UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-9126

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EJOOR PATRICK EKWEREKWU,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(3:93-CR-270-X)

(March 17, 1995)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Ejoor Patrick Ekwerekwu appeals his conviction and sentence for conspiracy to import heroin. Finding an inappropriate participation of the trial judge in the plea bargaining process, we vacate and remand.

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

Ekwerekwu was accused of being a recruiter of participants in a scheme to smuggle heroin into the United States. He agreed to plead guilty to conspiracy to import the contraband but at his arraignment he claimed that he had been entrapped. The court was informed that the court-appointed defense attorney had counseled against this defense. The court advised Ekwerekwu that it could not accept his guilty plea while he simultaneously asserted that he had been entrapped.

The foregoing action was entirely appropriate but, unfortunately, the court continued, telling Ekwerekwu that if his entrapment defense was unsuccessful he would probably be in prison until his eight-year-old son completed high school. After sketching some of the inculpatory evidence the government likely would use, the court continued:

> I don't purport to give you legal advice, but do you know how many times I have seen an entrapment defense work? I have been doing this as a prosecutor or defense lawyer or a judge . . . since [19]80. Do you know how many times I have seen an entrapment defense work in hundreds of cases? Zero. I don't mean to throw a wet blanket on your defense here, but I am just telling you that it is a hard row to hoe. . . . So, for today, we are not going to accept a plea . . . but let me tell you what we will do: If in the meantime you want to have further conferences with your client and you want to talk further about it and really think through this potential entrapment defense and see if it's really something that you think exists, in light of all the circumstances, we will have a trial. If you change your mind and you want to work out a plea agreement, I will be glad to hear you at that time. But for today, what you are telling me, I just simply can't accept your plea.

The court then revoked Edwerekwu's bond and ordered him into custody. In response to defendant's claim that he needed his

freedom to be of assistance to the authorities, the court noted that his claim of entrapment made his assistance of little value, concluding that if he wished to retain his freedom in order to facilitate cooperation with the authorities, he should "not try to run a con and tell it like it is."[1]

The following week, after the trial judge again expressed the view that Ekwerekwu had attempted to con the court, Ekwerekwu apologized for the prior week's events, stated that he was "100% guilty," and tendered a guilty plea. The court cautioned defendant not to plead guilty unless he indeed was guilty and if he had a defense he was encouraged to go to trial. Ekwerekwu insisted that he was guilty, that he had recruited young women to smuggle heroin, and that his plea was knowing and voluntary. The court accepted the plea and in subsequent proceedings sentenced Ekwerekwu to 135 months imprisonment. A timely appeal followed.

Analysis

Appearing *pro se* Ekwerekwu challenges his conviction, primarily contending[2] that the trial court's statements at the first arraignment constituted coercive participation in the plea process in violation of Fed.R.Crim.P. 11(e)(1).[3]

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[1]During this exchange Ekwerekwu looked at his counsel, apparently for assistance in his plea for continued enlargement. Seeing this the court stated: "Don't look at her. I bet you she wasn't out there at the Crown Suites Hotel with you."

[2]Ekwerekwu also raises his entrapment defense and the claim of ineffective assistance of counsel. Because of today's disposition, we need not consider either claim.

[3]Ekwerekwu did not raise this issue before the district court. The government candidly notes, however, that judicial involvement

As our colleagues of the Sixth Circuit succinctly stated: "The primary reason for Rule 11 is that a judge's participation in plea negotiation is inherently coercive."[4] The Rule, accordingly, bars a district court from "all forms of judicial participation in or interference with the plea negotiation process."[5] This absolute bar, which admits of no exceptions,[6] stems from a desire to curb several deleterious effects on the plea process, particularly the possibility of judicial coercion of a guilty plea, diminished judicial impartiality resulting from judges taking personal stakes in plea bargains that they suggest or encourage, and the likelihood that, by taking such an active role in the negotiations, the court "becomes or seems to become an advocate for the resolution [it] . . . has suggested to the defendant."[7]

Although a district court is allowed to refuse to accept a plea and to state its reasons for doing so, the court *a` quo* exceeded its markedly limited authority. The court's statements reflected the view that Ekwerekwu was an organizer of the scheme, and in light of the strong evidence against him his proposed defense of entrapment was specious. By commenting on the

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in plea negotiations constitutes error plain on the face of the record which can be considered on direct appeal. See **United States v. Adams**, 634 F.2d 830 (5th Cir. 1981).

[4]**United States v. Barrett**, 982 F.2d 193, 194 (6th Cir. 1992).

[5]**Adams**, 634 F.2d at 835.

[6]**United States v. Miles**, 10 F.3d 1135 (5th Cir. 1993) (citing **United States v. Bruce**, 976 F.2d 552 (9th Cir. 1992).

[7]**Adams**, 634 F.2d at 841.

prospective evidence and the weaknesses of Ekwerekwu's proposed defense, the court offered him "the choice of pleading guilty or taking his chances at trial in front of a judge who seemed already to have made up his mind about `[his] guilt.'"[8] The quandary, resulting from either actual or perceived judicial impartiality, is the conundrum Rule 11 was designed to avoid. In this the district court erred.

The comment on the length of the likely sentence exacerbated the error. Rule 11 absolutely forbids a judge from participating "in any discussion or communication regarding the sentence to be imposed prior to the entry of a plea of guilty or conviction, or submission . . . of a plea agreement."[9] The court's discussion of the lengthy sentence that Ekwerekwu faced and of its implicit adverse effect on his relationship with his young son breached Rule 11.

The government maintains that the court's remarks were harmless, not warranting the vacating of the conviction and sentence, citing the plea-related exchange found harmless in **Blackmon v. Wainwright**.[10] We decline the invitation to extend the holding of **Blackmon** to the instant matter. **Blackmon** involved a state court not bound by the strictures of Rule 11. In addition, that state court had only a limited exchange about possible

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[8]**Barrett**, 982 F.2d at 195.

[9]**Bruce**, 976 at 556 (citing **United States v. Werker**, 535 F.2d 198, 201 (2d Cir.)), cert. denied, 429 U.S. 926 (1976).

[10]608 F.2d 183 (5th Cir. 1979), cert. denied, 449 U.S. 852 (1980).

sentences, elicited in response to pointed queries from a defense attorney unsuccessfully attempting to secure a plea bargain. In the case at bar the court disparaged the merits of a potential defense after declining to accept a guilty plea. Although the court sought to temper or offset any adverse effect by cautioning Ekwerekwu not to plead guilty if he had a defense, it is doubtful in light of the entire circumstances that the instruction had any effect upon the defendant's perception of how the court might receive an entrapment defense. We cannot deem the district court's proscribed participation in the plea negotiations to be harmless; the conviction and sentence must be vacated.

In reaching today's disposition we pause to underscore that we entertain no doubt about the trial judge's objectivity. Our resolution, however, must appropriately consider Ekwerekwu's reasonable perception. Accordingly, on remand the matter must be reassigned to another district judge.

The conviction and sentence are VACATED and the matter is REMANDED for further proceedings consistent herewith.