

Vindictive Prosecution in the Ninth Circuit

By: Brett A. Purtzer, Aug 2007

With the decision in State v. Korum, 157 Wn.2d 614 (2006) fresh in most attorney's minds regarding prosecutorial vindictiveness, it is refreshing to see that the Ninth Circuit Court of Appeals can objectively review a case and not only cite the appropriate law, but also apply the law to the facts to reach the appropriate result. U.S. v. Jenkins, decided July 17, 2007, is such a case.

In Jenkins, the Ninth Circuit affirmed a district court's dismissal of an indictment on alien smuggling charges. Ms. Jenkins had been stopped on two separate occasions attempting to enter the United States from Mexico when customs officers discovered non-citizens concealed in her vehicle. Ms. Jenkins, after being issued Miranda warnings, stated that she was driving the vehicle across the border in exchange for money. On a third occasion she was stopped again, but instead of finding non-citizens, the customs officers found marijuana concealed in the interior panels of her vehicle. Again, Jenkins was given Miranda warnings, waived her rights and stated that she'd been paid \$500.00 to bring a non-documented alien across the border and that she believed the vehicle contained that individual.

Jenkins was charged with importing marijuana and at trial Jenkins testified that she did not know that the van contained marijuana because she believed she was smuggling aliens. After the jury began deliberating, the government indicted Jenkins for smuggling all of the individuals from the prior incidents. Jenkins moved to dismiss the alien smuggling indictment on the grounds of vindictive prosecution, arguing that the charges were brought only after she elected to testify in her defense in the marijuana importation trial. Her defense was that she believed she was smuggling aliens, not marijuana.

The district court granted Jenkins motion to dismiss. The Court of Appeals, in affirming the decision, noted that the government had been aware of Jenkins' alien smuggling activities well before deciding to file charges. The court explained that its ruling was a "prophylactic" measure intending to prevent the chilling of a defendant's ability to take the witness stand.

In affirming the district court's decision, the Court of Appeals noted that the government had violated Jenkins' right to due process of law if it filed the alien smuggling charges to penalize her for exercising a protected, statutory constitutional right. The court noted that Jenkins could establish prosecutorial vindictiveness by producing direct evidence of the prosecutor's punitive motivation towards her or if she could show that the alien smuggling

charges were filed because she exercised her statutory, procedural, or constitutional right in circumstances that rise to an appearance of vindictiveness. The court found that Jenkins involved the latter situation because the record did not show any evidence of the government's improper motivation. Once such presumption is established, however, the prosecutor must overcome the presumption by objective evidence justifying the prosecutor's action.

Here, the government argued that Jenkins' confession made the evidence of the alien smuggling charges stronger than what the government previously had. The court noted, however, that the government's explanation was unpersuasive as cases within that jurisdiction had been prosecuted for alien smuggling on evidence much less than was presented here. Because the government could not show that there was a non-vindictive purpose for bringing the charges, the Court of Appeals affirmed the district court's order dismissing the indictment.

Jenkins is refreshing because it shows that even after it appears that the concept of prosecutorial vindictiveness is no longer valid in Washington, Jenkins gives hope that a court or courts will hold the government to its responsibility of charging when appropriate and not allow the government to exercise its considerable power to punish individuals when they exercise their constitutional rights, such as the right to testify or the right to put the government to its burden of proof by requiring the government to go to trial.

End

Page 2 of 2