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Friedman v. United States

STATUS OF THE CASE

The United States Court of Appeals for the Eighth Circuit on March 16, 1967 reversed the judgment of the District Court for the Eastern District of Missouri in this case with instructions to enter a judgment of acquittal and dismiss the indictment. The Court of Appeals held that the indictment did not state a violation of 18U.S.C. 1001. Under Supreme Court Rule 22, 28 U.S.C., a petition for writ of certiorari must be filed within thirty days after entry of judgment.

BACKGROUND

On January 20, 1965, Harold Friedman was indicted on a charge of violating 18 U.S.C. 1001 (making a false statement in a matter within the jurisdiction of a department or agency of the United States). The indictment alleged that Friedman had submitted a written statement to the Federal Bureau of Investigation representing that on November 7, 1964, while in the custody of the Missouri Highway Patrol and while handcuffed, he was beaten and wounded by a Highway Patrolman. It was further alleged in the indictment that Friedman "in truth and fact, as he then well knew, was not struck . . . or wounded by . . . any . . . member of the Missouri State Highway Patrol. . . ." Friedman's statement to the FBI was in the course of a voluntary appearance at the Bureau's St. Louis office on November 13, 1964, accompanied by his attorney. He was not advised that statements made could be the source of a prosecution against him. At that time he alleged that he had been beaten by an officer of the Missouri Highway Patrol while in the custody of the Patrol at a branch headquarters. Thereafter the FBI conducted a preliminary investigation under 18U.S.C. 242. Although there was some evidence of a minor struggle between the officer and Friedman, (involving the officer's orders that Friedman remain seated in a chair in the headquarters lobby) the witnesses interviewed, including civilian witnesses, generally failed to corroborate Friedman's story. Assistant U.S. Attorney William C. Martin was of the opinion that the 242 case had "no merit whatsoever," and in a letter to the Civil Rights Division dated December 2, 1964, the U.S. Attorney requested authority to present an indictment to the Grand Jury under 18 U.S.C. 1001. (See Attorney General's memorandum for U.S. Attorneys, #331, November 5, 1962.)

By letter of December 16, 1964, Assistant Attorney General Burke Marshall indicated he had no objection to such a prosecution.

Friedman was indicted, was arrested on January 21, 1965 and posted bond. He entered a not guilty plea at his arraignment on February 26, 1965 and was tried on November 8-10, 1965, before a jury. He was convicted and was sentenced, on November 26, to three years and a fine of $2000.

The appeal was argued on October 20, 1966, and judgment of reversal was entered on March 16, 1967 (Register, DJ, dissenting).

DISCUSSION

1. The Decision

Although the appellant argued 11 points of error in his brief, the Court of Appeals dealt only with the first -- the claim that the indictment did not allege facts constituting a crime under Section 1001.

Title 18, Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any

> trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, *** shall be fined not more than $10,000 or imprisoned not more than five years, or both. (emphasis supplied)

The Court disposed of the case by accepting appellant's contention that the "jurisdiction" of the FBI to investigate crimes against the United States is not the "jurisdiction" envisioned by Section 1001.

The Court found that the statute's historical purpose was that of preventing the perversion of the functions of the government's regulatory agencies by assuring that information such agencies were given was reliable. Reliable information was essential to effective regulation by such agencies, the Court said. Though the statute was drafted in broad, inclusive terms, nothing indicates that Congress intended it to have application "substantially beyond the purposes for which it was created," the opinion stated.

Rejecting the Government's argument that the false statement perverted the FBI's functions by causing needless investigation, (see U.S. v. Gilliland, infra) the Court held that since the FBI was only empowered to investigate the claim, "mere investigation" caused no real corruption of its authorized activities.

Relying on Sorrells v. United States, 287 U.S. 435, 450 (1932), the Court declined to interpret the statute literally because such application would reach "patently absurd results." The Court would not "blithely assume" that Congress intended to punish an untrue statement to an FBI agent with a greater penalty than that prescribed for the crime of perjury. 1/

1/ 18 U.S.C. 1621 (perjury) provides for a fine of not more than $2000 or imprisonment not more than five years, or both. 18 U.S.C. 1001 provides for a fine of not more than $10,000 or imprisonment of not more than five years, or both.

Concluding that literal interpretation of the statute was "not envisioned by the enactment, reaches patently absurd results, and is fundamentally dangerous," the Court set out to define the proper limits of Section 1001. For this purpose the Court cited favorably cases dealing with interpretation of the word "jurisdiction" as used in the statute, particularly United States v. Stark, 131 F. Supp. 190, 207 (D. Md. 1955). The opinion in that case said:

> [T]here is a clear distinction between the power to investigate and the jurisdiction or authority to decide and act upon a particular subject matter . . . the important function of the Department of Justice with respect to criminal offenses against the United States is the power to investigate and initiate prosecutions, but not the power to decide whether a criminal offense has been committed. In this respect its functions are quite different from those of the Secretary of the Treasury with respect to the payment of claims against the United States, or the authority of . . . other [such] agencies. . . . I therefore conclude that in the particular situation here presented, the matter was not within the jurisdiction of the FBI or the Department of Justice within the meaning of that phrase as contained in section 1001.

The Friedman Court cited numerous cases involving the section, and maintained that the statute had been enforced, generally, only in matters outside the area of "enforcement of the general criminal law and the investigations relative thereto."

The Court concluded that governmental agencies have the right to use section 1001 to protect themselves from fraudulent claims and from "those who are seeking the grant of governmental privileges under false assertions." The statute can also be used to protect "regulative functions" from those who would destroy such functions by presenting false information. But if the agency has no positive power to enact binding regulatory requirements, such an agency has no "jurisdiction" under the statute.

Finally, the Court indicated it was "influenced" by the social policy served by encouraging an "open line" between the public and the police. It was feared that applying the statute to individuals volunteering unsworn information to the police would "to a degree dry up a prime source of truthful information."

2. Other decisions under section 1001 involving the FBI or the Justice Department

The Court in Friedman correctly observed that the reported cases dealing with application of 1001 to statements made to the FBI indicate a general reluctance to construe the statute broadly. In United States v. Stark, supra, the District Court, in a proceeding to decide preliminary questions before trial, found that where defendant falsely answered questions put by an FBI agent, section 1001 did not apply because answers to questions were not "statements" within the meaning of the statute and because the Bureau did not have "jurisdiction" within the meaning of section 1001. The Court concluded that:

> The sweeping generality of the language of section 1001, especially when isolated as it appears in the 1948 revision from the remainder of the 1934 amendment, requires caution in applying it to particular situations.

United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953), also relied upon by the Court in Friedman, involved dismissal of an indictment brought under section 1001. On the Government's motion to reconsider, the Court refused, saying:

> When the charge involves statements made when not under oath a reasonable and sensible construction of the statute would be to limit its application to persons under legal obligation to speak or to give information to . . . an agency [with] authority to finally dispose of the matter being investigated. . . . (emphasis added.)

Similarly, in United States v. Davey, 155 F. Supp. 175 (S.D. N.Y. 1957), a motion to dismiss a 1001 indictment was sustained on grounds that the defendant's false statement was an "exculpatory no" and not a "statement" within the contemplation of the statute, and, alternatively, that the Bureau had no "jurisdiction" under the statute. "I fail to see that the giving, receiving and recording of such a false statement perverts the true function of the FBI," the Court said. Davey involved a denial, in the course of an interview with an FBI agent, that the defendant knew one Enos Bromwell. It was shown that Enos Bromwell was the name the defendant had falsely used in registering for the draft. Although the Court noted that the United States Attorney had the responsibility to determine whether the draft delinquent should be prosecuted, it is not clear whether the Court failed to consider the FBI as an arm of the Department of Justice or whether, in any event, the Court did not regard even the Department's function in the case as constituting "jurisdiction" under section 1001.

Two cases involving Justice Department personnel support the government's position in Friedman. Both are very similar on their facts to Friedman, in that, unlike Stark, Davey or Levin, supra, they involve situations where information was volunteered to Department of Justice representatives, prompting an investigation which later proved needless. In United States v. Van Valkenburg, 157 F. Supp. 599 (D. Alaska 1958), the defendant had approached an Assistant U.S. Attorney and accused a third person of having stolen from him, forged and cashed two checks. The indictment charged that the defendant knew at the time that the representations made were false. Denying a motion to dismiss the indictment, the Court distinguished Stark on the ground that the indictment in Van Valkenburg alleged an "affirmative false statement . . . to the United States Attorney to induce that office to take action against a third person." Such governmental action, the court said, was clearly within the jurisdiction of the United States Attorney.

In United States v. Adler, (unpublished, S.D. N.Y. Oct. 31, 1966), the Court held that a false statement to the FBI, volunteered by the defendant, was punishable under section 1001. Expressly rejecting the Stark, Levin and Daley cases as being based on too narrow a construction of the section, the Court also noted that in none of those cases did the defendant take the initiative, as defendant Adler had, "and seek out the FBI and go to them and make a knowingly false statement. . . ."

Also cited with approval in Adler was the case of Brandow v. United States, 268 F. 2d 554 (9th Cir. 1959). Brandow involved a false statement to an IRS agent made by signed affidavit in the course of an investigation of an alleged fraud. There the Court affirmed a conviction, holding that the IRS had jurisdiction because "by statute the officers were entitled to seek the information sought." The Court also declined to follow Levin and Stark, stating that it preferred the reasoning in "the later case of United States v. Van Valkenburg. . . ." (supra)

The four cases discussed above, Levin, Stark, Daley, and Van Valkenburg, are the only published cases known involving Justice Department personnel. The trial memorandum in the Adler case (DJ 51-51-747) indicated that in at least two other unpublished cases (United States v. Eubanks (W.D. Wash., 1954); United States v. Bray (N.D. Ga. 1953)), a false accusation made to FBI agents has been made the subject of a prosecution under section 1001. Both cases involved the making of accusations that third persons had committed federal crimes. In Bray, according to the Adler memorandum, the accusation stated an unspecified civil rights violation. In Eubanks and Bray, the defendants entered guilty pleas during the course of their trials.

It appears, therefore, that in spite of the limitations placed on section 1001 in the earlier district court cases involving the Department, Friedman is the first case to find 1001 inapplicable where the false statement was one volunteered to the Department by the defendant.

3. Supreme Court holdings involving section 1001

The Supreme Court has never been confronted with the problem of interpreting the meaning of "jurisdiction" in section 1001. In fact, neither of the major cases involving the statute has required the court to deal with any of the issues which have most concerned the lower federal courts. (For example, construction of the word "statement"; necessity that the statement be "material"; concern with whether or not the statement must be (1) under oath (2) volunteered (3) oral or written or (4) likely to "pervert" the functions of the agency.) The only thing clear from a reading of Supreme Court opinions is that thus far the Court has favored broad interpretation of the statute.

In United States v. Gilliland, 312 U.S. 86 (1940), the Government appealed a judgment of the District Court sustaining a demurrer to indictments charging a violation of the 1934 version of section 1001. 2/ The defendant had been charged with making false reports to the Department of the Interior stating amounts of petroleum produced and received from certain producers. The defendant maintained, successfully in the District Court, that the statute was limited to controversies about funds involving some financial or proprietary interest of the government. The Court found that the statute was not so limited, and said:

> The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits 'in any matter within the jurisdiction of any department or

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2/ The relevant portion of the predecessor statute (Criminal Code section 35, 48 Stat. 996) read as follows: ". . . or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined" etc. It should be well noted that the Gilliland case involved written reports made in an attempt to circumvent government regulations dealing with oil production. It is possible to read the Court's broad language as limited to cases involving the use of "documents or affidavits."

> agency of the United States.' . . . The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction.

Note, however, that the Court's holding was limited to the use of false statements in "documents or affidavits," and that the legislative history of the amended act indicated that it was expressly intended to apply to fact situations like the one involved in the Gilliland case.

In United States v. Bramblett, 348 U.S. 503 (1955), the Court discussed the meaning of the phrase" . . . in any matter within the jurisdiction of any department . . . of the United States. . . ." Here the Government had appealed a District Court holding that the House Disbursing Office was not a department or agency within the meaning of section 1001. A former congressman had been charged with falsely representing to the disbursing office that a certain person was entitled to compensation as an employee of his office. After finding that 1863 predecessor to section 1001 was extremely broad in scope and clearly covered "the presentation of false claims against any component of the Government. . .", the Court discussed the amendment adding the above-quoted phrase and concluded that the language did not exclude legislative and judicial offices from coverage. Although the question was a considerable distance from that posed by the Friedman case, and involved a fraudulent money claim, the Court's language indicated that narrow construction of the statute was not favored:

> "There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted."

Coupling the Bramblett holding that the statute has broad application with the Gilliland opinion that the statute is not restricted to cases involving pecuniary or property losses, some doubt is cast on the limitations imposed on the application of the statute by the Friedman court. 3/

4. Cases involving other agencies

The agency most nearly analogous to the FBI which is frequently involved in cases under section 1001 is the Internal Revenue Service. Generally, IRS has had comparatively little difficulty in such litigation. There appears to be a tendency on the part of the courts to consider as more serious statements made which involve tax liability. Although the Supreme Court in Gilliland, supra, held that the predecessor to 1001 was not limited to pecuniary interests of the government, the courts nevertheless do not regard IRS and FBI investigative functions as comparable. In Knowles v. United States, 224 F. 2d 168 (10th Cir. 1955), the Court affirmed a conviction involving a false statement by a defendant orally examined by IRS personnel. The case does not make clear whether the statement was under oath. The Court considered the Levin case, but rested its judgment on a finding that the statement made to IRS was "made in pursuance of statutory requirements." Citing statutes describing the functions of IRS agents, the Court said:

> "[T]he Internal Revenue Agent is not only authorized to inquire in an investigative capacity but to 'administer and enforce' the revenue laws. . . . It follows, we think, that a statement to an internal revenue agent in the course of an authorized inquiry into the correctness of the taxpayers' returns is a statement made 'within the jurisdiction of any department or agency of the United States.'"

The holding in Brandow v. United States, supra, is based on a similar rationale, although the Brandow court held that such false statements to the IRS were covered by section 1001 "apart from" any statute stating the jurisdiction of IRS.

3/ But the facts and holding in the Gilliland case, like those in Bramblett, are too far removed from the FBI cases to afford more than minimal value as precedent.

The Second Circuit, in a strong holding that section 1001 has broad application to governmental investigations, said in United States v. McCue, 301 F. 2d 452 (2nd Cir. 1962):

> The main thrust of appellant's argument with respect to section 1001 is that the section is intended to protect the processes of government from interference and obstruction and not to require 'the citizen to speak truthfully to police officers.' . . . There is no reason to believe that the administration of the tax laws and the collection of taxes is not one of the processes of government which the statute was designed to protect, or that making false statements about taxes to the representative of the Treasury is not the kind of interference and obstruction which the statute was intended to prevent. . . . The recent cases in which the Supreme Court has concerned itself with the section contain no suggestion of confining the effect of the statute to any smaller area than that encompassed by its own broad language.

The Court also quoted from Cohen v. United States, 201 F. 2d 386 (9th Cir. 1953), where, in another IRS case, the Court stated:

> [1001 is] . . . a statute based upon the broad public policy against the making of false statements in any matters within the jurisdiction of any department or agency of the United States. (emphasis in original)

The leading case contra to McCue involving the IRS is Paternostra v. United States, 311 F. 2d 298 (5th Cir. 1962). On appeal from a conviction for false statements under oath to questions propounded by an IRS agent, the Court reversed and ordered entry of a judgment of acquittal on grounds that the statements deemed to be false were essentially negative answers to inquiries. The Court distinguished cases wherein the defendant's statements were positive assertions "aggressively and deliberately initiate[d]" [and] "calculated to pervert the legitimate functions of Government." Thus Paternostro rests entirely on the "exculpatory no" distinction discussed in connection with United States v. Davey, supra. The Court expressly approved the result in Brandow, supra:

> It is difficult to see how there could be a case more suited to a prosecution under section 1001 than the Brandow case.

One other case should be mentioned. In United States v. Pantelopoulos, 336 F. 2d 421 (2d Cir. 1964), the Court affirmed a conviction for a section 1001 violation based on the execution of an affidavit for the Immigration Service falsely alleging cohabitation and non-payment of consideration for marriage. The defendant was an alien attempting to establish lawful residence in the United States based upon a former marriage. The case was concerned with the issue of materiality of the false allegations, and did not otherwise involve interpretation of section 1001. However, it is significant that the Court upheld the conviction on the basis that the government had a "right to have administration of the immigration laws conducted honestly."

5. Policy considerations

The Circuit Court in the Friedman case stated that it was "influenced" by the social policy served by maintaining an open line of communication between the public and law enforcement agencies. The Court feared that section 1001 could operate to dry up sources of truthful information, because of a fear that "should their information appear to be false to the police they (the public) may be called upon to defend themselves in a criminal prosecution."

Against this possible result cited by the Court must be weighed the Government's interest in protecting the integrity of its investigative agencies. The Court in United States v. Davey, supra believed that the function of the FBI was to gather information, and did not believe that gathering false information perverted that function. It could be argued, however, that the true function of the Bureau is to accumulate and assist in establishing facts, and any false information tending to "pervert" that function should be punishable under section 1001. Under this view the statute would be clearly applicable where, as in Friedman, the evidence indicates that the false statement was volunteered, involved an accusation of commission of federal crime by a third person, and necessitated the expenditure of the Bureau's resources on an investigation. Certainly in some sense this constitutes a perversion of the agency's true function. A separate question, discussed infra, is whether 1001 is an appropriate vehicle for the protection of the Bureau's functions.

The policy of maintaining open lines of communications is not, however, the only policy basis on which Friedman rests. This Court was one of the few courts dealing with the statute which has attempted to go beyond the broad language of the Supreme Court's Gilliland opinion and assert that "there is nothing to indicate that Congress intended this statute to have application substantially beyond the purposes for which it was created."

> Obviously, the immediate and primary purpose in amending the old "fraudulent claims" statute was to curtail the flow of false information to the newly created regulative agencies.

Setting to one side the broad language of the Gilliland and Bramblett Supreme Court opinions, (both of which are concerned with less difficult questions of section 1001's applicability than that faced by the Friedman court) it is true that Congress, in 1934 when the statute was adopted in roughly its present form, probably never intended it to have applicability to "police" matters. And as Friedman points out, when applied to such matters the statute invests law enforcement officials with a "dangerous" power and inflicts upon violators a severe penalty.

The Court also argued that strict application of section 1001 "would remove the time-honored and now necessary formality of requiring witnesses to testify under oath."

SUMMARY

Although District Courts dealing with false statement cases involving the FBI are in polar conflict, Friedman represents the only discovered case involving the FBI that has departed from the distinction made in the District Court cases, ie., elicited false information cases, which have consistently resulted in acquittals (Stark, Levin, Davey, supra) as against volunteered false statement cases which have, with equal consistency, resulted in convictions (Van Valkenburg, Adler, Eubanks and Bray, supra; cf. Brandow and McCue, supra). As the only appellate opinion precisely in point, Friedman automatically becomes the leading authority on the application of section 1001 to FBI investigations. Although no other Circuit Court has considered a case involving the Bureau, the strong holding in McCue indicates that the Second Circuit may well be in disagreement with the Friedman holding. (See also Pantelopoulos, supra.)

Whether or not the Department should seek review by certiorari in Friedman becomes, essentially, a policy question. It is clear that the meager legislative history 4/ of section 1001 and its predecessor statutes contains only inferential support for the limitations placed upon the statute by the Friedman opinion. The statute's language is very broad but the courts have consistently sought to limit its application. 5/ The statute, as the

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4/ United States v. Stark, 131 F. Supp. 190, at 198-202, summarizes the statute's legislative history.

5/ Courts have also been concerned about the severity of the penalty. See DJ File 46-012, where, in an FBI statement dated June 28, 1965, it was noted that District Judge Samuel Perry criticized the assistant United States Attorney from the bench for having brought section 1001 cases before him involving false statements made by persons applying for Christmas employment with the Post Office. Judge Perry was quoted as asking the Assistant U.S. Attorney whether he expected "the firm fist of the law to give the maximum penalty in this case?" In two such cases, the Court imposed six months probationary sentences, and in a third instance, Judge Perry sentenced a defendant to "one hour in the custody of the U.S. Marshall."

Friedman opinion points out, prescribes a severe penalty for a crime which, in the typical FBI context, is not a serious one. Friedman belies the argument that judicial discretion to impose a lesser penalty is adequate to protect defendants against this difficulty. (Defendant Friedman was sentenced to three years imprisonment and a $2000 fine.)

If it is felt that a false statement statute is necessary to protect the Bureau's processes, new legislation might be proposed expressly proscribing such statements and providing, perhaps, punishment as a misdemeanor. Such a suggestion was made by Director Hoover in a memorandum to the Assistant Attorney General, Criminal Division, on April 18, 1966. (See DJ File 46-012) Mr. Hoover's suggestion was in regard to Title 18, section 287 (false, fictitious or fraudulent claims), but the Criminal Division considered at that time the possibility of amending section 1001 as well. The idea was not then favorably considered, but in light of the difficulties encountered in applying section 1001 to Departmental matters, reconsideration of such a proposed statute, as an alternative to an attempt to gain a reversal in Friedman, might be in order.

Also noteworthy is the fact that in several areas of activity where false statements can have serious results, Congress has provided specific statutory penalties for making false reports. 6/ In most of these cases, the FBI is obviously one of the agencies to which the statements might be made. For example, 18 U.S.C. 35 punishes the knowing "imparting or conveying" of false information concerning attempts to destroy aircraft, trains or shipping in interstate or foreign commerce. Such statements are punished by a $1000 fine, or if the statement is made "willfully and maliciously," by a $5000 fine and five years imprisonment. 18 U.S.C. 837 punishes the conveying, by mail, telephone or telegraph, of any threat or false information concerning attempts to damage or destroy buildings or other property. The penalty prescribed is one year and $1000.

6/ Two bills proposed in the 90th Congress, HR 1438 and HR 5387, would amend the Criminal Code to provide penalties for falsely accusing any law enforcement officer of having violated the civil rights of any person. These bills are now in the House Judiciary Committee

There are also statutes covering false representations of U.S. citizenship (18 U.S.C. 911); false representation that one is acting under the authority of the federal government (18 U.S.C. 912); fraud by wire, radio or television (18 U.S.C. 1343) and false claims against government officials (18 U.S.C. 287). 49 U.S.C. 1472(m) provides punishment of up to five years for willful and malicious conveying of false information concerning attempts to commit specified crimes aboard aircraft. The next subsection, 1472(n), gives the FBI investigative authority in such cases.

The existence of these and other statutes dealing with specific conduct offers some measure of protection of the Bureau's processes, at least in regard to serious crimes.

RECOMMENDATION

We recommend that the Department not seek certiorari in this case.