One Step Over the Line: Second Circuit Revisits Limitations on Proffer Agreements

Bruce Maffeo, New York Law Journal

As experienced federal criminal practitioners are all too well aware, the limited protections for statements provided by a client in the course of plea negotiations against their later use by the prosecution can create a precarious trap for the unwary. Should the plea negotiations fail and the prosecution proceed to trial, prevailing case law in the Second Circuit severely limits trial counsel's ability to either elicit testimony through cross-examination or make jury arguments that are inconsistent with statements provided by their clients in the earlier plea negotiations, and can therefore hobble counsel's ability to try the case. A recent decision issued by the Second Circuit, *United States v. Rosemond*, No. 15-940-cr, slip op. (2d Cir. Nov. 1, 2016) provided much needed guidance on the limits on the government's ability to restrict defense counsel from mounting an effective defense under these circumstances.

By way of brief background, in federal courts, the continuing use of mandatory minimum sentences in drug cases and the jaw dropping potential range of incarceration in fraud cases under the sentencing guidelines provide powerful incentives for clients to explore a negotiated disposition rather than confront the risks attendant to a conviction after trial. See generally J. Bruce Maffeo and E. Niki Warin, "Lost: the Vanishing Relevance of the Federal Fraud Guidelines," N.Y.L.J. (Dec. 1, 2010). Indeed, counsel's failure to explore or convey a plea offer has been held to constitute ineffective assistance by the U.S. Supreme Court. *Lafler v. Cooper* , 566 U.S. 156, 132 S. Ct. 1376, 1388 (2012) (holding that a defendant may show ineffective assistance of counsel where counsel caused the rejection of a plea leading to trial and a more severe sentence); *Missouri v. Frye , 566 U.S. 133*, 132 S. Ct. 1399, 1408 (2012) ("[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). Moreover, because the sentencing guidelines specifically provide that cooperation with the government can—on the government's motion—enable the sentencing court to depart from otherwise applicable mandatory minimums or sentencing guidelines, defendants and their counsel frequently consider exploring that option as well. U.S. Sentencing Guidelines Manual §5K1.1 (U.S. Sentencing Comm'n 2015).

Where cooperation is being pursued, the traditional practice in federal court, and increasingly in New York state courts, is for counsel and the defendant to meet with the government prosecutor(s) and agent(s) in what is referred to in the vernacular as a "proffer session." The ostensible purpose of the meeting is to allow the government an opportunity to evaluate a defendant's credibility and usefulness before deciding whether to agree to enter into a formal cooperation agreement. At the outset of the meeting, the defendant and his or her counsel are asked to review and sign a written agreement that restricts the government from introducing the defendant's statements at trial should negotiations fail subject to various exceptions. Chief among these exceptions is the proviso, similar to that employed in the *Rosemond* case, that the statements could be used "as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of [Rosemond] at any stage of a criminal prosecution." *United States v. Rosemond*, No. 15-940-cr, slip op. at 13 (2d Cir. Nov. 1, 2016).

The enforceability of these agreements and the government's concomitant ability to introduce statements from a proffer in the event of a breach have been repeatedly upheld where defense counsel makes a factual assertion either in opening, summation or cross-examination that is flatly inconsistent with the defendant's proffer statements. See, e.g., United States v. Barrow , 400 F.3d 109, 125 (2d Cir. 2005); *United States v. Roberts , 660 F.3d 149, 157-58* (2d Cir. 2011); *United States v. Hardwick , 544 F.3d 565, 570* (3d Cir. 2008); *United States v. Krilich , 159 F.3d 1020, 1025* (7th Cir. 1998); *United States v. Rebbe , 314 F.3d 402, 405* (9th Cir. 2002). A more difficult question, however, is presented "when counsel's arguments or questions assert facts implicitly rather than directly that arguably contradict a statement made during proffer session." *Barrow*, 400 F.3d at 119.

The precise distinction between implicit and explicit assertion of facts is murky at best and was at the heart of the Second Circuit's decision in *Rosemond*. Rosemond, a prominent music producer, was charged in the Southern District of New York with murder-for-hire arising out of the shooting death of Lowell Fletcher, an associate of 50 Cent, a rival producer who had been embroiled in a longstanding feud with Rosemond over a mutual client, The Game. Fletcher and another associate of 50 Cent were arrested and convicted in 2007 of charges stemming from their assault of Rosemond's then minor son outside of Rosemond's studio in lower Manhattan. After Fletcher's release from prison two years later, he was found shot to death in the Mt. Eden section of the Bronx.

Rosemond proceeded to trial before now Chief Judge Colleen McMahon, where the government's proof consisted of several former associates of Rosemond, who testified generally to the alleged feud between Rosemond and 50 Cent and the assault on Rosemond's son. The government's primary witness on the homicide was Brian McLeod, a former co-defendant of Rosemond who subsequently pleaded guilty to the murder-for-hire charge and testified that he provided Rosemond with details regarding Fletcher's whereabouts after his release from prison and agreed to arrange with others to shoot Fletcher. However, McLeod, both in his statements to the government prior to trial as well as his testimony at trial, repeatedly denied that Rosemond had ever requested that Fletcher be murdered, much less discussed it. Because the federal murder-for-hire statute, 18 U.S.C. §1958, requires the government to prove the defendant's specific intent to kill, any proof of Rosemond's intent became a key issue at trial. See U.S. Attorneys' Manual, §9-60.900 (2010). During cross-examination of McLeod, defense counsel repeatedly elicited testimony that Rosemond never had told him that he wanted Fletcher murdered and that McLeod had never discussed murdering Fletcher with any of the other participants in the shooting. Although the government did not object to these questions during the cross-examination itself, the next day at trial the government moved to introduce a portion of a proffer statement provided by Rosemond prior to trial (while represented by different counsel) in which he discussed the murder and said that he "knew [Fletcher] was going to be dead."

In opposing the government's motion, Rosemond's counsel argued that his cross-examination on these points was designed to attack McLeod's credibility and underscore the gap in the government's proof on Rosemond's intent—two areas previously thought to be permissible under the prevailing case law at the time. *United States v. Oluwanisola , 605 F.3d 124, 132-34* (2d Cir. 2010); *Barrow*, 400 F.3d at 119. Chief Judge McMahon disagreed, ruling that the questions "implied that Rosemond did not participate in a *murder* conspiracy or order the *murder* of Lowell Fletcher," and as such contradicted Rosemond's

proffer statement. *Rosemond*, No. 15-940-cr, slip op. at 35. Judge McMahon found that Rosemond's counsel had thus opened the door to the government's introduction of the portion of Rosemond's proffer but declined the government's request to present evidence of the same to the jury, citing her concern with the spillover prejudice to Rosemond's co-defendant. Instead, Chief Judge McMahon precluded defense counsel from arguing the issue of Rosemond's intent to murder in his closing remarks. The case resulted in a hung jury and a mistrial as to Rosemond. The case was then retried against him alone, again before Chief Judge McMahon, where she adhered to her earlier ruling, limiting the cross-examination of the same witness who was called by the government at the second trial to prior inconsistent statements, and prohibiting any defense arguments to the jury "that it was a mere shooting" without a specific intent to murder, unless the defense was willing to allow the government to use the proffer statement. Defense counsel avoided these inquiries and the proffer statement was not admitted. This time, the jury returned a verdict of guilty, and Rosemond was sentenced principally to a term of life imprisonment plus 20 years.

The Second Circuit reversed, holding that the trial court's decision had "unduly restrict[ed] Rosemond's ability to defend against the charges." Specifically, the Circuit Court found that the trial court had (1) limited defense counsel's cross-examination of McLeod's repeated denials that Rosemond had ever requested, much less discussed, Fletcher's murder with him, and (2) precluded defense counsel from arguing in his jury address the shortfall in the government's proof. In reaching its decision, the Circuit reviewed the prior precedent in this area and provided a bright line ruling as to when defense counsel's cross-examination or jury arguments will trigger a waiver of the proffer protections. For example, the court held that trial counsel was entitled to argue that McLeod's testimony failed to support the government's burden to prove Rosemond's intent, distinguishing such an argument from affirmatively stating that Rosemond had not intended to murder Fletcher. *Rosemond*, No. 15-940-cr, slip op. at 31-33. Similarly, in cross-examination, the court found that defense counsel "did not accuse McCleod of actually conspiring with Rosemond to commit a non-fatal shooting, or make factual assertions to that effect. To the extent the questions might also have carried the implication that Rosemond did not actually intend to have Fletcher murdered, they were no more inconsistent with the proffer waiver than entering a plea of not guilty or challenging the sufficiency of the evidence." *Rosemond*, No. 15-940-cr, slip op. at 37.

Finally, the Circuit catalogued the arguments that would and would not trigger a proffer's introduction. Included in the latter are arguments that the government had failed to establish the elements of the crime and cross-examination that witnesses were "lying, mistaken, or … not remembering an event accurately. Id. at 29. Arguments likely to trigger the admission of proffer statement, on the other hand, include a factual assertion that the crime was "an intended kidnapping gone wrong," when the defendant had admitted that the shooting was an intentional murder in a proffer session. Id. at 30.

Its immediate impact on Rosemond aside, the Second Circuit's decision provides both the bench and bar much needed clarity in an area fraught with peril for defense counsel. That said, defense counsel need to remain conscious that the proverbial "one question too many" can lead to disastrous consequences.