

**OFFICE OF THE FEDERAL PUBLIC DEFENDER
DISTRICT OF MARYLAND**

SOUTHERN DIVISION
6411 IVY LANE, SUITE 710
GREENBELT, MARYLAND 20770
TEL: (301) 344-0600
FAX: (301) 344-0019

JAMES WYDA
FEDERAL PUBLIC DEFENDER

MICHAEL T. CITARAMANIS
ASSISTANT FEDERAL PUBLIC DEFENDER

June 22, 2000

Ms. Nicole R. Blanche
United States Probation Officer
6500 Cherrywood Lane, Suite 100
Greenbelt, Maryland 20770

Re: *United States v. Eric G. Tyler*
Crim. No. AW-00-0121

Dear Ms. Blanche:

In connection with your preparation of the presentence report in the instant case, please find enclosed a copy of the application for a protective order made by Mr. Tyler's wife and paperwork showing that this order has been rescinded. Also please find enclosed letters on Mr. Tyler's behalf from his parents.

As I previously discussed with you, the government's request for a two-level upward adjustment under U.S.S.G. §3C1.1 ("Obstructing or Impeding the Administration of Justice") is totally without basis and unwarranted.

In his June 7, 2000, memorandum to you, Assistant United States Attorney Steven Dettelbach bases this request on testimony by Mr. Tyler at the hearing on his Motion to Suppress Evidence, which Mr. Dettelbach claims was false. In particular, Mr. Dettelbach claims that Mr. Tyler falsely testified "he did not voluntarily consent" to a search of his car and did not know the gun was there. Neither of the statements attributed to Mr. Tyler justify a finding he falsely testified at the hearing and Mr. Dettelbach's request should be denied.¹

¹ I also need point out that Mr. Dettelbach's unequivocal statement that pens, pencils, and a ruler found in the backpack in which the gun was found "belonged to the defendant" is grossly overstated as this was never shown at trial. Indeed, there was only the inference suggested by Mr. Dettelbach that these items belonged to Mr. Tyler because he was in school and people in school use backpacks. Also, Mr. Dettelbach is also incorrect in asserting that Mr.

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The Sentencing Guidelines manual provides various examples of when a two-level upward adjustment for obstruction of justice is appropriate under §3C1.1, including “committing . . . perjury.” See U.S.S.G. §3C1.1, *Commentary*, note 4(b). The Supreme Court has ruled that “perjury” under §3C1.1 is to be given its common meaning, and specifically, “false testimony concerning a material matter with the willful intent to provide false testimony.” *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 1116 (1993). Broken down into elements, this means that a defendant (1) falsely testified; (2) about a material matter; and (3) with a willful intent to deceive.

Of course, the burden rests with the government -- the proponent of the adjustment -- to establish that Mr. Tyler committed perjury. More precisely, the government must identify what testimony was allegedly false, why it was false, why it also was material, and that said testimony was given with the required intent.

In analyzing whether a defendant has committed perjury and should receive an adjustment under §3C1.1, a “cautious approach” is appropriate. *United States v. Polanco*, 37 F.Supp.2d 262, 264 (S.D.N.Y. 1999). Of consideration is the need “not to chill a defendant’s freedom to assert his constitutional rights.” *Id.*

In the instant case, the government is just plain wrong in its assertion §3C1.1 applies.

First, the assertion Mr. Tyler falsely testified he did not voluntarily consent to the search of his car is down-right wrong. Mr. Tyler freely admitted to consenting to the search and he did not characterize his consent as “not voluntary.” What Mr. Tyler did say about his consent is that he did not feel he had a choice, thinking the police officer had a right to search his car.² This does not equate with a claim the consent was not voluntary.

Indeed, the Court found as much and in doing so made no finding Mr. Tyler falsely testified. In fact, the Court commented that the testimony of the police officers and Mr. Tyler were almost entirely consistent.

¹(...continued)

Tyler is an “apprentice draftsman.” He is not. He is instead an apprentice journeyman in the sheet metal worker’s union.

² Although I previously informed you I had a transcript of the testimony at the motions hearing and would provide you with a copy of Mr. Tyler’s pertinent testimony, I in fact do not have a transcript of Mr. Tyler’s testimony. I only have a transcript of the testimony of the arresting officer. I am ordering a transcript of Mr. Tyler’s testimony and will share it with you once received.

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Further, the testimony of the officers -- with which Mr. Tyler agrees -- supports that what Mr. Tyler testified to at the suppression hearing regarding his belief he had no choice. In particular, both officers testified that Mr. Tyler, in response to a request to search, said something to the effect, "If you have to," or, "If you feel you need to."

Although I, as defense counsel, argued the consent was not voluntary, the principal issue at the hearing concerned whether Mr. Tyler was "seized" within the meaning of the Fourth Amendment prior to consent being given. Further, positions taken by defense counsel cannot be construed as perjury by defendants. If so, then all defendants will be "chilled" from asserting their constitutional rights.

I have one final comment regarding this first piece of testimony given by Mr. Tyler. At trial, Mr. Dettelbach, in his closing argument, responded to my point Mr. Tyler would not have consented if he knew the gun was in the car. Speculating on reasons why Mr. Tyler may have done this, one inference raised by Mr. Dettelbach was that Mr. Tyler may have thought he had no choice but to consent. It is therefore ironic that Mr. Dettelbach is now suggesting something totally at odds with this suggestion.

As to the second portion of Mr. Tyler's testimony which Mr. Dettelbach claims was false, although Mr. Tyler testified he did not know the gun was in the car, this does not warrant a finding of obstruction under §3C1.1. The reasons are:

(1) The assertion he did not know the gun was *in the car* is not necessarily inconsistent with the jury's finding of guilt he possessed the gun on or about the day in question. As charged, the jury was not required to find Mr. Tyler knowingly possessed the gun in the car while driving on the Baltimore-Washington Parkway. The indictment only charged Mr. Tyler with possessing the gun on or about February 22, 2000. Essentially, the jury could have found him guilty if they believed the gun belonged to him, whether or not he specifically knew at the time the gun was in the car.

For this reason, it cannot be said that the jury's verdict necessarily establishes that Mr. Tyler's testimony at the motions hearing was false.

(2) Mr. Tyler's testimony regarding his knowledge of the gun's presence was not pertinent to the issues at the suppression hearing, and principally, whether or not he was "seized" or unlawfully detained before consenting to the search his car.

Thus, this piece of testimony did not concern a "material matter." *See e.g., United States v. Jones*, 159 F.3d 969, 981 (6th Cir. 1998) (false testimony by defendant at his sentencing that officers who arrested him were wearing t-shirts with racial slurs was not "material" so as to justify an upward adjustment for obstruction); and *United States v. Parker*, 25 F.3d 442, 448 (7th Cir. 1994) (where the defendant admittedly lied at his plea hearing regarding the amount of money he received from robbery, an upward adjustment for obstruction was not warranted).

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This case is unlike others, where, at a motions hearing, a defendant testified to matters which were the subject of the motions and this testimony was found to be false. *See e.g., United States v. Stokes*, 211 F.3d 1039 (7th Cir. 2000) (where the upward adjustment for obstruction was found appropriate in view of the defendant's false claim he was not read his *Miranda* warnings, which was the basis of his motion to suppress statements); and *United States v. Matos*, 907 F.2d 274 (2nd Cir. 1990) (where the district court found "inherently implausible" defendant's testimony in support of his motion to suppress statements that he was not advised of his constitutional rights until after his oral and written statements were made, he was forced to sign the waiver forms with the times and dates left blank, and the agents backdated the forms).

(3) In claiming he did not know the gun was in the car, Mr. Tyler did not willfully intend to obstruct justice or affect the outcome of the motions hearing.

As a final matter, I want to inform you that I will be moving for a downward departure on Mr. Tyler's behalf. Although I have not yet completed my research and thinking on this request and do not yet know all the grounds upon which this request will be based, I can say at this point that the request will be based at least in part on the ground that Mr. Tyler is not the "typical" defendant convicted of possessing a firearm after previously being convicted of a felony. This is so, considering he has been out of prison over eight years, has married and fathered four children since then, has steadily worked to provide for his family, has been a devoted father to his children, is deeply involved in his religion, and has pursued educational and employment opportunities in order to improve himself and provide better for his family.

In this regard, a downward departure is warranted under U.S.S.G. §5K2.0 in that Mr. Tyler's personal characteristics make him the "atypical" defendant whose case does not fall within the "heartland" of cases of the type here. Once I return from vacation, I will provide you with a more complete argument and legal analysis.

I thank you for your attention and consideration in Mr. Tyler's case.

Sincerely,

MICHAEL T. CITARAMANIS
Assistant Federal Public Defender

cc: AUSA Steven Dettelbach
Eric G. Tyler