

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States v. Bove

888 F.3d 606 (2d Cir. 2018) · No. 16-3848-cr · Decided April 26, 2018

SUMMARY

The United States Court of Appeals for the Second Circuit affirmed the denial of Gerald E. Bove's application for attorney's fees and litigation expenses under the Hyde Amendment. The court held that abuse of discretion is the applicable standard of review and concluded that the government's prosecution was not vexatious, frivolous, or conducted in bad faith. The court rejected challenges based on the prosecution's legal theory, the sufficiency and credibility of the evidence, and alleged prosecutorial misconduct.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	José A. Cabranes; Dennis Jacobs Livingston; Richard C. Carney
JURISDICTION	Federal
DECIDED	April 26, 2018
DOCKET	16-3848-cr
DISPOSITION	affirmed
PROCEDURAL POSTURE	Gerald E. Bove appealed the Western District of New York's denial of his application for attorney's fees and other litigation expenses under the Hyde Amendment after a jury acquitted him of attempted Hobbs Act extortion and Hobbs Act extortion conspiracy.
STANDARD OF REVIEW	Abuse of discretion. A district court abuses its discretion when it bases its ruling on an erroneous view of the law, makes a clearly erroneous assessment of the evidence, or renders a decision outside the range of permissible decisions.
PRECEDENTIAL VALUE	Published and precedential
PARTIES	Gerald E. Bove v. United States of America

TOPICS

appellate procedure

standard of review

criminal procedure

prosecutorial misconduct

statutory interpretation

PRACTICE AREAS

criminal law

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QUESTIONS PRESENTED

1. What standard of review applies to an appeal from the denial of a Hyde Amendment application for attorney's fees and litigation expenses?
2. Whether the district court abused its discretion in concluding that the government's prosecution was not vexatious, frivolous, or in bad faith under the Hyde Amendment.
3. Whether the government's unsuccessful legal theory, allegedly insufficient evidence, and alleged prosecutorial misconduct required an award under the Hyde Amendment.

HOLDINGS

1. An appellate court reviews a district court's denial of an application for attorney's fees and other litigation expenses under the Hyde Amendment for abuse of discretion.
2. A prosecution qualifies as vexatious, frivolous, or in bad faith when it is brought to hector or intimidate the defendant on shaky factual or legal grounds, lacks even a reasonably arguable factual and legal basis, or includes intentional deceit or dishonesty.
3. The government's prosecution theory was not frivolous or vexatious because no controlling precedent definitely foreclosed it, some circuit precedent arguably supported it, the district court had considered and rejected a challenge to it during the prosecution, and the theory had been reviewed by government legal authorities.
4. The district court did not abuse its discretion in rejecting Bove's argument that the government's evidence was insufficient or that a witness was not credible; an unsuccessful prosecution or arguably noncredible witness does not alone establish vexatiousness, frivolousness, or bad faith.
5. The district court did not abuse its discretion in rejecting Bove's prosecutorial-misconduct arguments because the government had no duty to present exculpatory evidence to the grand jury and the challenged Jencks Act material was disclosed before trial.

KEY QUOTATIONS

"We join our sister circuits in holding that the standard of review applicable to the appeal of a district court's denial of a defendant's application for attorney's fees and other litigation expenses pursuant to the Hyde Amendment is indeed abuse of discretion." (888 F.3d at 608)

"An arguable theory is not a frivolous theory." (888 F.3d at 611)

"We therefore AFFIRM the District Court's Decision and Order of November 7, 2016." (888 F.3d at 620-21)

FACTUAL BACKGROUND

Bove was prosecuted under the Hobbs Act based on a theory that extortion could include using coercion to replace nonunion workers with union workers, even where the employer wanted the labor performed. A jury

acquitted him of attempted extortion and extortion conspiracy. Bove argued that the prosecution's legal theory was frivolous and vexatious, that its evidence was insufficient, and that prosecutors engaged in misconduct concerning witness statements, grand-jury presentation, and disclosure of Jencks Act material.

PROCEDURAL HISTORY

Bove was acquitted by a jury of one count of attempted Hobbs Act extortion and one count of Hobbs Act extortion conspiracy. He then applied for reimbursement of attorney's fees and other litigation expenses under the Hyde Amendment. The district court denied the application in a Decision and Order dated November 7, 2016, and the Second Circuit affirmed.

DISPOSITION

affirmed

CASES CITED

- United States v. Truesdale, 211 F.3d 898, 905-06 (5th Cir. 2000)
- United States v. Terzakis, 854 F.3d 951, 953 (7th Cir. 2017)
- United States v. Manzo, 712 F.3d 805, 809-10 (3d Cir. 2013)
- United States v. Knott, 256 F.3d 20, 36 (1st Cir. 2001)
- Dinler v. City of New York (In re City of New York), 607 F.3d 923, 943 n.21 (2d Cir. 2010)
- United States v. Ghailani, 733 F.3d 29, 44 (2d Cir. 2013)
- Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995)
- Hayden v. Pataki, 449 F.3d 305, 314-15 (2d Cir. 2006) (en banc)
- Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566-68 (2012)
- United States v. Connolly, 552 F.3d 86, 90 & n.3, 92 (2d Cir. 2008)
- United States v. Costello, 666 F.3d 1040, 1043-44 (7th Cir. 2012)
- United States v. True, 250 F.3d 410, 419-22 (6th Cir. 2001)
- United States v. Gilbert, 198 F.3d 1293, 1299-1302 (11th Cir. 1999)
- United States v. Schneider, 395 F.3d 78, 86-87 (2d Cir. 2005)
- United States v. Mulder, 273 F.3d 91, 111 (2d Cir. 2001)
- United States v. Adkinson, 247 F.3d 1289, 1292 (11th Cir. 2001)
- United States v. Williams, 504 U.S. 36, 52-53 (1992)
- United States v. Kirsch, No. 07-CR-304S(6), 2015 WL 1472122, at *3-5 (W.D.N.Y. Mar. 31, 2015)