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Judge Tells Jury That A Testifying Defendant Has Motive to Lie

By David Zapp

When the Bronx NYPD conducts a search that results in the seizure of a gun, there is always a chance the cops will tailor their testimony in court to uphold the search. This may not be a scientific conclusion, but experience bears it out. U.S. v. Prince Gaines, 2d Cir. July 20, 2006, is a case in point.

Late one night in January, Prince Gaines was picked up by a livery cab on a Bronx street corner. Shortly thereafter, the cab was pulled over by the police. Officer Cilento walked up to the cab, opened the rear passenger door and told Gaines to step out while he conducted a search of the backseat. The officer found a small-caliber handgun wedged between the seat cushion and the seat back. Gaines was placed under arrest, and, because of his previous criminal history, was charged with violating 18 U.S.C. § 922(g), a provision prohibiting convicted felons from possessing a firearm or ammunition. When the case went to trial, Gaines was facing up to 96 months' imprisonment.

The morning the trial was scheduled to begin, Gaines's attorney moved to suppress the gun seized during the search of the cab. The attorney claimed that the police had given conflicting explanations for pulling the cab over, and, further, that Officer Cilento had recognized Gaines as he climbed into the cab – Cilento had previously stopped Gaines for possession of marijuana. In light of the motion, the judge decided to conduct a brief suppression hearing before commencement of the trial proper, in order to determine whether the gun could be used as evidence.

In response to an alarming increase in livery cab driver murders, in 2000 New York City's then mayor, Rudolph Giuliani, ordered all livery companies to install bulletproof partitions or security cameras in their cabs as an extra safety measure. Cabs equipped with security cameras had to display a sticker indicating such. At the suppression hearing, Officer Cilento testified that he had pulled over Raul Juarez, the cab owner and driver, because he could tell there was no partition separating the front and rear seats of the cab. This, he further testified, despite the fact that it was difficult to see through the car's tinted windows in the dark. Although Mr. Juarez had a sticker attached to one of the cab windows indicating he had a security camera installed, Officer Cilento claimed not to have seen it. As a result of his statements at the hearing, "[the judge] found [Cilento's] manner to be credible," and denied Gaines's motion to suppress the weapon.

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Once the jury trial got underway, Cilento's testimony was called into question when Raul Juarez, the cab driver, took the stand. This is one of the benefits of a trial. The facts of the case are presented much more broadly than they are at a preliminary hearing focusing on a single issue. At trial, the prosecutor generally attempts to present the broadest factual picture so that the jury has a full understanding of the case. For that reason, no doubt, the prosecutor in *U.S. v. Prince Gaines* had Juarez identify his cab as the one stopped during the arrest, and asked him to describe the features of his car. Here was a civilian who had no interest in the outcome of the case, and clearly no bias towards either side. While describing his car, Juarez casually stated that his windows were not tinted, directly contradicting part of Officer Cilento's testimony during the suppression hearing. If the defendant had pled guilty, once his motion to suppress had been denied, to avoid going to trial, this defect in the prosecution's evidence never would have come to light.

As the trial came to a close, the judge addressed the members of the jury before they began deliberation. Because Gaines had testified in his defense, the judge instructed the jury that, "...the defendant has a deep personal interest in the result of his prosecution. This interest creates a motive for false testimony and, therefore, the defendant's testimony should be scrutinized and weighed with care." The judge's instruction undermined the presumption of innocence; it carried the implication that this defendant had a motive to lie, and, by extension, that he was guilty. There is, after all, no motive to lie in the mind of an innocent defendant. The likelihood is that the judge in *Prince Gaines* had no intention of predisposing the jury to convict; judges become so used to seeing guilty defendants before them that, over the years, they often adopt an almost subconscious stance of assuming most defendants are guilty, or they would not find themselves in court in the first place. Such "institutional thinking" can infuse judges' words and body language without their realizing it.

The jury ultimately found Gaines guilty, and he was sentenced to 92 months incarceration. But Gaines appealed his conviction. The appellate court vacated the district court's order denying the suppression motion, citing the conflict between Officer Cilento's and the cab driver's testimonies regarding the condition of the cab. Even if some of Cilento's testimony was accurate, the appellate court felt that the conflicting evidence impacted upon the "credibility of [Cilento's] other observations and testimony." The appellate court also reversed the conviction, finding that the district judge's jury instruction "prejudiced Gaines, and a new trial [is] required."

In sum, the appeals court ordered Gaines "a new evidentiary hearing on [Gaines's] motion to suppress evidence," and also that, "[i]n the event [that] the motion is denied once again, he [is] entitled to a new trial."

Fast-Track Program Slow to New York

By David Zapp

If a previously deported alien is apprehended in the United States and charged with illegal re-entry, he can face more than 50 months of imprisonment. However, this is not always the case. In some districts, fast-track programs are in place that can greatly reduce the length of a sentence for illegal reentry.

In 1994, the Southern District of California was processing 600,000 arrests a year along the Mexican border. In response to this large, and increasing, number of arrests, the United States Attorney for that district decided to implement a fast-track program for defendants who violated 8 U.S.C. § 1326 (Reentry of Removed Aliens). In exchange for a 24-month sentence, defendants waived their rights to an indictment by a grand jury, trial by jury, presentation of a pre-sentence report, and appellate review of the sentence. Because the program successfully lessened the strain on the Southern District of California's prosecutorial resources, other southwestern districts decided to create fast-track programs of their own.

In 2003, Congress approved the programs as part of the PROTECT Act ("PROTECT" stands for Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today), and Attorney General Ashcroft expressed the principle on which the Justice Department would authorize a fast-track program in any district: "[A] defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants." Today, thirteen federal districts have fast-track programs: Arizona; Central, Southern, Eastern and Northern California; Idaho; Nebraska; New Mexico; North Dakota; Oregon; Southern and Western Texas; and the Western District of Washington.

But why should illegal reentry defendants in San Diego be able to get a break on sentencing when those in New York must face a sentence strictly based on Guidelines? Quite simply, because New York is not a fast-track jurisdiction. At least not yet.

In *US v. Mejia* (2d Circ., 2006), Jorge Mejia appealed a 37-month sentence from the Southern District of New York for illegal reentry. He argued that his sentence created an unwarranted sentencing disparity, and that he should have received a sentence comparable to one he would have received had he been charged in a district with a fast-track program. But the Second Circuit Court of Appeals affirmed the lower court's decision stating, "We join other circuits in holding that a district court's refusal to adjust a sentence to compensate for the absence of a fast-track program does not make a sentence unreasonable."

However, the appeals court may have been sending an encouraging message when it added: "The record does not reflect whether the Southern District of New York could qualify for a fast-track program, or why qualification has not

been sought (or if sought, not granted). . . the SDNY has more than twice the number of illegal reentry cases as the districts of Idaho and Nebraska, and more than four times the number as the districts of North Dakota and Western Washington.”

Unfortunately, this will not help defendants facing illegal reentry prosecution in the Southern and Eastern Districts of New York in the immediate future. The Court of Appeals held that fast-track plea bargains are only permissible in fast-track districts, which the New York districts presently are not, but there appears to be some real prospect of their ultimately joining the fast-track “club.”

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