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4 July 20, 1962

4 MEMORANDUM

cc: Files  
Mr. Reis  
Mr. Siegel  
Mrs.  
Copeland

4 Applicability of the False Statements  
Act (18 U.S.C. 1001) to Statements  
Made to Agents of the Federal Bureau  
of Investigation

The question before us is whether a person who knowingly and wilfully makes false statements in writing, but not under oath, to an agent of the Federal Bureau of Investigation, may be prosecuted under the False Statements Act. Act of June 25, 1948, C. 645, 62 Stat. 749 (18 U.S.C. 1001).

We are advised that this question comes up at this time because of a specific case, the facts of which appear to be these. A Negro in a written statement given to the FBI declared that while walking on the street with his wife in the city of Birmingham, Alabama, he was accosted without provocation by city police, "frisked" for weapons, assaulted and his wife was insulted. The statement was not under oath. Based upon this complaint, the FBI initiated an investigation. Further inquiry showed that the complainant had deliberately falsified the facts, and had not been harmed. In our opinion, the question whether the provisions of the False Statements Act apply here may generally be answered in the affirmative, but whether criminal proceedings should be instituted will depend on the particular facts of each case. Before initiating action, it may be desirable to clear in advance with the Deputy Attorney General's office.

Title 18 U.S.C. 1001 prohibits the knowing and wilful making of "any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States . . . ." The Supreme Court in United States v. Gilliland, 312 U.S. 86, had occasion to consider fully the scope of this provision in the precursor act then known as section 35 of the Criminal Code, as amended by the Act of June 18, 1934. The statutory provision is intended, the Court there noted (312 U.S. at 93), "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive

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practice described." And it reaches false and fraudulent statements made under such circumstances even though they do not cause the Government pecuniary or property loss (312 U.S. at 93; See too, United States v. Bramlett, 348 U.S. 503, 507).

This principle has been applied to various cases. In a leading case, the defendant was charged with making false statements to an official of the State Department, the FBI and the Civil Service Commission. Although the counts based on the statements to the FBI and the Civil Service Commission were held barred by the statute of limitations, the Court of Appeals held that no prejudicial error was committed in the reception of evidence on those counts to establish that all the statements made were wilfully false. Marzani v. United States, 168 F. 2d 133 (App. D.C. 1948) affirmed without opinion by an equally divided court, 335 U.S. 895. Other cases involved treasury agents. Brandow v. United States, 263 F. 2d 559 (9 Cir. 1959); Cohen v. United States, 201 F. 2d 386 (9 Cir. 1953); United States v. Curcio, 279 F. 2d 681 (2 Cir. 1960); investigator for the Immigration and Naturalization Service. United States v. Chow Bing Kew, 141 F. Supp. 253 (N.D. Cal. 1956); the Department of the Army. Frasier v. United States, 267 F. 2d 62 (1 Cir. 1959); the Atomic Energy Commission, on a Personnel Security Questionnaire. Pitts v. United States, 263 F. 2d 353 (9 Cir. 1959) cert. denied 360 U.S. 935; custom inspector. United States v. Zavala, 139 F. 2d 830 (2 Cir. 1944).

In the Marzani case, the false statement regarding alleged Communist associations was not under oath and the interview was at the appellant's request. The Court of Appeals for the District of Columbia speaking through Judge Prettyman said, 168 F. 2d at 142:

" . . . The pertinent statute does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to 'any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States.'"

Another case in point is United States v. Van Valkenburg, 157 F. Supp. 599 (D.C. Alaska, 1958) where the false statement was made to an Assistant United States Attorney to induce action against a third person. And in United States v. Silver, 235 F. 2d 375 (2 Cir. 1956) cert. denied 352 U.S. 880, which involved a false statement to an Internal Revenue agent, the court said

(p. 377): " . . . a fact deliberately or willfully misstated in a matter of appropriate governmental inquiry seems properly punishable even if it is only a gratuitous red herring."

As against this array of authority, there are several decisions of Federal District Courts which require comment. These are United States v. Stark, 131 F. Supp. 190 (D.C. Md. 1955); United States v. Levin, 133 F. Supp. 88 (D.C. Colo. 1953); and United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957). /1/

In United States v. Stark, *supra*, FBI agents, investigating alleged bribery of FMA officials by building contractors, interviewed certain contractors, who stated that they had never paid such bribes and did not know of anyone who had. The contractors were charged under 5 U.S.C. 1001 with having made false statements to the FBI agents. The District Court granted a motion to dismiss on the ground that the word "statement" was not intended to include the kind of statements involved in this case where the defendants did not volunteer any statement or representation for the purpose of making claims upon it or inducing improper action by the government against others. (131 F. Supp. at 205). The court held further that the FBI agents were not acting on a matter within their jurisdiction, within the meaning of the statute, because it lacked the power to decide whether a criminal offense had been committed. (131 F. Supp. at 207-208).

The Stark case is distinguishable because in the instant case the complainant sought to induce improper action by the Department of Justice; and moreover, investigation of denial of civil rights by State officials acting under color of authority is within the jurisdiction of the FBI, since such conduct constitutes a possible violation of Federal law. See

44/1/ ~~###FNI~~ United States v. Moore, 185 F. 2d 92 (5 Cir. 1950) is clearly distinguishable. The false statement was alleged to have been made during the course of an inspection of a business to determine whether the United States Labor Department had jurisdiction under the Fair Labor Standards Act. Since the preliminary investigation did not constitute an exercise of jurisdiction, but merely an inquiry as to whether jurisdiction was present, the Court held that the Act did not apply. In the instant case, the FBI had undisputed jurisdiction if the facts alleged were true. See Brandow v. United States, *supra*, 268 Fed. 2d at 564-565.

5 U.S.C. 300. In addition, the soundness of the Stark case has been questioned. Brandow v. United States, 268 F. 2d 559, 564 (9 Cir. 1959). United States v. Van Valkenburg, supra, 157 F. Supp. at 600; and see to Frasier v. United States, 267 F. 2d 62, 65 (1 Cir. 1959) which preferred to follow the Marzani case supra.

In United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953), the defendant was indicted for falsely stating to an FBI agent that he had never told anyone that he had any information as to the identity of the owner of a certain piece of jewelry. The indictment was dismissed for two reasons: (1) that a statement not made under oath to an FBI agent is not indictable under 5 U.S.C. 1001 because the agent has no final power to dispose of the matter under investigation; and (2) the defendant must have been under a legal obligation to speak or give information. (133 F. Supp. at 90-91).

The Levin case is contrary to the Marzani and other decisions supra, to the extent that it holds that a statement must be under oath to be indictable. 2/ Also, the reasoning of the Levin case like the Stark decision has been rejected by the Court of Appeals for the Ninth Circuit upon the ground that 5 U.S.C. 1001 contains no requirement that there must be a legal obligation to make the statement which is falsified and that without such legal obligation no crime is committed under this section. See Brandow v. United States, supra, 268 F. 2d at 564; United States v. Van Valkenburg, supra, 157 F. Supp. at 600.

In United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957), the defendant, who was under investigation by FBI agents for violation of the Selective Service Act, gave simple "no" answers to two questions relating to his identity. He was

2/ FN 10 There appears to be a memorandum of Mr. Olney dated April 24, 1953, in the Levin matter, Crim. No. 13509, not to seek to extend 5 U.S.C. 1001 to cover an oral statement made to an investigating agent. This is referred to in Dept. of Justice File No. 51-13-24, letter of Dec. 22, 1953, but we do not know if Mr. Olney's view is still being followed by the Criminal Division. A letter dated Dec. 10, 1953, in Dept. of Justice File 51-13-25, indicates that the Acting Solicitor on June 3, 1953, approved a recommendation that no appeal be taken in the Levin case. The Levin case is in Dept. of Justice File No. 122-13-35.

charged, inter alia, with having made false statements to them. The count was dismissed on the grounds that (1) a simple "no" in response to a question from an FBI agent is not a "statement" within the meaning of 5 U.S.C. 1001; and (2) the authority and function of the FBI is purely investigative, and it was the duty of the Selective Service System to report delinquents to the United States Attorney, and his duty--in turn--to prosecute; hence the alleged false statements did not relate to a matter "within the jurisdiction" of the FBI. 155 F. Supp. at 177-178.

Contrary to the Davey case, in the instant case the complainant furnished a statement in writing, and moreover it was the duty of the FBI to bring the gist of the complaint--denial of civil rights by an official acting under color of the law--to the attention of the United States Attorney, which apparently was done. While these cases appear to be distinguishable for the reasons given, they demonstrate a definite reluctance on the part of federal district judges to apply 5 U.S.C. 1001 unless the facts strongly call for it.

In sum, what we have here appears to fall within the principles of leading cases cited above in which the Act was held to apply.

The statement was issued to an agent of the Federal Bureau of Investigation, a bureau within a Department of the United States Government. It was a voluntary statement. Since the complaint involved an alleged denial of civil rights under the Constitution committed by a State or local official acting under color of his authority, it was within the general jurisdiction of the FBI to investigate the charge. The complainant, upon the facts before us, knew that it was false. The statement he gave was bound to obstruct or impair the honest and faithful operation of the Department of Justice including the Federal Bureau of Investigation. The FBI often works in cooperation with local police officials, and inquiry into alleged unlawful conduct on their part which has no foundation is apt to induce hostility on the part of local officials. The fact that the statement was not under oath, or that the Government did not lose anything of monetary value, or that the complainant did not gain anything of monetary value is immaterial. It could therefore be argued, that on the facts before us the false statement was designed to pervert the authorized functions of a government department, and as such would seem to be within the language and purposes of 5 U.S.C. 1001.

While the Act would appear to apply to the facts, if accurate, the immediate benefit to the continued effectiveness of the FBI by prosecution of such a case should be weighed against possible long-range disadvantages in drying-up valuable sources of information. Those prepared to furnish information in other cases may hesitate if it means running the risk of going to jail if their information turns out to be false. It is true that the person giving a false statement must have acted wilfully in order to support a conviction under the Act, but this fine distinction would be lost upon those who might otherwise want to cooperate with the FBI. In view of these considerations, and the balance to be struck, it would appear to be desirable that proposed prosecutions in cases of this kind should be cleared in advance with the Deputy Attorney General.