

DOCKET NO.
02-1033

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

-v-

FERNANDO RAMOS-FERNANDEZ,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF ON APPEAL FOR DEFENDANT-APPELLEE
FERNANDO RAMOS-FERNANDEZ

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because this case was a criminal case alleging violations of the laws of the United States under 8 U.S.C. § 1326. By order entered November 26, 2001, the District Court (Mordue, J.) granted the defendant's motion to dismiss the indictment for lack of venue. The Court's order was a final order disposing of all parties' claims. Jurisdiction in this appeal is invoked in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED

WHETHER THE DISTRICT COURT CORRECTLY
DISMISSED THE INDICTMENT FOR IMPROPER VENUE
IN THE NORTHERN DISTRICT OF NEW YORK BECAUSE
DEFENDANT-APPELLEE WAS FOUND AND ALL
ELEMENTS OF THE ALLEGED CRIME WERE
COMPLETED IN THE EASTERN DISTRICT OF NEW
YORK.

STATEMENT OF FACTS

On December 21, 2000, a one count indictment charging defendant-appellee Fernando Ramos-Fernandez with unlawful reentry by a deported alien, in violation of 8 U.S.C. § 1326, was filed in the Northern District of New York. The indictment charged that Mr. Ramos-Fernandez had been previously convicted of an aggravated felony, was subsequently deported, and was then found in the United States at Rome, New York on or about October 27, 2000 without having obtained the consent of the Attorney General. (A 9-10¹).

On April 11, 2001, Mr. Ramos-Fernandez moved to dismiss the indictment for lack of venue. (A 4). On October 18, 2001, the District Court held an evidentiary hearing. At the hearing, a New York State Parole Officer, Audrey Crawford, testified that she expressly informed the INS of the defendant's presence in Queens, New York and discussed with the INS the defendant's prior deportation and illegal status in the country. (A 13).

The evidentiary hearing left no doubt as to whether all the elements of the crime of illegal reentry were complete when Mr. Ramos-Fernandez was taken into state custody in the Eastern District of New York. The Government concedes that, at a minimum, Ms. Crawford spoke to INS deportation officer Neil Arci, who was

¹ References made to "A" refers to the Appellant's Appendix.

employed at Ulster Correctional Facility in upstate New York, and informed him that Mr. Ramos-Fernandez had unlawfully returned to the United States after being deported and was being held at Rikers Island Correctional Facility in Queens, New York. (Appellant's Brief, Pages 3-4).

After carefully reviewing the record, the District Court granted Mr. Ramos-Fernandez's motion to dismiss and held that the Immigration and Naturalization Service (INS) "knew, had constructive knowledge of or should have had constructive knowledge of defendant's prior deportation, his illegal reentry and illegal status following Ms. Crawford's contact with Mr. Arci in February 2000." The District Court concluded that venue was therefore lacking in the Northern District New York and lay instead only in the Eastern District. (A 50-51).

SUMMARY OF ARGUMENT

The District Court correctly ruled that the crime of illegal reentry based on being “found in the United States” was complete when New York State Parole Officer Audrey Crawford notified the INS that Mr. Ramos-Fernandez had illegally reentered the country following his prior deportation and was apprehended and being held in Queens, New York. Consequently, the Eastern District of New York is the proper and sole venue for federal prosecution of this offense. Therefore, the District Court correctly dismissed the indictment against Mr. Ramos-Fernandez which was mistakenly brought in the Northern District of New York.

POINT I

THE DISTRICT COURT CORRECTLY DISMISSED THE INDICTMENT FOR IMPROPER VENUE IN THE NORTHERN DISTRICT OF NEW YORK BECAUSE DEFENDANT-APPELLEE WAS FOUND AND ALL ELEMENTS OF THE ALLEGED CRIME WERE COMPLETED IN THE EASTERN DISTRICT OF NEW YORK.

This Court has repeatedly recognized that the crime of illegal reentry based on being found in the United States is not a continuing offense but rather is complete when an alien illegally reenters the country and the Immigration and Naturalization Service is aware of such reentry and prior deportation. United States v. Rivera-Ventura, 72 F.3d 277, 282 (2d Cir. 1995); United States v. Whittaker, 999 F.2d 16, 18 (2d Cir. 1993). In the present case, the undisputed facts are that after Mr. Ramos-Fernandez was discovered in Queens, New York and held by state authorities, a New York State Parole Officer promptly and explicitly notified the INS of such reentry as well as the prior deportation. Consequently, in accordance with clear precedent, the District Court ruled that the proper venue for prosecution was the Eastern District of New York and that the indictment mistakenly filed against Mr. Ramos-Fernandez in the Northern District had to be dismissed. The district court's determination of proper venue is subject to de novo review. United States v. Kim, 246 F.3d 186, 188 (2d Cir. 2001).

On appeal, the Government still refuses to accept such a simple reality and instead presses ahead with a specious argument that the INS did not really know Mr. Ramos-Fernandez had reentered the country until they completed a more extensive investigation after Mr. Ramos-Fernandez was transferred to a state prison in the Northern District. Because the Government's arguments ultimately seek to permit the Government and the INS to ignore the venue requirements which govern all criminal prosecutions, such an indefensible position must be soundly rejected on appeal. Federal Rules of Criminal Procedure, Rule 18; United States v. Cores, 356 U.S. 405, 407 (1958).

The Government cites a number of cases in support of their position that the instant case was properly brought in the Northern District. In contrast to the facts of the present case, however, all of the cases the Government relies upon involve determinations of whether the INS exercised due diligence in discovering the whereabouts and identity of a prior deportee. In United States v. Bencomo-Castillo, 176 F.3d 1300, 1303 (10th Cir. 1999), the Tenth Circuit declined to require the INS to exercise more than reasonable diligence in screening for previously deported aliens. Likewise, in United States v. Calderon, 85 F.Supp. 2d 319, 320-21 (S.D.N.Y. 2000), the Southern District Court refused to find the INS negligent for failing to discover the real identity and prior deportation status of a

defendant who had failed to appear for a deportation hearing in Arizona until he was subsequently arrested in New York. Finally, in United States v. Herrera-Ordonez, 190 F.3d 504, 510 (7th Cir. 1999), the court refused to impose an obligation on the INS to discover the prior deportation status of an illegal alien merely because the defendant had given the police false information at the time of his arrest for a state crime in another district.

In Mr. Ramos-Fernandez's case, the issue of due diligence is irrelevant. The record irrefutably reflects and the District Court found that Audrey Crawford, a New York State Parole Hearing Officer, notified an INS deportation Officer, Neil Arci, that Mr. Ramos-Fernandez was arrested in Queens and that he had illegally reentered the country after being deported. Once this occurred, Mr. Ramos-Fernandez's alleged crime was complete and the venue for any subsequent prosecution was conclusively and exclusively established.

The Government's reliance on this Court's recent holding in United States v. Los Santos, 283 F.3d 422 (2d Cir. March 3, 2002), is also misplaced. In Los Santos, this Circuit held that a four month delay while a defendant was in state custody constituted a reasonable amount of time to fully investigate and indict a defendant for the crime of illegal reentry. The Court thus held that a downward departure based on a lost opportunity for a concurrent sentence was unwarranted.

In the present case, as repeatedly stressed, once the INS was expressly notified that the defendant was apprehended in the Eastern District and had illegally reentered the country after being deported, the place of venue was established. Mr. Ramos-Fernandez takes no issue with the right of the Government and the INS to take additional time (within the statute of limitations) to investigate the case; however, once they decided to indict, the place for prosecution was the Eastern District.

In short, the question of the proper location for prosecution is completely unrelated to the timing of such prosecution. The Government's clever attempt to mislead the Court in equating two entirely separate jurisdictional elements of a criminal offense merits scant consideration.

Finally, the Government argues that if affirmed the District Court ruling, "would require the recipient of the communication (of an alien's illegal reentry into the United States), whoever he or she may be, to see to it that a federal investigation is immediately launched in the district in which the defendant is being held at that time, before the suspect can be transferred anywhere. Such an overhaul of INS procedure would be unwarranted and unworkable. Moreover, for the courts to mandate such a change would constitute an intrusion on the function of an agency of the Executive Branch." (Appellant's brief, pages 13-14).

The Government's contention is frivolous hyperbole. The sole consequence of the District Court's adherence to case law and the rules of venue is to ensure that the federal prosecution take place in the Eastern District. The suggestion that by upholding the decision of the District Court, the Court of Appeals would prevent suspects who are initially discovered in one district from subsequently being transferred to state prison in the Northern District of New York is ludicrous. The requirement that Mr. Ramos-Fernandez's prosecution take place in the Eastern District places no burden whatsoever on the INS. Indeed, since the defendant had completed his state sentence prior to being brought to Syracuse, New York, the sole consequence of adhering to the law, is that the defendant be brought by the United States Marshall's Service a few additional miles south instead of west. This is hardly a steep price to pay for complying with the rule of law.

In conclusion, Mr. Ramos-Fernandez's crime of illegal reentry was complete when the INS was notified of his arrest, identity, prior deportation and location in the Eastern District of New York. Because the proper place of venue for Mr. Ramos-Fernandez's alleged offense was the Eastern District, Judge Mordue correctly granted a motion to dismiss the indictment brought in the Northern District of New York. The District Court decision should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed in all respects.

Dated: April 16, 2002

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