IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

****
UNITED STATES OF AMERICA,

v.
DYJUAN TATRO,
a/k/a Dy,

Defendant.
****

Criminal Action No.
O9-CR-578 (GLS)

SECOND SENTENCING MEMORANDUM OF THE UNITED STATES

In his Sentencing Memorandum, the Defendant, **DYJUAN TATRO** objects to a number enhancements and calculations that have resulted in a advisory guideline range of 151 to 188 months, minus any credit owed for relevant conduct.

I. Obstruction of Justice

The Defendant objects to a two-level enhancement pursuant to United States Sentencing Guidelines (U.S.S.G.) §3C1.1 (Obstruction of Justice) which directs:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

.

The Presentence Investigation Report (PSIR) at ¶¶27 to 30 correctly lays out the Defendant's attempts to have other OGK gang members find "Du", Dushawn Wilson, and have him to state that 1) he and the Defendant were friends, and 2) that the Defendant did not shoot him.

The Defendant argues that the phrase "Money Talks" is simply a reference from the Defendant to his brother to pay his lawyer for work on a post-conviction motion. However, a review of that letter, attached herein as "Exhibit A", shows that at no time does the Defendant discuss hiring an attorney. The letter only references getting a statement from Du. In the letter dated March 4, 2008, which was written over a series of days, the Defendant wrote:

> "What it do? I heard that Du is on trial right now. What's the verdict?? that? I really hope he beats that shit cause if my appeal doesn't go through I'm gonna need his statement. I put in my transfer so hopefully I'll be ?? up out of here soon...looked me up in the computer and it says I'm blood. Can you believe that? I asked the counselor about it and she said that they put that in there at Downstate... I just got a letter from Arthur telling me that Du got acquitted. Get on top of that ASAP, Money Talks!! His statement will get me back down. Hurry up. My package too!!"

As stated above, this letter is not about hiring an attorney.

In a letter written by the Defendant to an identified female but intended for Chris Mazone dated around April 10, 2008, the Defendant wrote:

> "...Lil Bro," "Now to this statement I need. Quite simply I need him to say who shot him (Eleek), how it happened, that it wasn't me and that me and him actually have a friendly relationship. If he can put down the truth contrary to the lies Andre told, I would be very grateful. Andre said that I came from around a Jeep, bare face talking on a cell, and said what, what, then started shooting. The statement will be between me & my lawyer and the court. He doesn't need to admit to any wrong doing. Please find

> that boy. I added you to my call list and I will try it sometime next week. If he's in Atlanta it's not a problem. First we gotta get him to agree to giving the statement... P.S. I will make you or copy down Andre's testimony. We gotta get this right."

Here it appears as if the Defendant is attempting to get someone to tell Du to state that "Eleek" was really the person who shot him. Also, in this latter it appears as if it is important to get Blakemore's trial testimony so that Wilson's statement can be tailored correctly.

In a letter dated May 4, 2008, written by the Defendant and intended for Chris Mazone, he wrote:

> "Keep tryin to holla at Du. He's gotta do this right. If you still have'nt talked to him, call Major (Mundhir Connor) and see if he can track this dude down through Quan, my appeal gets heard during the first week of June. So I want to put this motion in before then. Stay on top of that!!" Later in the letter Dyjuan wrote, "P.S. Ask Major if he sent out that money yet, too. Tell Guy to let me know when he's gonna come visit. If Major has'nt sent that money yet, you can send some." Additionally, inside the letter is an order form.

In a letter dated August 4, 2008, from the Defendant while incarcerated at the Five Points Correctional Facility to an identified female, two letters were included inside the envelope. Again in this letter numerous references were made to the status of other known OGK gang members. It appears from the letter that Wilson has been contacted in Atlanta but does not now appear to be willing to provide the statement the Defendant is looking for:

> "Kanan's alright, he had ?? get it on with sleeze cause he can afford to

> bail-out (Sleeze said he has snitched in short). Bris ??st (known to be Chris Mazone) got violated again but he max out in September. Elmo touched (tell him I said what up). K-won (known to be Kwon Lillard) is home, and the Jungle Junkies got everyones name in their paperwork. Be safe out there Ray"..."More or less, I've been tryin get lil Du to lay down what happened on paper for me. He's in Atlanta and ni _ _ a's got his # and they've talked to him but he has'nt been a man of his word. I got a private investigator on standby, paid for, but Du's saying one thing and doing nothing. That's all I got, you already know"... "DyDy"...

The Probation Department's belief that the Defendant attempted to obstruct justice appears to also be shared by Acting Justice of the Supreme Court Roger D. McDonough. In his September 20, 2010, decision, attached herein as "Exhibit B", denying the Defendant's CPL §440.10(1)(g) motion seeking to vacate his judgment of conviction, Judge McDonough found:

> "It is worth noting that the People offered testimony and evidence at the hearing which offered both circumstantial and direct proof that Wilson's statement was the direct product of defendant's solicitation through associates and agents, an that its contents were dictated and controlled by defendant and his operatives. Equally troubling is the repeated reference in defendant's letters to the role that money would play in securing this statement. While this evidence alone is not enough to completely undermine Wilson's credibility, when considered in conjunction with the aforementioned inconsistent and incredible nature of Wilson's testimony, significant questions exist to Wilson's truthfulness.

Judge McDonough then denied the Defendant's motion. Clearly the Court can also consider Judge McDonough's findings with respect to the conduct the Defendant engaged in when getting others to contact and tailor Wilson's testimony in a manner that the Defendant believed would be favorable to him. Again, Judge McDonough's findings support the Probation Officer's and the government's belief, that the Defendant

obstructed justice, warranting the two-level enhancement as recommended.

II. **Criminal History Computation**

The Defendant also objects to a two-level enhancement being applied pursuant to U.S.S.G. §4A1.1(d). The United States disagrees. This guideline enhancement was correctly applied by the Probation Department in this case and similarly situated co-defendants.

As detailed in PSIR ¶69, the Defendant committed the instant offense while under a criminal justice sentence. Specifically, the Defendant was under New York state Parole supervision when he committed Overt Acts 86 and 87. In addition, he was under Albany County Probation supervision when he committed Overt Acts 7, 10, and 83.

Application Notes to §4A1.1(d) hold that:

> *Two points are added if the defendant committed any part of the instant offense (i.e. any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.*

As detailed in ¶5(b) of his Plea Agreement, the Defendant admitted being a member of the OGK gag since 2000. By his own admission in his Acceptance of Responsibility admission found in ¶40 , he admitted "hanging out Downtown" at the age of 16, which would roughly be around the year 2002. As detailed in the Indictment, the RICO Conspiracy ran from about 2000 up to the date of the Indictment, October 23, 2009. Overt Act #7 is the first Overt Act referencing the Defendant which occurred on February 6, 2004. A review of the Defendant's criminal history details that the

Defendant was under either Parole or Probation supervision on the dates as alleged by the Probation Department. The two-level enhancement is correctly scored as the Instant offense dated from 2000 up until 2009, and during that time period the Defendant was either under New York State Parole or Probation supervision.

III. Tribute

The Defendant objects to PSIR ¶¶22 to 33 as being taken out of context and that they misrepresent the meaning and content of the conversation between the Defendant and others. The government disagrees with the Defendant. The Probation Department is correct that the conversations and letters detailed in these paragraphs demonstrate that non-incarcerated gang members financially and emotionally support the incarcerated gang members buy sending them money, letters, pictures, clothing, and also by visiting them. This is not done out of a sense of "tribute" as stated by the Defendant but rather out of a sense of loyalty. This evidence was earmarked as "association" evidence as the investigation revealed that other than family, only non-incarcerated OGK gang members supported incarcerated OGK gang members.

A series of monitored telephone calls, recorded while the Defendant was incarcerated at the New York State Sing Sing Correctional Facility, demonstrate that he expected other OGK gang members to financially support him, got updates on gang activity, and offered advice to his younger brother, OGK co-defendant, Kanan Tatro.

The following phone calls evidence that the Defendant expected financial support:

On January 12, 2007, the Defendant called his brother Kanan Tatro:

Kanan: Who dis?

Dyjuan: Dyjuan! Who the fuck else?

Kanan: What's choppin homie?

Dyjuan: Man, what's good?

Kanan: Huh?

Dyjuan: Yo, where you at?

Kanan: I'm at Sleeze' shit.

Later in the conversation, the Defendant stated:

Dyjuan: "Yo, K. Give them ni _ _ s my address and tell them to send me a couple hundred asap!"

On February 25, 2007, the Defendant called Kanan Tatro and they discussed other OGK gang members to include Bamp (Winfield Nicholson), Sleeze (Elijah Cancer) and others. Later, the Defendant again sought support, clothing and money, from other OGK gang members and stated:

Dyjuan: Yeah, but tell… Yeah, tell Montana (known to be OGK gang member Mundhir Connor) to get me them hoodies and shit. ASAP, though, you hear me?

Kanan: Yeah.

Dyjuan: Ain't shit though…. Uh, what you need to do is try to get ni__ ers send me money.

Kanan: Who?

Dyjuan: Bones, Sleeze, whoever.

On August 16, 2007, the Defendant called Kanan Tatro and later "three- way'd" "Fetti" (known to law enforcement officers as OGK gang Theodore Bickley) and included him in the telephone call. Again, the Defendant sought money:

Dyjuan: The next ni_ _ er buy a car and don't send me nothing…

UM : Yo!

Bickley: (Laughs)..Fuck out of here ni _ _ a. I just sent you some last night, ni_ _ er.

Dyjuan: Yeah.

Bickley: A hundred and twenty five.

Dyjuan: Yeah.

Bickley: I had …. of that ni-_ _ er.

At the end of the conversation they end the call by stating:

Kanan: All right G's up

Dyjuan: Yeah, Always.

It seems almost impossible to take out of content what these conversations were about. The Defendant was seeking either financial support or clothing from non-incarcerated gang members. As stated before, this is all evidence of an "association" between these OGK gang members.

IV. CONCLUSION

The United States respectfully contends that the Court deny the Defendant's

requests as detailed above.

Dated: July 26, 2011

Respectfully submitted,

RICHARD S. HARTUNIAN
United States Attorney

By: /s/
Carlos A. Moreno
Assistant United States Attorney
Bar Roll No. 105079

IN THE UNITED STATES DISTRICT COURT
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DYJUAN TATRO,
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CERTIFICATE OF SERVICE

Criminal Action No.
O9-CR-578 (GLS)

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2011, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

1. Lawrence Elmen, Esq.

/s/
Carlos A. Moreno
Assistant United States Attorney
Bar Roll No. 105079
July 26, 2011

Exhibit A

3-4-08

BH

What it do? I heard that Du is on trial right now. What's the verdict + that? I really hope he beats that shit cause if my Appeal doesn't go through I'm gonna need his statement. I put in my transfer so hopefully I'll b up out there soon. Did you send out the package already? I really hope so and I hope you ordered them tapes too.

M. Connor

SSDD though. It just do me. Major gets off parole this month, maybe he'll come through? Neal is mommy? When does Asshole get out of the box? If he comes out I'm going to the box. I don't have the energy. My new cellmate is an idiot, can't wait to get a single cell. How's your new jun coming along? I'm so bored right now, the same 20 songs are on the radio, there isn't shit on TV, and the visits they had on this weekend are stupid. The book I'm reading is good but I can only read so much at a time. The cuz's ba texas figure me out so they sent and hooked me up in their commissary and it [redacted] can you believe that? So I asked the counselor about it and she said that they put that in here at Downstate where the funds that came from I have no idea but I'll attribute it to how stupid these people are.

3-12-08

I got a few letters today (Nian, Mr. Decker, Blaum, and Ray) and Ray was telling me about them pictures? Did you ever go get the negatives developed? If not, try to get that done. Ray CD's in September. Hollla back.

Dyquan

P.S. Send this other letter to Blizz.

Tell Kite that the name of Suze Orman's book is Women and Money.

[redacted]

[redacted]

3-13-08

I just got a letter from Arthur telling me that Du got acquitted. Get on top of that ASAP, Money talks!! His statement will get me back down. Hurry up. My package too!!

3-12-08

Bizzy

What it really do? I can't really call it, staying out of that shit ya dig. I'm looking for catch one of these bucks through, I mean me, the hood made me, and they can't make it like us anymore. I read to figure these other lames out!! This shit is for the birds but niggas like us don't fall to that shit.

A reversal would do me real right about now, time and money is what that thing come down to. Sounds like his shit, that's a good look. I gotta get around some of my people, these lames are suffocating. They stare and guess all day but they'll never quite nigga out. They'll get it eventually cause I'm gonna spank the first frog that leaps. Wish, Front Page, real talk.

"Call me for anything just don't call me with shorts". I'm here, in good health, do what we do ya dig. Stay up and on your shit.

Dy Dy

"Ride on Sunday"

Exhibit B

At an All-Purpose Term of the Albany County Court, held in and for the County of Albany, in the City of Albany, New York, on the 20th day of September, 2010.

STATE OF NEW YORK COUNTY COURT
COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER

v.

INDICTMENT NO.: 9-9855

DYJUAN TATRO,

Defendant.

APPEARANCES:

HON. P. DAVID SOARES
Albany County District Attorney
For the People
(Shannon K. Corbitt, Esq., of Counsel)
Albany County Judicial Center
6 Lodge Street
Albany, New York 12207

FROST & KAVANAUGH, P.C.
Attorneys for Defendant
(Arthur Frost, Esq., of Counsel)
287 North Greenbush Road
Troy, New York 12180

Roger D. McDonough, Justice

Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10 (1)(g). The People oppose the requested relief.

Background

On October 23, 2006, defendant was convicted of two counts of the crime of Assault in

the Second Degree. He was thereafter sentenced by this Court to two consecutive prison terms of seven (7) years. The Judgment of conviction was affirmed by the Appellate Division, Third Department (People v Tatro, 53 AD3d 781 [3rd Dept. 2008]).

The conviction stemmed from a shooting incident wherein defendant shot Andre Blakemore (hereinafter Blakemore) and Dushan Wilson (hereinafter Wilson). At trial, Blakemore identified defendant as the shooter, and Wilson was deemed an unavailable witness as the result of a related and then pending criminal matter.[1]

Defendant subsequently moved to vacate his judgment of conviction, relying upon an October 14, 2008 sworn statement of Wilson asserting that defendant was not the individual who shot Blakemore and Wilson. By its own Decision and Order dated July 6, 2009, the Court granted defendant an evidentiary hearing to determine said motion. That hearing was conducted on May 18, 2010, at which time Wilson, defendant's sole witness, testified that defendant was not the person who shot him and Andre Blakemore in February 2006. On direct examination by defendant's counsel, Wilson testified as to various physical differences between the shooter and defendant, and attributed his failure to offer testimony at defendant's trial to his lack of knowledge as to who actually shot him, as well as concern over the charges pending against him.

On subsequent cross-examination by the People, and in response to questions by the Court, Wilson acknowledged that there was an approximately three month period from the time he was shot in February 2006 until the time he himself was criminally charged in May 2006. Wilson further acknowledged that he knew what the defendant looked like prior to the shooting, and knew, within days of the incident, that defendant had been arrested and charged with shooting him and Blakemore. Despite his professed interest in punishing the individual who shot him, Wilson testified that he never told any member of law enforcement or the District Attorney's office during this three-month period that defendant was not the shooter, or that they

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[1] Said matter is no longer pending, as Wilson was acquitted of murder and other charges following defendant's trial.

had arrested and charged the wrong man. In response to a question on cross-examination, Wilson also acknowledged that his October 2008 sworn statement came about after he was asked to provide such statement by defendant's brother.

The People offered the testimony of Investigator Christian Nunez, of the New York State Department of Corrections, and Special Agent Charles Kessler, of the Federal Bureau of Investigation, at the hearing, and offered through these witnesses a series of letters and recorded phone calls made by defendant during his post-conviction incarceration. Said letters and recordings were admitted in evidence, and contain defendant's specific requests and instructions to family members and others concerning the importance of securing a statement from Wilson, the possible means to contact Wilson in order to secure such statement, the use of a private investigator in this effort, and the proposed content of Wilson's statement, including the use of Blakemore's trial testimony in its creation.

CPL § 440.10(1)(g) Motion

CPL § 440.10(1)(g) provides that:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
>
> (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.[2]

It is well settled that "[t]o warrant a new trial, the newly discovered evidence must be

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[2] The People raise no challenges regarding defendant's: (1) diligence in producing the new evidence; and/or (2) diligence in bringing the instant motion.

such as to **probably, not merely possibly**, change the result if a retrial is had." People v. Penoyer, 135 AD2d 42, 44 (3rd Dept. 1988), **emphasis added**; see People v. Priori, 164 N.Y. 459 (1900). In order to determine if the newly discovered evidence creates such a probability, the Court must carefully and completely analyze and evaluate the character and credibility of said evidence. See People v. Wong, 11 A.D.3d 724, 725 (3rd Dept. 2004). In conducting such analysis here, the Court has the considerable benefit of presiding over not only the hearing at bar, but the initial trial itself. As such, the Court is positioned to more fully comprehend the quality and quantity of the evidence of defendant's guilt adduced at said trial, as well as to observe Wilson's demeanor during his hearing testimony, and evaluate his credibility.

Following a careful and complete analysis, the Court is unconvinced that Wilson's testimony is of such a character as to create a probability that, had such evidence been received at trial, the verdict would have been more favorable to defendant. Indeed, a review of Wilson's hearing testimony reveals it to be not only internally inconsistent, but, in portions, incredible on its face. For example, Wilson provides dramatically conflicting testimony as to whether he knew or was familiar with defendant before the incident, and whether he ever told anyone that defendant was not the shooter. Moreover, Wilson offers various, often inconsistent, and collectively unconvincing motivations for failing to previously exonerate defendant, especially during the period preceding his own criminal charges. Likewise, Wilson offers no explanation for the approximately two year delay between his own acquittal on murder charges and his October 2008 sworn statement to defendant's agent.

Furthermore, Wilson's testimony concerning his relationship with Blakemore, and his own affiliation with gang activity related to the shooting, stands in stark contrast to the trial testimony of Blakemore and the Albany Police Department's Gang Expert. So to, Wilson's admission that he relied upon "rumor" gleaned from jailhouse sources in his October 2008 sworn statement when contradicting Blakemore's trial testimony also serves to undermine Wilson's credibility. Most incredibly, Wilson asserts that he and Blakemore never had a conversation concerning who shot them following the incident, despite Wilson's professed interest in finding

out the identity of the shooter. Wilson's assertion that law enforcement and prosecuting officials never asked him if defendant was, in fact, the shooter, is equally incredible.

It is worth noting that the People offered testimony and evidence at the hearing which offered both circumstantial and direct proof that Wilson's statement was the direct product of defendant's solicitation through associates and agents, and that its content was dictated and controlled by defendant and his operatives. Equally troubling is the repeated reference in defendant's letters to the role that money would play in securing this statement. While this evidence alone is not enough to completely undermine Wilson's credibility, when considered in conjunction with the aforementioned inconsistent and incredible nature of Wilson's testimony, significant questions exist as to Wilson's truthfulness.

In sum, it is the considered judgment of the Court that content of Wilson's testimony, in light of other testimony and evidence at the hearing and at trial, is highly improbable and that Wilson himself is not credible. Therefore, the Court finds that it is highly unlikely that Wilson's testimony will produced a more favorable verdict for defendant at a new trial.

THEREFORE, defendant's motion to vacate his judgment of conviction pursuant to CPL § 440.10 (1)(g) is in all respects denied.

DATED: September 20, 2010
Albany, New York

R.D.M

ROGER D. MCDONOUGH
ACTING JUSTICE OF THE SUPREME COURT