UNITED STATES v. GI-HWAN JEONG

United States Court of Appeals for the Fifth Circuit
624 F.3d 706 (2010)

STEWART, CIRCUIT JUDGE:

Gi-Hwan Jeong, a South Korean national, was convicted in South Korea for bribing American public officials in exchange for their assistance in landing a lucrative telecommunications contract. Jeong was sentenced to time served and ordered to pay a fine. Later that year, the United States induced Jeong to travel from South Korea to Dallas, Texas. When he arrived, Jeong was arrested and subsequently indicted on the basis of the same bribery scheme that had led to his conviction in South Korea. Jeong moved to dismiss the indictment on the ground that the United States lacked jurisdiction to prosecute him for these offenses. The district court denied the motion. Jeong pleaded guilty, but reserved the right to appeal the denial of his motion to dismiss the indictment. . . .

In early 2008, a Korean district court convicted Jeong and imposed a fine of 10 million South Korean won (then approximately worth $10,500). The court also imposed a fine of 20 million won (then approximately worth $21,000) against SSRT. The court gave Jeong credit for the 58 days of pretrial detention he had served, and ordered no further incarceration. The conviction and sentence were affirmed on appeal.

The United States continued to investigate the bribery scheme after Jeong's conviction. On September 3, 2008, it submitted to South Korea a formal request for assistance under the mutual legal assistance treaty between the two countries. In early November 2008, Jeong exchanged a series of emails with an AAFES employee that discussed the possibility of Jeong traveling to AAFES headquarters in Dallas, Texas. AAFES invited Jeong to the United States to discuss his claims that AAFES owed money to another one of his companies, Concordia. But the United States had no intention of having such a discussion. On November 14, 2008, it obtained an arrest warrant for Jeong, and upon Jeong's arrival in Dallas four days later, he was arrested.

Jeong was initially charged with two counts of federal bribery under 18 U.S.C. § 201(b)(1). A superseding indictment in May 2009 added one count of conspiracy under 18 U.S.C. § 371, and two counts of honest services wire fraud under 18 U.S.C. §§ 1343, 1346.

In the district court, Jeong moved to dismiss the indictment on three grounds. First, he argued that the federal bribery statute does not have extraterritorial application. Next, he asserted that his prosecution by the United States violated a multilateral treaty to which both the United States and South Korea are signatories:

the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. No. 105-43 (1998) (hereinafter the Convention). The Convention, Jeong argued, prohibits a signatory party from prosecuting a foreign national whose alleged offenses occurred overseas. Finally, Jeong asserted that Article 4.3 of the Convention prohibits multiple prosecutions of the same individual for the same offense. Because the United States had waived jurisdiction, Jeong contended, South Korea exclusively had jurisdiction to prosecute him, and the present indictment thus violated the treaty.

The Korean Ministry submitted a letter to the district court, styled as an amicus brief, in support of Jeong's motion to dismiss. The Ministry argued that because the United States had not previously asserted jurisdiction to prosecute Jeong, the United States had effectively waived that right. As further evidence of waiver, the Ministry pointed to the statement in the United States' request for mutual legal assistance that stated it was not seeking to prosecute Jeong. The Ministry also argued, agreeing with Jeong's motion, that the current prosecution violated Article 4.3 of the Convention. Attached to its letter were copies of four letters the Ministry had submitted to the U.S. Department of Justice, each of which expressed concern over Jeong's arrest.

After a hearing in May 2009, the district court denied Jeong's motion to dismiss. The court concluded that the federal bribery laws have extraterritorial application, and that the Convention was neither self-executing nor a bar to multiple prosecutions. Jeong then pleaded guilty to all five counts in the superseding indictment, but reserved his right to appeal the denial of his motion. At Jeong's sentencing hearing in November 2009, the district court imposed concurrent sentences of sixty months on all five counts, and a $50,000 fine. Jeong timely appealed the denial of his motion to dismiss the indictment.

On appeal, Jeong makes two arguments. First, he again contends that his prosecution in the United States violates Article 4.3 of the Convention. Second, and in the alternative, he asserts that the United States expressly and impliedly waived its jurisdiction to prosecute him, and that therefore his indictment is invalid. . . . .

The Convention, adopted by the Organization for Economic Cooperation and Development, was ratified and implemented in the United States in 1998. Article 4 of the Convention, titled "Jurisdiction," contains four provisions. The third provision states:

> When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

The Convention, art. 4.3. Jeong asserts that this language establishes a *non bis in idem* provision, meaning that it forbids more than one trial for the same offense. *See* BLACK'S LAW DICTIONARY 1150 (9th ed. 2009) ("*non bis in idem*" means "not twice for the same thing," and usually refers to the bar against double jeopardy). In his view, the provision's plain meaning is that countries with concurrent jurisdiction must always consult to determine the one appropriate jurisdiction to prosecute an offense--and once that determination is made, any subsequent prosecutions for the offense are prohibited. We disagree; Article 4.3 is not a bar to multiple prosecutions. Because we reject Jeong's reading of that treaty provision, we need not address whether Article 4.3 is judicially enforceable.

We apply the traditional canons of interpretation to Article 4.3. . . . Applying these canons, we conclude that the plain language of Article 4.3 does not prohibit two signatory countries from prosecuting the same offense. Rather, the provision merely establishes when two signatories must consult on jurisdiction. Article 4.3 states that two signatories with concurrent jurisdiction over a relevant offense must, "at the request of one of them," consult on jurisdiction. The phrase "at the request of one of them" is a dependent clause that conditions the consultation requirement on the existence of a request. Where no such request is made, then, the ordinary reading of Article 4.3 is that consultation is not required. Jeong is therefore incorrect that the provision requires consultation in every instance of concurrent jurisdiction. In the case at hand, the record shows that neither the United States nor South Korea requested consultation on their concurrent jurisdiction to prosecute Jeong. That they did not consult on jurisdiction, therefore, does not violate Article 4.3.

Even if the United States and South Korea had been required to consult on jurisdiction, however, it would not follow that only one of the two nations could prosecute Jeong. Article 4.3 requires that consultation be made "with a view to determining the most appropriate jurisdiction for prosecution." Jeong argues that because the provision uses the singular, not plural, form of "jurisdiction," prosecution of an offense may be had in only one jurisdiction. But this reading impermissibly engrafts additional requirements on the clause, and we may not "alter, amend, or add to" the plain language of a treaty. . . .The plain language of the clause provides that where consultation is required, the parties need only consult "***with a view*** to determin[e]" the jurisdictional question--they need not actually answer it. And, most significantly, the provision requires nothing more than consultation upon request; it does not require any additional actions of the party countries. . . .

Jeong argues in the alternative that the United States "waived its jurisdiction" to prosecute him. He asserts that the United States impliedly waived jurisdiction when it helped South Korea investigate Jeong's role in the bribery scheme, and expressly waived jurisdiction when, in its request for mutual legal assistance, it stated that it was "not seeking to further prosecute Jeong." Implicit in Jeong's argument is a presumption that although the United States and South Korea both had the right to

prosecute him for his offenses, only one of the two countries was permitted to exercise that right. Operating under this presumption, Jeong argues that the United States impliedly and expressly ceded its right of prosecution to South Korea.

In an omission fatal to his argument, however, Jeong fails to identify any source of domestic or international law that permits such a presumption. At the outset, we note that it is doubtful whether Jeong has recourse in domestic law. For instance, we have held that the Double Jeopardy Clause of the Fifth Amendment "only bars successive prosecutions by the same sovereign." . . . Double jeopardy thus does not attach when separate sovereigns prosecute the same offense, as here.

In addition, Jeong has not pointed us to any applicable international law that limits the United States' jurisdiction over the offenses in this case--nor have we found any in our own research. There are three accepted sources of international law in the United States: customary international law, international agreement, and "general principles common to the major legal systems of the world." . . . Because Jeong has not identified--nor does the record show--a legal agreement between the United States and South Korea that would permit a conclusion of jurisdictional waiver in this case, we simply lack a basis in which to evaluate Jeong's waiver claims. . . .

Jeong's arguments on appeal, in essence, challenge the propriety of his prosecution by the United States. In this context, we reiterate that "the decision to prosecute is particularly ill-suited to judicial review," and that for this reason, the United States Government "retains broad discretion as to whom to prosecute." . . . Factors such as "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.". . . Similarly, we are ill-equipped to consider how the prosecution of a foreign national might, if at all, impact diplomatic relations between two countries. In this case, the Executive Branch chose to prosecute Jeong in the United States, and we may evaluate only the specific arguments Jeong raises on appeal. We conclude that he has not demonstrated grounds for relief from this court. . . . The denial of Jeong's motion to dismiss the indictment is AFFIRMED.