of the three officers were *"not credible, not worthy of belief."*

The judge even questioned whether the grand jury that indicted the defendant had received "accurate information," and scolded the government telling it that if a confidential informant *"is to be protected, there are ways to do it which do not require misstatements to a federal grand jury or a judge."*

The U.S. Attorney's Office sent letters to the judge, asking him to withdraw his findings, citing the potential damage to the officers' careers. The judge refused.

Comment

A couple of things. First, it may come as a shock to some, that the prosecutor acted honorably. That is no surprise. 99.9 percent of prosecutors I know would have acted the same way. The majority of prosecutors are not "lifers" who are going to dedicate their lives to being prosecutors. They are just young men and women on their way to other careers: private law practice, journalism, politics, business, or even criminal defense. They do not have a personal stake in convicting people. Sometimes prosecutors get carried away but rarely. They are not on a crusade. They are just doing their jobs to get some good training for their future. Period.

On the day of writing this article, *The New York Times* had an article about a former prosecutor who prosecuted a well-known hedge fund manger just months ago is now representing a bookkeeper involved in the Ponzi scheme of Bernard Madoff in the very same court where he formerly prosecuted the hedge fund manager, and complaining all the way about his former office actions! Prosecutors are nothing more or less than young men and women who anyone, including defendants, would be proud to have as their sons and daughters. So this prosecutor revealing information that could potentially undermine his case does not surprise me at all.

And the judge's actions do not surprise me. At least in New York, judges are very independent. Defense lawyers in New York can always go to a federal judge with their arguments when they feel prosecutors are being unreasonable. A federal judge's questioning the credibility of law enforcement witnesses and characterizing their testimony, as "nonsense" does not surprise me. The judge's refusal to "withdraw his findings," after being requested to do so by the United States Attorney's Office also does not surprise me whether or not it could hurt the officers' careers.

It should be noted, however, that this concealing of informants by "shading" the truth is an on-going problem and it's high time someone called attention to it. It is why an attorney should always ask an officer-witness whether he or his colleagues have received other information leading to the stop, search, or arrest of his client and make the same request of the prosecutor. No sense in just relying on the integrity of prosecutors or agents.

In one case I had I asked a state prosecutor for the "street" surveillance tapes of the scene of a car search based on a "traffic violation," and advised him that I was also going to be asking a

nearby bank branch for their surveillance tapes. Within days I received a "notice of dismissal." Coincidence? Maybe, but there are few coincidences in criminal law.

– David Zapp, Esq.

"Safety Valve": The How, When and Where

By David Zapp, Esq.

"Safety Valve" is the procedure **in drug cases** whereby a defendant can escape the mandatory minimum sentences. The qualifications for "Safety Valve" eligibility are found in 18 United States Code. §3553(f) and United States Sentencing Guideline. §5C1.2(a):

(1) the defendant does not have more than **1** criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

1. When can a defendant apply for safety valve consideration?
2. How many times can you make a safety valve presentation?
3. Can the government prevent a defendant from making a safety valve presentation because they do not believe the defendant is eligible and if the government denies consideration, is it reversible error?

The Short Answers:

1) While at least one circuit has suggested that safety valve eligibility requires the defendant to cooperate through the criminal process, the majority of courts have concluded that the only deadline that a defendant must meet is the beginning of the sentencing hearing. A defendant may thus apply for safety valve consideration even after going to trial. The court may also delay the sentencing proceeding to allow a defendant to make a full disclosure to obtain safety valve eligibility.

2) There is no limit on how many times the defendant may make a safety valve presentation; however, the government may refuse to hear multiple presentations if it believes that the defendant is not being truthful. Moreover, the government is generally regarded as having no obligation to debrief the defendant, and may decline to meet with the defendant at all. Therefore, it is not reversible error for the government to decline to consider the defendant's safety valve presentation.

3) The government is under no obligation to debrief the defendant, whether or not they believe the defendant is eligible for safety valve consideration. However, the government may not unilaterally preclude the defendant from applying for safety valve consideration. The burden is on the defendant to disclose all relevant facts, not just express a willingness to make a proffer to the government. In order to fulfill this obligation, the defendant may make such a proffer in its court filings or in a letter to the government. The debriefing process is generally considered the best way to disclose information and a failure to seek out an interview with the government may be held against a defendant; therefore, defendants seeking to take advantage of the safety valve provision should try to make a presentation to the government if possible. While it is not reversible error for the government to fail to meet with the defendant, it would be reversible error for the court to hold that such a meeting is required for safety valve consideration.

Neither the Guidelines nor §3553(f) provide additional guidance on the processes and procedures by which a criminal defendant may seek safety valve consideration.

(Special thanks to Anne Silver recent graduate from Columbia Law School for writing this article.)

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