

United States of America
First Circuit Court of Appeals

NO. 08-2300

UNITED STATES OF AMERICA,

Appellee,

v.

CIRINO GONZALEZ,

Defendant/Appellant

REPLY BRIEF OF DEFENDANT - APPELLANT

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ARGUMENT

I. Factual Disputes

In its brief the Government makes several statements of purported fact that do not comport with the record, and which should be pointed out.

A. Misstatement of “Or” and “And”

The Government misstates what the indictment says. GOV’T BRF. at 5. Referring to the language of the indictment, the Government reports as though it were a fact that Count II charges Mr. Gonzalez in the *disjunctive* “or,” when it plainly charges the two conspiracy objects in the *conjunctive* “and.” Although it is understood that the Government later argues this difference does not matter, the fact is misstated.

B. No “Volunteer Security” in Audio

The Government’s brief, in its statement of facts and elsewhere, claims that “Gonzalez’s role at the Brown’s estate was to serve as ‘volunteer security,’” and cites Government’s exhibit 1h. GOV’T BRF. at 8, 64 (quotes in original). Exhibit 1h is an audio of somebody talking. The phrase “volunteer security,” which the Government puts in quotes, is not contained in the exhibit cited. The source of the quote, if there is one, is unknown.

C. No “Armed Bodyguard” in Testimony, Video, or Surveillance

The Government’s brief, in its statement of facts, alleges that “the jury saw a videotape of Gonzalez at the Brown’s estate, in which he carried an assault rifle over his shoulder and an aerial surveillance film of Gonzalez walking behind Mr. Brown as an armed bodyguard.” GOV’T BRF. at 8. The Government cites the testimony of Jamie Berry at page 32, and Government exhibits 1c and 4.

Exhibit 1c, cited by the Government, is a mostly silent video showing Mr. Gonzalez and others – notably not Mr. Brown – on a porch. It shows Mr. Gonzalez with a rifle over his shoulder, but just standing there, talking and milling around. There is nothing in the video to suggest he is being a bodyguard for anyone.

Exhibit 4 is aerial surveillance of the parking area of Mr. Brown’s home. It shows a car and an ATV being moved in and out of a garage, and two people walking around. Although one is carrying something, it is not recognizable as a weapon, and it certainly cannot be pegged as an “assault rifle.” Either because the film is from overhead or has insufficient clarity, neither person can be recognized. There are no actions or movements in the footage that suggests bodyguarding, and neither person appears to be “walking behind” the other.

Page 32 of Mr. Berry's testimony, which the Government also cites, does say that Mr. Gonzalez is wearing a rifle, but not an "assault rifle." It says nothing about Mr. Gonzalez being an "armed bodyguard" for Mr. Brown.

The Government's claim that "the jury saw a videotape of Gonzalez at the Brown's estate, in which he carried an assault rifle over his shoulder and an aerial surveillance film of Gonzalez walking behind Mr. Brown as an armed bodyguard," is either a misstatement or a faulty characterization of the evidence.

D. Emails are Mr. Riley

The Government's statement of facts is logically divided into three sections, one for each of the three defendants. In an apparent effort to show Mr. Gonzalez's connection to a weapon (for which the jury did not convict him), under the heading A, "Gonzalez," the Government cites a number of emails concerning the purchase of a gun. GOV'T BRF. at 9.

It must be noted that Mr. Gonzalez was the *recipient* of each of these emails, and the author of none. The emails all reflect co-defendant Mr. Riley's thoughts and attitudes, and not Mr. Gonzalez's. Obviously the two knew each other and acted together to buy similar guns. But there should be no tarring of Mr. Gonzalez with Mr. Riley's intents.

The Government cites one email in which “Riley told Gonzalez that Gonzalez would probably only need one of these weapons ‘for the house,’” GOV’T BRF. at 9, *quoting and citing* Government exhibit 2. That email, however, also contains a statement by Mr. Riley that he understands that Mr. Gonzalez might want the weapon for “your personal collection.” EMAIL, Gov’t.Exh.2.

Throughout his defense, Mr. Gonzalez maintained that he bought the gun for his personal use. The email thus substantiates Mr. Gonzalez’s claim, and is not the aspersion the Government suggests.

E. Three Separate Defendants

Throughout the Government’s brief, it repeatedly refers to “the defendants” as a collective plural. It is important to note that there are three, and Mr. Gonzalez presents a situation different from the others.

Messrs. Gerhard and Riley, for instance, were found guilty of the weapons charges and a second conspiracy, but Mr. Gonzalez was not. Mr. Gerhard will serve 20 years and Mr. Riley 30, but Mr. Gonzalez – much less culpable – got 8 years. Mr. Gonzalez’s situation is different than the other two, and should not be casually confused with them.

II. Count 2A is a Misdemeanor

In his opening brief Mr. Gonzalez showed that Count 2A is a misdemeanor, but that he got sentenced as though it were a felony. GONZALEZ BRF. at 44 *et.seq.* To the extent the Government addresses the issue, its brief makes two points.

The first is that the misdemeanor/felony issue is somehow dependent upon Mr. Gonzalez's allegation that the government did not establish the elements of the Brown's underlying tax offenses. It is unclear how that issue relates to this. They are independent. Regardless how this Court decides on the sufficiency of the indictment or evidence regarding the Browns' offenses, Mr. Gonzalez was improperly sentenced for a felony when at most he committed a misdemeanor. His argument on the matter is set forth in his opening brief.

Second, the Government alleges that Mr. Gonzalez failed to preserve the misdemeanor/felony issue and thus plain error review should be applied. GOV'T BRF. at 55.

Not so. The issue was brought to the attention of the trial court on at least four occasions. In his objections to the PSI, Mr. Gonzalez pointed out the issue. LETTER FROM DAVID BOWNES, ESQ. TO MELISSA ELWORTHY, UNITED STATES PROBATION at p. 5-6 (Sept. 12, 2008). In its Addendum to the Presentence Report, the Probation Officer specifically responded to the objection. PSI - Objections ¶

26, *SealedAppx.* at 32. The matter was raised by Mr. Gonzalez again in great detail before sentencing, SUPPLEMENTAL SENTENCING MEMORANDUM at 2-4 (Sept. 25, 2008), DE 532, and again after trial. MOTION FOR BAIL PENDING APPEAL at ¶8b (Oct. 1, 2008), DE 539.

Thus, this court does not review for plain error, as the government alleges, GOV'T BRF. at 55, but *de novo*.

Count 2A is a misdemeanor, but Mr. Gonzalez was sentenced as though it were a felony. The Government's brief largely ignores the merits of the issue, and thus it should be considered conceded. GOV'T BRF. at 55.

III. Territorial Jurisdiction

In its brief the Government has belittled Mr. Gonzalez's territorial jurisdiction argument by misstating it. The Government argues only that the court had *subject matter* jurisdiction. GOV'T BRF. at 54.

For criminal jurisdiction generally, there must be not only personal and subject matter jurisdiction, but territorial jurisdiction as well. *See generally*, Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999); *State v. Legg*, 9 S.W.3d 111, 114 (Tenn. 1999) ("It is elementary that before a court may exercise judicial power to hear and determine a criminal prosecution, that court must possess three types of jurisdiction: jurisdiction over the defendant, jurisdiction over the alleged crime, and territorial jurisdiction.")

Mr. Gonzalez does not focus on a lack of subject matter jurisdiction. Rather, his argument goes to territorial jurisdiction, which is separate and must also be present before federal authority exists in a place. Mr. Gonzalez urges this Court to undertake a specific territorial jurisdiction analysis, and not be misguided by the Government's misunderstanding of the issue.

CONCLUSION

Based on the foregoing and in accord with his opening brief, Mr. Gonzalez respectfully requests this Court reverse all convictions, or in the alternative, remand for re-sentencing.

Mr. Gonzalez hereby joins such other portions of his co-defendants' briefs and reply briefs as may be applicable to him.

Mr. Gonzalez requests that his attorney be allowed to present oral argument.

Respectfully submitted,

Cirino Gonzalez
By his Attorney,

Law Office of Joshua L. Gordon

/s/

Dated: April 23, 2010

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I hereby certify that on April 23, 2010, a copy of the foregoing will be forwarded to Arnold H. Huftalen, Esq., AUSA; Paul Glickman, Esq., for co-defendant Jason Gerhard; and Sven Wiberg, Esq., for co-defendant Daniel Riley.

/s/

Dated: April 23, 2010

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X4, and that it contains no more than 1,184 words, exclusive of those portions of the brief which are exempted.

/s/

Dated: April 23, 2010

Joshua L. Gordon, Esq.