

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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DAWUD BEY : NO. 04-269-5

MEMORANDUM AND ORDER

McLaughlin, J.

February 14, 2006

Dawud Bey pled guilty to conspiracy to manufacture and distribute cocaine. At his sentencing hearing, the government requested a two point adjustment for obstruction of justice and an upward departure of six offense levels for obstruction of justice. The Court took the government's motion under advisement and decides that motion here. The Court will grant the two point adjustment and will upward depart one offense level for obstruction of justice. The Court concludes that the total offense level in this matter is thirty and the criminal history category is two for an advisory guideline range of 108 to 135 months.

Under Sentencing Guidelines Section 3(c)1.1, the Court should increase the offense level by two levels if "(A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice during the course of 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." This adjustment applies if the defendant's obstructive conduct was related to a closely related case, such as that of a co-defendant. Application Note 1.

Under 18 U.S.C. §3553(b) and U.S.S.G. §5K2.0, a court may depart from the Guidelines when it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." A court may depart even when the factor is already taken into account elsewhere in the Guidelines, "if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense." U.S.S.G. §5K2.0(a)(3). Courts have used these provisions to upward depart in order to impose more than a two point adjustment for obstruction of justice. See, e.g., United States v. Ventura, 146 F.3d 91, 97 (2d Cir. 1998) (affirming two level enhancement under §3(c)1.1 and two level upward adjustment under §5K2.0, where defendant engaged in two separate acts of obstruction; United States v. Wint, 974 F.2d 961, 970-71 (8th Cir. 1992)(upholding four level upward departure for obstruction of justice).¹

¹ See also, United States v. Milton, 147 F.3d 414, 421-22 (5th Cir. 1998); United States v. Wade, 931 F.2d 300, 306 (5th Cir. 1991); United States v. Pulley, 922 F.2d 1283, 1289-90 (6th

The Court is persuaded by the reasoning of these cases and holds that the Court does have the discretion to depart upward under the Guidelines when the Court concludes that the instances of obstruction of justice vary from the norm by reason of the degree of seriousness or frequency of occurrence.

The Court turns now to a discussion of the evidence presented by the government at the sentencing hearing to support its request for an eight offense level increase for the defendant's obstruction of justice. The government argues that Mr. Bey obstructed justice by threatening five people: Paul Daniels; Robert Wilks; Craig Oliver; Malik Jones; and Captain Andre Matevousian. The evidence presented consists of hearsay testimony by Special Agent Kevin Lewis concerning conversations he had with some of the alleged victims, and tapes from the Title III wiretap of the cell of co-defendant Kaboni Savage. In addition to evidence with respect to the five alleged victims, the government presented tapes in which the government contends that Mr. Bey talked with Mr. Savage about hurting other potential witnesses, and about past incidents that the government contends constituted witness intimidation in other cases. Special Agent Lewis also testified about a murder and arson of the family of

Cir. 1991); United States v. Lewis, 235 F.3d 394, 396 (8th Cir. 2000); United States v. Ismoila, 100 F.3d 380, 397-98 (5th Cir. 1996).

one of the cooperating witnesses, other than the five alleged victims.

The Court will not consider the threatening remarks made by Mr. Bey about Captain Matevousian because there is no evidence that the threats were ever communicated to the Captain. It is also unlikely that such a threat to a security officer at the Federal Detention Center would amount to obstruction of justice. Nor will the Court consider the arson/murder because there was no evidence linking Mr. Bey to those crimes. The Court will not consider past incidents of alleged witness intimidation both because the tapes are ambiguous on this topic and because such conduct would not be related to the offense of conviction or a closely related offense.

The Court also does not believe that there was sufficient evidence of obstruction of justice with respect to Malik Jones. Special Agent Lewis did testify that Mr. Jones was going to enter into a cooperation plea agreement with the government and then changed his mind about cooperating because he had been threatened. He did not tell Special Agent Lewis by whom he had been threatened. There was some discussion on the tapes between Mr. Bey and others from which one could infer that Mr. Bey had stopped Mr. Jones from cooperating.

After the hearing, however, the Court received a letter from Malik Jones in which he complained that the government was

misstating his willingness to cooperate. He said that he was never a government witness. In view of the weakness of the testimony regarding Mr. Jones and his subsequent letter, the Court concludes that there was insufficient evidence of obstruction of justice with respect to Mr. Jones.

The Court concludes that there was sufficient evidence of obstruction of justice with respect to Paul Daniels, Craig Oliver, and Robert Wilks. Paul Daniels told Special Agent Lewis that after coming to a proffer session with the government in the summer of 2004, Mr. Bey told him that he was putting his family in danger. Mr. Bey told Mr. Daniels that all Mr. Bey needed to do was to make one phone call or have one visit to "make his magic happen" and that Mr. Daniels should not believe that just because he was the son of co-defendant Gerald Thomas, now deceased, he would get a pass. On the tapes behind Tab 2 and Tab 11 to the government's sentencing memorandum, Mr. Bey admits that he said almost the exact words to Mr. Daniels.

Similarly, Craig Oliver, a cooperating witness, told Special Agent Lewis about a conversation that he had with Mr. Bey and Mr. Savage through the toilet bowl. Mr. Bey told Mr. Oliver that his people knew where Mr. Oliver's people stayed. Mr. Oliver said that he believed it was a threat. In the tape behind Tab 14, Mr. Bey and Mr. Savage discuss the conversation that Mr.

Oliver related to Special Agent Lewis. Again, Mr. Bey confirms Mr. Oliver's report to Special Agent Lewis.

Co-defendant Robert Wilks told Special Agent Lewis that an inmate "Deda" told him that Mr. Bey communicated a threat for "Deda" to relay to Mr. Wilks. Mr. Wilks told Special Agent Lewis that he bumped into Mr. Bey on another occasion in the visiting room and Mr. Bey said that he was worried about whether Mr. Wilks was going to cooperate. On the tapes, behind Tab 13, Mr. Bey confirmed that he threatened Mr. Wilks.

The Court concludes that a three offense level increase is sufficient to take account of the attempted intimidation of the witnesses. One point is added for each witness who was threatened by Mr. Bey. None of the three was physically injured. Each one testified at the trial of Kaboni Savage so attempted obstruction was not successful.

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ORDER

AND NOW, this 14th day of February, 2006, IT IS HEREBY ORDERED that, for the reasons stated in a memorandum of today's date, the total offense level in this matter is thirty and the criminal history category is two.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.