10-1978

Dunn v. United States

Lewis F. Powell Jr.

PRELIMINARY MEMORANDUM

Dec. 1
~~October 13,~~ 1978 Conference
List 2, Sheet 1

No. 77-6949

DUNN (Convicted of making false statements before grand jury)	Cert to CA 10 (Barrett, Doyle, & Logan)	
v.		
UNITED STATES	Federal/Criminal	Timely

1. SUMMARY: Petr seeks review of his conviction under 18 U.S.C. § 1623 of making false statements before a grand jury. The government's case was based on § 1623(c), which allows the government to make its case if it proves that two sworn statements are so inconsistent that one of them must be false. Petr contends (1) that declarations made before a federal grand jury under a grant of immunity cannot be used to establis

I would deny, as petr has admitted that his immunized testimony was false. He therefore cannot claim the protection of the immunity. David

the corpus delecti of an inconsistent declarations prosecution under § 1623(c) without it first being established that the immunized declarations were false and (2) that petr's admission before a federal district judge that 90% of his grand jury testimony was false cannot be relied upon in sustaining a § 1623 conviction when the only theory presented to the trial court was one of inconsistent declarations.

2. STATUTE INVOLVED: 18 U.S.C. § 1623(a) makes it a crime to knowingly make a false material declaration under oath "in any proceeding before or ancillary to any court or grand jury of the United States . . . § 1623(c) provides for situations in which a single witness makes two or more inconsistent sworn statements:

> "(c) An indictment or information for violation of this section alleging that in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false need not specify which declaration is false . . ."
>
> "In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury."

Thus, the government need not prove which of the inconsistent declaration was false through extrinsic evidence, but rather, the falsity of one of the two declarations is inferred from its inconsistency with the other.

3. FACTS: In June 1976, under a grant of immunity pursuant to

18 U.S.C. § 6002, */ petr presented grand jury testimony implicating one Musgrave in illegal drug activity and leading ultimately to Musgrave's indictment. In September 1976 petr appeared in the office of Musgrave's attorney and in the presence of the attorney and a notary public gave an oral statement under oath which was recorded and transcribed in which he recanted his grand jury testimony implicating Musgrave. Petr stated that much of what he had previously told the grand jury was not true. Armed with these admissions, Musgrave's attorney challenged the indictments charging Musgrave with illegal drug activity. In an evidentiary hearing on Musgrave's challenge to the indictments, petr reaffirmed under oath that he had lied to the grand jury. In particular, petr stated that "possibly 10%" of his grand jury testimony had been true.

Shortly thereafter, petr was charged with five counts of making false statements to a grand jury in violation of § 1623. Evidence introduced against petr included excerpts from his testimony before the grand jury, his testimony in the attorney's office, and his testimony at the Musgrave evidentiary hearing. The jury found petr guilty on three of the five counts.

The CA 10 affirmed. The court first agreed with petr that the proceeding in the attorney's office was not a proceeding "ancillary to a court or a grand jury of the United States," but held that the evidentiary hearing conducted in the district court on Musgrave's challenge to his indictment did constitute a proceeding ancillary to the grand jury pro-

*/ Section 6002 provides:
"No testimony or other information compelled under the order may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

ceeding. In this regard, the court also held that admission into evidence of petr's testimony at the Musgrave hearing did not create a fatal variance between proof at trial and the indictment. (The indictment contained excerpts from petr's initial grand jury testimony and from his testimony in the attorney's office. It did not contain excerpts from his testimony at the Musgrave hearing.) The variance was not fatal because petr could have anticipated from the indictment what evidence would be presented at trial.

The CA 10 next turned to petr's contention that grand jury testimony immunized under 18 U.S.C. § 6002 may not be used to establish the corpus delecti of a prosecution for inconsistent declarations without a prior showing of its falsity. The court distinguished cases cited by petr for this proposition on the ground that in this case petr's testimony in the attorney's office and in the Musgrave hearing was not only inconsister with his immunized grand jury testimony but also contained an admission that he had in fact testified falsely before that grand jury. Petr's unequivocal admission that his immunized testimony before the grand jury had been false justified the use of the immunized testimony to establish the corpus delecti of his § 1623 prosecution.

4. CONTENTIONS: Petr contends that the CA 10's decision conflicts with circuit court decisions holding that immunized testimony may not be used to establish the corpus delecti of an inconsistent declarations prosecution without a prior showing that the immunized testimony was false. He argues that "to compel the defendant on the one hand to testif

truthfully under an order of immunity thereby setting aside his Fifth Amendment claim, but on the other hand, prosecuting him for inconsistent declarations without proving a violation of the immunity order is a violation of due process and [the defendant's] Fifth Amendment privilege." Petn. at 10-11.

5. DISCUSSION: The cases holding that immunized testimony cannot be used as the basis of an inconsistent declarations prosecution under § 1623(c) are the product of § 1623(c)'s provision allowing the government to make its case without proving which inconsistent statement was false. As the CA 7 stated in United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), "Perjury by inconsistent statements must necessarily be shown through the use of the immunized testimony." Because the government need not show which inconsistent statement is false, the government may well be violating the terms of the grant of immunity by using truthful immunized testimony to prove the falsity of subsequent sworn testimony. When the subsequent inconsistent statements contain an admission that the earlier, immunized testimony was false, however, this reasoning seems to evaporate. Indeed, it appears that the government did not need to prosecute this case under an "inconsistent statements" theory. It could simply have used petr's sworn admission to prove the falsity of the earlier immunized grand jury testimony.

There is no response.
I would deny.

10/5/78 Cooper CA 10 op in petn.

DW 11/30/78

Deny at Hold

SG asks us to hold this case for N. J. v. Portash 77-1489 (set for next week) that presents a somewhat related issue as to use of immunized testimony.

I don't object to holding, tho I think this is a clear "Deny".

Supplemental Memorandum

December 1, 1978 Conference

No. 77-6949 Cert to CA10

DUNN

v.

UNITED STATES Federal/Criminal Timely

A response from the SG and petr's reply to that response have been received, and the case is set for discussion at the Conference this Friday.

Section 1623(a) makes it a crime to give a material, false declaration in any proceeding ancillary to a grand jury

proceeding. §1623(c) eliminates the need for the government to prove which of two inconsistent statements is false, thereby allowing a witness to be convicted under §1623(a) if he has made two contradictory declarations in proceedings anciallary to a grand jury proceeding. The SG recognizes that in the instant case it probably was unnecessary to proceed under the "inconsistent statements" rubric of §1623(c), as petr had admitted in sworn testimony that his grand jury testimony had been false. Thus, the immunity granted for that testimony was ineffectual, and the testimony was properly admissible to show that petr had lied before the grand jury.

The SG maintains, however, that because the government proceeded against petr under §1623(c), this Court cannot assume that petr's grand jury testimony was false. Thus, the SG concludes that this case presents an important question deserving the Court's plenary review: whether truthful, immunized testimony may be used as the partial basis for an inconsistent statements prosecution under §1623(c). The government argues that immunized testimony can be so used because the immunity extends only to use against the witness concerning crimes that occurred prior to the giving of the testimony. Because the crime involved here was petr's subsequent perjury, the SG insists that there is nothing wrong with using immunized testimony (even if truthful) as the partial basis for the prosecution. The government contends that, although there is no direct conflict among the circuits, there

is strong dictum in some decisions indicating that some courts do not agree with the government's position.

Nonetheless, the SG does not ask the Court to grant certiorari at this time. Rather, the government asks the Court to hold this case for the decision in New Jersey v. Portash, No. 77-1489 (to be argued next week). The issue in Portash, as you will recall, is whether immunized testimony constitutionally may be used to impeach a defendant's testimony at his trial for the crime with respect to which he testified. Dunn of course differs importantly from Portash, as in the former the immunized testimony was used as the basis for a separate perjury prosecution, whereas in the latter the testimony was used to help convict the witness of the very crime with respect to which he testified under the grant of immunit. The SG contends, however, that the difference in Dunn means only that, if the Court affirms the New Jersey decision, the question here will remain open: Even if immunized testimony cannot be used with respect to crimes occurring prior to the giving of the testimony, it may be useable with respect in prosecuting the witness for his later perjury. If the Court were to reverse in Portash, however, the SG contends that affirmance in the instant case would follow a fortiori.

In his reply, petr reasserts that the proof at his trial varied substantially from the charges contained in the indictment, and that this in itself is enough to warrant the granting of certiorari. In addition, petr contends that the use

of his grand jury testimony here is prohibited by the terms of the federal use immunity statute, 18 U.S.C. §6002. Under that statute, immunized testimony can be used only in a "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Petr claims that the structure of the provision indicates that witnesses' testimony may be used against them only if they both are prosecuted for giving a false statement and violated the order to give the immunized testimony. In the instant case there is no indication that petr violated the order to testify before the grand jury, and so he does not fall within the exception.

I suppose that it does no harm to hold this case for Portash, as the two cases involve related issues. Nonetheless, I question whether the Court should do anything ultimately but deny certiorari. Thus, if Portash were reversed (the Court ruling that immunized testimony could be used to impeach), there would be no reason to GV&R, as the decision below would follow a fortiori from the decision in Portash; similarly, there would be little point in granting plenary review in order merely to say that this is an easier case than Portash. If, on the other hand, Portash were affirmed, the Court would have to decide whether this is the appropriate case to address the question raised by the SG. It seems to me that it is not for three reasons. First, the SG himself admits that there is no square conflict. Second, it seems to me that the SG is correct in his analysis--that is, that the court below reached the correct

result, albeit by somewhat muddied analysis. Third, I continue to be troubled by the fact that proceeding under the inconsistent statements provision of §1623(c) seems to have been entirely unnecessary in this case: Petr has twice admitted under oath that his grand jury testimony was false, and therefore the immunity granted should not apply.

11/30 David

December 1, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-6949

DUNN

vs.

UNITED STATES

Response requested and received.

Held for N. J. v. Portash 77-1459

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.	✓		for			N. J. v			Portash				
Brennan, J.	✓												
Stewart, J.	✓												
White, J.	✓												
Marshall, J.	✓												
Blackmun, J.			✓										
Powell, J.	✓												
Rehnquist, J.			✓										
Stevens, J.		✓											
.....													

December 8, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-6949

DUNN

vs.

UNITED STATES

Relisted.

John says there is a pending time that is dif. from Portash Grant Hoel

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.		✓											
Stewart, J.		✓											
White, J.	✓												
Marshall, J.		✓											
Blackmun, J.	✓												
Powell, J.	✓												
Rehnquist, J.	✓	or ✓	✓										
Stevens, J.		✓											
.....													

Grant.
Richman

January 5, 1979 Conference
Supplemental List

No. 77-6949

Motion for Appointment of Counsel

DUNN

v.

UNITED STATES

Petr asks that Daniel J. Sears, Esq., be appointed to represent him. Mr. Sears represented petr from arraignment through the cert petn, and was last appointed by CA 10. He was admitted to the Colo. bar in 1968, the N. Mex. bar in 1969, and this Court in 1975. He was appointed Federal Public Defender in 1975.

Mr. Sears appears qualified.

1/2/79
sal

Richman

grant. E.g.

Argued ....., 19... *Assigned* ....., 19... No. 77-6949

Submitted ....., 19... *Announced* ....., 19...

DUNN

vs.

UNITED STATES

Motion for appointment of counsel.

G

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
.....													

May 2, 1979

77-6949 Dunn v. United States

Dear Thurgood:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

of the term ancillary proceeding in § 1623, a phrase not defined in that provision or elsewhere in the criminal code. More specifically, we must determine whether an interview in a private attorney's office at which a sworn statement is given constitutes a proceeding ancillary to a court or grand jury within the meaning of the statute.

I

On June 16, 1976, petitioner Robert Dunn testified before a federal grand jury under a grant of immunity pursuant to 18 U. S. C. § 6002.[2] The grand jury was investigating illicit drug activity at the Colorado State Penitentiary where petitioner had been incarcerated. Dunn's testimony implicated a fellow inmate, Phillip Musgrave, in various drug-related offenses. Following petitioner's appearances, the grand jury indicted Musgrave for conspiracy to manufacture and distribute methamphetamine.

---

ably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury: It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true."

[2] Under 18 U. S. C. § 6002:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 3, 1979

Re: 77-6949 - Dunn v. United States

Dear Thurgood:

Although I tentatively expressed a different view during our Conference discussion, I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 3, 1979

RE: No. 77-6949 Dunn v. United States

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 4, 1979

Re: 77-6949 - Dunn v. United States

Dear Thurgood:

Please join me.

Respectfully,

John

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 7, 1979

Re: No. 77-6949 - Dunn v. United States

Dear Thurgood:

Please join me.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 17, 1979

Re: No. 77-6949 — Robert Dunn v. United States

Dear Thurgood:

My dissent here will be a silent one -- strictly graveyard.

Sincerely,

Byron

Mr. Justice Marshall
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1979

Re: No. 77-6949 - Dunn v. United States

Dear Thurgood:

My dissent, as Byron's, will be of the graveyard variety. Please join me.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 24, 1979

Re: No. 78-5072 - Davis v. Passman

Dear Bill:

Please join me in your recirculation of May 21.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United St
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 26, 1979

Dear Thurgood:

Re: 77-6949 Dunn v. U.S.

I join.

Regards,

Mr. Justice Marshall

cc: The e onference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
				4/2/79				
	Join TM 5/3/79	Join TM 5/3/79	silent dissent 5/17/79	1st draft 5/2/79	Join TM 5/7/79	out letter 5/2/79	Join TM 5/24/79	Join TM 5/4/79
			join TM 5/29/79	2nd draft 5/3/79				
				77-6949 Dunn v. U.S.				