

On April 13, 1997, Boggi filed a motion pursuant to 28 U.S.C. § 2255, based on five separate claims. First, Boggi alleges that the court understated the government's burden of proof when instructing the jury on reasonable doubt. Second, he alleges ineffective assistance based on counsel's failure to challenge the jury instruction regarding the Hobbs Act violation. Third, he claims ineffective assistance based on counsel's failure to object to the government's not obtaining necessary Department of Justice approval for the government's cross-appeal. Fourth, he claims ineffective assistance based on counsel's failure to appeal the application of Sentencing Guideline § 2B3.2. Finally, he claims that the court failed to advise him of his right to appeal at resentencing. The court finds the following: 1) the jury instructions on reasonable doubt were proper; 2) defendant was not denied effective assistance of counsel for any of the three bases he alleges; and 3) defendant was not advised of his right to appeal at resentencing. Accordingly, defendant's sentence will be vacated so that he can be resentenced and advised of his right to appeal.

FACTS

From 1984 until his conviction, Robert Boggi was the business agent for Philadelphia-based Local 1073 of the United Brotherhood of Carpenters and Joiners of America ("UBC"). The UBC is an international union consisting of numerous affiliated local unions and district councils representing carpenters and other types of skilled tradespersons. As business agent for

Local 1073, Boggi was responsible for overseeing the daily operations of the union. The union members were primarily engaged in residential carpentry. The federal grand jury superseding indictment against Boggi charged him with exacting numerous illegal payments and gifts from contractors between 1984 and 1990. Boggi was charged with one count of racketeering, in violation of 18 U.S.C. § 1962(c) (Count 1); three counts of unlawful receipt of money or a thing of value by a union official, in violation of 29 U.S.C. § 186 (Counts 2-4); and one count of extortion conspiracy, in violation of 18 U.S.C. § 1951 (Count 5). The indictment also sought the forfeiture of the racketeering proceeds pursuant to 18 U.S.C. § 1963 (Count 6).

Following a seven-day trial, the jury returned a guilty verdict on all but one count. Boggi filed a motion for judgment of acquittal or, in the alternative, for a new trial. The court denied Boggi's motion and sentenced Boggi to 48 months imprisonment. The court applied Sentencing Guideline § 2C1.1, establishing penalties for extortion by public officials, as the applicable Guideline provision and sentenced Boggi accordingly. In doing so, the court overruled the Government's argument that the applicable Guideline was Sentencing Guideline § 2B3.2. The Court of Appeals affirmed the convictions but vacated the sentence, and remanded the case for resentencing. The Court of Appeals held that this court incorrectly applied Sentencing Guideline § 2C1.1 instead of Sentencing Guideline § 2B3.2 or Sentencing Guideline § 2B3.3. The court resentenced under Sentencing Guideline § 2B3.2 to 63 months imprisonment on Counts

1 and 5, 60 months on Counts 3 and 4, to run concurrently, and 3 years supervised release. Boggi was also fined \$12,500 and ordered to pay a \$200 special assessment. This motion followed.

DISCUSSION

I. The jury instruction on the Government's Burden of Proof.

Boggi argues that the jury instruction understated the government's burden of proof on reasonable doubt. He contends that the following instruction was erroneous:

"The Government has the burden of proving the defendant guilty beyond a reasonable doubt. . . .

Now, it's not proof to a moral certainty or beyond every possible doubt, reasonable doubt, proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.

There aren't too many things in life we know with absolute certainty so that that's not required in a criminal case. But if based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, you find him guilty.

If on the other hand you think there's a real possibility that he's not guilty, you must give him the benefit of the doubt and find him not guilty."

[Transcript date 8/2/94 at pages 15-16].

His argument is that the language "firmly convinced" suggests the burden is only "clear and convincing," not "beyond a reasonable doubt."

Boggi cites no case in which a conviction was reversed for using "firmly convinced" in jury instructions. The use of precisely this language has been affirmed in several recent cases. In United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), cert denied, 500 U.S. 915 (1991), the Court of Appeals upheld a conviction after the judge had stated reasonable doubt

"is a doubt which would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in their own affairs. That's what reasonable doubt is, and that in order to convict, in order to find proof beyond a reasonable doubt, you must be firmly convinced of the guilt of someone."
Pungitore. 910 F.2d at 1145.¹

The phrase "firmly convinced" can also be found in the Federal Judicial Center, Pattern Criminal Jury Instructions.

"Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty."
Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (instruction 21).

In the recent case of Victor v Nebraska, 511 U.S. 1 (1994), the Supreme Court explored a variety of definitions of "reasonable doubt." In determining whether jury instructions properly conveyed the notion of "beyond a reasonable doubt," the court looked to whether the "language impressed upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." Id. at 15 (quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979)). The language challenged by the defendant certainly meets this standard.

¹It should be noted that the most recent Court of Appeals case involving jury instructions and reasonable doubt is of no help to defendant's proposition. That case, United States v. Isaac, 1997 WL 429455 (3d Cir. 1997), deals with instructions involving the jury drawing one of two possible inferences. In that case the Court of Appeals affirmed the conviction while expressing disapproval of the court's two inference instruction.

In her concurring opinion in Victor, Justice Ginsburg cited the challenged language with approval as a "clear, straightforward, and accurate" explication of reasonable doubt. Victor v. Nebraska, 511 U.S. at 27 (1994)(Ginsburg, J., concurring in part and concurring in the judgment). After setting out the Federal Judicial Center's proposed jury instruction on reasonable doubt, Justice Ginsburg stated "[t]he 'firmly convinced' standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a "real possibility" that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly." Id. The charge was not erroneous.

II. The three ineffective assistance of counsel claims.

Claims of ineffective assistance of counsel are evaluated under the two-part test established in Strickland v. Washington, 466 U.S. 668, 686-90 (1984). The movant must show both that his counsel's performance was deficient and that the deficient performance so prejudiced the defense that the result of the trial is unreliable. Counsel's performance must comply with prevailing professional norms, and must be reasonable in light of the facts of a given case. There is a strong presumption that counsel's assistance is adequate. The movant must also demonstrate "prejudice," defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 697.

Using this two part test, none of the cited deficiencies rise to the level of ineffective assistance of counsel.

A. The jury instruction on the Hobbs act violation.

The jury charge was correct on the Hobbs violation with which Boggi was charged: 18 U.S.C. § 1950; see 18 U.S.C. § 1951 (b)(2). The evidence was sufficient to establish that victims parted with property as a result of wrongful use of force or fear.

Defense counsel was not ineffective for not insisting on an instruction that the petitioner had to be acquitted absent an explicit promise to do something or to refrain from doing something in exchange for the payment. Neither was counsel ineffective for failing to raise this issue on appeal. Boggi was convicted of extortion by "threatened force or fear[.]" 18 U.S.C. § 1951(b)(2). The government correctly points out that extortion by threat of force or fear is inconsistent with an explicit promise. The only possible promise is the implicit promise to forego acting on the implicit or explicit threats.

There is ample evidence on the record to support Boggi's conviction for threats and implicit promises to avoid taking action in return for money payments. PCA and Bienenfeld both acquiesced in Boggi's demands to prevent Boggi from using his position with the labor union to inflict serious economic harm. Boggi also threatened James Bormann, the superintendent at Polo Run. Bormann testified that Boggi always behaved in an intimidating manner and would generally conclude his visits to

Polo Run by vowing to "take his business to the streets."
Bormann's testimony provided evidence of Boggi's threats of physical injury, and implicit promise to refrain if his demands were met. As a result, even if the proposed instruction had been given, there is no reasonable likelihood Boggi would have been acquitted of conspiracy to commit extortion and all predicates involving extortion. No prejudice has been shown. There has been no constitutional violation.

B. The Government's cross-appeal.

Boggi contends that he was denied ineffective assistance of counsel because counsel failed to move to dismiss the government's cross-appeal for failure to obtain necessary Department of Justice approval. However, the Solicitor General approved the appeal on April 5, 1995. The government complied with the requirement for obtaining approval of the Solicitor General before the government "further prosecute [the] appeal[.]" 18 U.S.C. § 3742(b) (1988 & Supp. 1997).

C. Application of Sentencing Guideline § 2B3.2.

Defendant claims the extortion offenses should have been sentenced under Sentencing Guideline § 2B3.3, rather than § 2B3.2. The Court of Appeals made clear the applicable criteria:

If the court finds that a victim could reasonably have interpreted Boggi's threats to cause labor problems as express or implied threats of violence to person or property, or of economic harm so severe as to threaten the existence of the victim, then the district court may resentence Boggi pursuant to § 2B3.2. If, however, the court finds that there was clearly no such threat of violence or economic ruin, then it may properly apply § 2B3.3.

United States v. Boggi, 74 F.3d 470, 478 (3d Cir. 1996)

This court held a sentencing hearing in accordance with the Court of Appeals mandate, and found the facts supported the application of § 2B3.2 to the extortion offenses. The Court of Appeals had already affirmed the conviction under the required application of Sentencing Guideline § 2B3.2 or Sentencing Guideline U.S.S.G. § 2B3.3. The opinion made clear that the evidence would support sentencing pursuant to Sentencing Guideline § 2B3.2. Counsel could have reasonably concluded that further appeal would have been pointless in view of that opinion reversing this court's prior sentence and the specific instructions for sentencing on remand. Counsel was not ineffective in failing to appeal the application of that section. The decision was reasonable in light of the facts of the case and no prejudice existed.

III. The District Court's failure to advise Boggi of his right to appeal upon resentencing.

The transcript of the resentencing does not show that defendant was expressly advised of his right to appeal as he had been when originally sentenced. Even though Boggi obviously knew of his right to appeal under Fed. R. Crim. P. 32(c)(5), defendant is entitled to resentencing, so that he can once again be informed of his right to appeal the sentence. The defendant will be resentenced before this court in accordance with the mandate of the Court of Appeals and will be advised of his right to appeal the sentence. At the resentencing counsel may not attack the underlying conviction, but may argue whether Sentencing

Guideline § 2B3.2 or Sentencing Guideline § 2B3.3 should apply
applies based on the evidence presented at trial.

CONCLUSION

The court will not set aside the convictions but will vacate the sentence. Upon reimposition of sentence, the defendant may take an appeal if he so chooses. An appropriate order follows.

