

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1090  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DARIAN DASHUN MOSLEY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:92-CR-113-E  
- - - - -  
(January 5, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Darian Dashun Mosley argues that the district court erred in applying enhanced penalties pursuant to 21 U.S.C. § 851 and sentencing him to a mandatory term of life imprisonment after the prosecutor threatened, during plea negotiations, to file the sentencing enhancement information only if he refused to plead guilty. Mosley contends that the prosecutor's improper use of the sentencing information to force him to choose between a

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

guilty plea or trial by jury constituted prosecutorial misconduct and violated his rights to due process.

In Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), however, the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment did not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to an offense. Id. at 358, 365. In that case, the prosecutor advised the defendant that if he did not plead guilty, the prosecutor would seek an indictment under the Kentucky Habitual Criminal Act, which would subject the defendant to a mandatory term of life imprisonment by reason of his two prior felony convictions. Id. at 358-59.

The Supreme Court held that the prosecutor's conduct did not violate due process. Id. at 365. "While confronting a defendant with the risk of more severe punishment clearly may have a `discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable' -- and permissible -- `attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" Id. at 364 (citation omitted). This Court has "accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." Id. The crucial inquiry is whether the accused was aware of and knew the price of rejecting the plea bargain. Ehl v. Estelle, 656 F.2d

166, 170 (5th Cir. Unit A Sept. 1981), cert. denied, 455 U.S. 953 (1982).

Mosley was "fully informed of the true terms of the offer when he made his decision to plead not guilty." See Bordenkircher, 434 U.S. at 360. Further, the sentencing enhancement was authorized by 21 U.S.C. § 841(b)(1)(A) and, once the information had been filed and the district court determined that Mosley was subject to increased punishment by reason of prior convictions, the court was required to apply the enhanced penalties. See 21 U.S.C. § 851(d)(1). Thus, the conduct of the prosecutor, "which no more than openly presented [Mosley] with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution," did not violate Mosley's due process rights under the Fourteenth Amendment. See Bordenkircher, 434 U.S. at 365; see also Montgomery v. Estelle, 568 F.2d 457, 458 (5th Cir.) (charging petitioners under the Texas habitual offender statute only after they refused to plead guilty to an unenhanced offense did not amount to prosecutorial vindictiveness), cert. denied, 439 U.S. 842 (1978).

Mosley's reliance upon the panel's decision in United States v. Viera, 819 F.2d 498 (5th Cir. 1987), is misplaced. In Viera, a panel of this Court held that the prosecutor's threats to a defense witness violated the defendant's Sixth Amendment right to present witnesses in his own behalf. Id. at 504-05. The panel's decision was vacated, however, by United States v. Viera, 828 F.2d 2 (5th Cir. 1987), and 839 F.2d 1113, 1115 (5th Cir. 1988) (en banc) (panel decision reinstated in part), in which the full

Court held that the defendant's rights were not violated by the prosecutor's conduct. Viera is factually inapposite from the instant case because it involved the effect of the prosecutor's statements to a potential defense witness upon the defendant's exercise of his Sixth Amendment rights.

AFFIRMED.