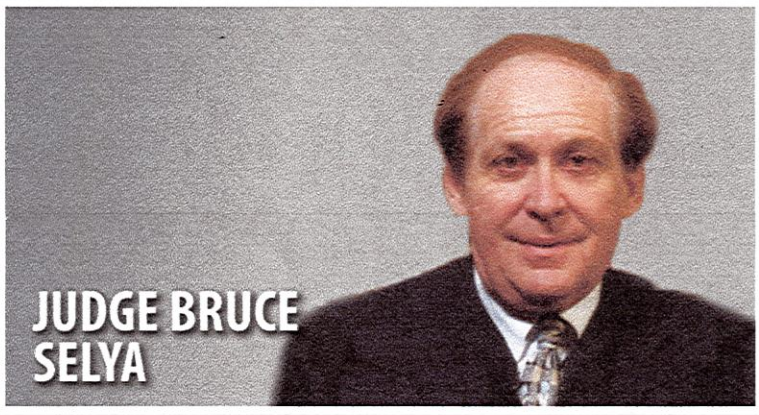
Ex parte exchange between probation officer, judge OK

Drug trafficker's sentence is upheld

By: Eric T. Berkman February 2, 2017



Two brief off-the-record conversations between a federal judge and a probation officer during a sentencing proceeding did not violate the defendant's right to know the nature of the information upon which he was being sentenced or his right to challenge the information, the 1st U.S. Circuit Court of Appeals has found.

Because the attorney representing the defendant at the sentencing stage did not object to the conversations at the time, the 1st Circuit addressed the defendant's appeal of his sentence using a plain error standard, which requires an appellant to show clear and obvious error that affected his or her substantial rights and seriously impaired the fairness and integrity of the proceedings.

The government argued that the sentence should be affirmed because the defendant could not show a reasonable probability that it would have been different if not for the conversations.

The 1st Circuit agreed.

"[T]here is simply no basis for concluding that the conversations involved new facts or raised new matters," Judge Bruce M. Selya wrote for the court. "While the [defendant] repeatedly urges us to consider the possibility that the probation officer's discussions with the sentencing judge may have been improper and prejudicial, that would entail a fruitless exercise in speculation and surmise."

When an appellant forgoes objection, Selya continued, "he is in a woefully weak position to

insist that we indulge in such speculation."

The 17-page decision is *United States v. Bramley*, Lawyers Weekly No. 01-020-17. The full text of the ruling can be found here.

Reaffirmation of principle

Assistant U.S. Attorney Julia M. Lipez of Maine, who argued on the government's behalf, said the ruling reaffirms the principle that a federal District Court judge and a probation officer working for the court are entitled to have certain conversations in private, and, if the defendant does not object, a federal circuit court will be hard-pressed to find anything improper.

"As the 1st Circuit said in the opinion, the probation officer is an arm of the court, and so the court has blessed the idea that a probation officer should be able to advise the court in a confidential capacity as long as they're not sharing any facts the defendant isn't aware of that might impact the sentencing," Lipez said.

The defendant's appellate counsel, Jamesa J. Drake of Auburn, Maine, could not be reached for comment prior to deadline.

But Andover criminal defense lawyer Murat Erkan said that even if the defendant's trial counsel failed to object to the conversations, "the fact remains that the court pressed the mute button on five minutes of grave import to the defendant."

In order to preserve public confidence in judicial proceedings and to preserve the right of the accused to be heard at sentencing, the 1st Circuit, at a minimum, should have remanded the matter for further hearing in order to determine and reveal the contents of the ex parte discussion, Erkan said.

"A remand would repair the critical transparency [that] is a traditional and indispensable component of our system of justice," he added.

Samuel Goldberg, a criminal defense attorney in Cambridge, said it is not unusual in federal cases for judges to have brief conversations with probation officers.

Still, he said, *Bramley* is concerning to attorneys because it was completely based on faith.

"In other words, we have to assume there's nothing new being interjected [during the ex parte conversation], and if there is, the judge will bring it up with both parties," he said.

Additionally, Goldberg said, the 1st Circuit placed much emphasis on the fact that the

defendant's attorney did not object at the time.

"But how are you going to object to a two-minute conversation? All that'll do is antagonize the judge by suggesting you don't trust him," he said.

Goldberg said he also was struck by Selya's tone in the opinion. While it was clear the court was not buying the defendant's argument from the start, Goldberg said, he wondered why Selya opted to employ what comes across as an overly flippant style.

"The bottom line is someone's going to jail for a long time, and that's not so funny," he said. "It makes for enjoyable reading, but if you want to write a novel, go write a novel."

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>
> *— 1st Circuit Judge Bruce M. Selya*

Ex parte discussion

In mid-2013, while conducting a wiretap investigation into a drug-trafficking ring in Maine, the Drug Enforcement Agency intercepted communications between defendant Daniel Bramley and apparent ringleader Robert Evon.

Among other things, Evon requested that Bramley collect "paperwork" from a co-conspirator, a request that Bramley allegedly complied with, receiving a package containing $25,000 in drug proceeds.

Later, Bramley apparently obtained 20 pounds of marijuana, some of which he peddled in Vermont.

As the investigation progressed, the DEA obtained information from a cooperating witness — who turned out to be Evon himself — that, a decade earlier, he had procured large quantities of marijuana from Bramley and that, in 2012, Bramley had served as a middleman between Evon and a marijuana source in New York.

Evon also revealed that Bramley had arranged for him to obtain marijuana from another New York source and that the two of them subsequently met that source in San Francisco to

acquire liquid LSD, which they planned to distribute in Vermont and Maine.

In March 2014, a grand jury in U.S. District Court in Maine indicted Bramley on federal conspiracy charges.

Bramley eventually pleaded guilty.

A pre-sentence investigation report alleged that Bramley was responsible for 68 kilograms of marijuana and approximately 50 milliliters of liquid LSD, which was considered the equivalent of 5,000 kilograms of marijuana.

However, Bramley had not admitted to any specific quantities, so the court recognized, with the government's assent, that under U.S. Supreme Court precedent Bramley was subject to a maximum 60-month sentence instead of the 135 to 168 months called for under the sentencing guidelines.

The government then argued for a sentence close to the 60-month maximum, reasoning that Bramley's brushes with the law were more extensive than suggested by his criminal history score.

Bramley's attorney countered that those past brushes were remote in time, that his depression and diabetes called for leniency, and that a sentence of more than a year could expose him to deportation.

Meanwhile, Bramley initially denied to the court that unexplained amounts of cash in his possession came from unlawful sources, but when pressed he acknowledged that at least some of it could have been from marijuana sales.

After a two-week recess in Bramley's proceeding, the government offered wiretap records suggesting that his involvement with Evon was greater than he had characterized.

Toward the end of the resumed hearing, Judge George Z. Singal announced a brief recess and engaged in an off-the-record conversation with the probation officer.

Bramley's counsel did not object to the five-minute conversation.

Immediately afterward, the judge asked the parties to address the government's assertion that Bramley should be denied any credit for acceptance of responsibility. The judge also told Bramley's counsel that he did not "want to even consider doing something unless you get an opportunity to address it."

After arguments on that point, the judge found that Bramley had lied deliberately at least twice

during the sentencing phase and, based on the apparent falsehood, gave Bramley a 50-month sentence.

Before final imposition of the sentence, Singal had a 10-second off-the-record conversation with the probation officer while considering monetary increments of the sentence. Again, defense counsel did not object, and Singal imposed the mandatory $100 special assessment.

Bramley appealed, arguing that the two ex parte discussions between Singal and the probation officer violated his right to know the nature of information upon which he was being sentenced and to challenge its relevancy and accuracy.

No plain error

Conducting a plain error review, Selya stated that while existing precedent is protective of a defendant's right to disclosure of any information that might affect his sentencing disposition, many of those precedents involved communications between the judge and a third party.

On the other hand, communications between a judge and a probation officer are different because the probation officer is an extension of the court itself, Selya said. Still, he continued, any factually information that a probation officer shares with a judge that is relevant to sentencing must also be disclosed to the defendant.

"In the case at hand, the contents of the conversations are unknown — and that circumstance is the direct result of the appellant's failure to object," Selya said. "At any rate, nothing in the record suggests that those conversations imported new facts into the sentencing calculus."

Accordingly, he said, the defendant's claim failed the first two elements of the plain error review: a showing of clear and obvious error.

Similarly, he said, the defendant's claim failed the third step of the plain error analysis in that Bramley could not show that the alleged error affected his substantive rights.

That was because Bramley failed to show a reasonable probability that his sentence would have been different if not for the two off-the-record conversations, Selya stated.

In short, Selya said the 1st Circuit concluded that "all roads lead to Rome. The appellant's sole claim of error engenders plain error review, and that standard presents a high hurdle that the appellant cannot vault."