UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-7124
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EALUM LEE STEARMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR3 90 268 T)

(December 22, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:[1]

Stearman appeals his conviction for destroying property affecting interstate commerce by means of fire or an explosive. We affirm.

I.

At 4:17 in the morning of September 24, 1986, Captain Jimmy Kerr of the Greenville Fire Department went to the Floor Store,

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[1] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

owned and operated by appellant, Stearman. He found the building on fire, one of the doors blown off its hinges, the odor of gasoline in the building, and the presence of several containers that smelled of gasoline.

Paula Wakefield, who worked as an agent with Stearman's real estate office in Rowlett, Texas, received a call at about 6:00 that morning, asking if Stearman was there. The caller told her that there had been a fire at the carpet store and they were looking for Stearman. Wakefield agreed to go and went to the real estate office to see if he was there. Barbara Willis, who helped manage the real estate office and ran a courier service, arrived at the office at about 6:45 a.m.

In a telephone conversation with Stearman's wife Faye, Willis learned that a van parked in front of the real estate office belonged to Stearman. Upon looking inside the van, Willis and Wakefield found Stearman's wallet, a briefcase, and a note. Willis smelled the strong odor of gasoline in the van and saw containers from which the odor emanated. The note stated in part as follows:

> My dearest Faye.
>
> Well someone got me, but I will never know who.
>
> I woke up and went to the store for some reason this morning.--don't know why. I went in at the up-stairs outside ent[]rance and was met with a ball of fire.
>
> I knew I would be accused of doing it since I was burned, so I just left to think it over. I may come back and may not.

Stearman testified that the note was in his handwriting but that he did not recall writing it.

Dr. Kurt Lange testified at the trial that he examined Stearman at the emergency room of the VA Hospital in Dallas on the morning of September 24, 1986. According to the doctor's notes, Stearman stated that he went to his business that morning and found it on fire. Stearman said that when he opened the door, flames flew up in his face, burning him superficially.

Tommy Hemphill, the manager of the Floor Store, testified that about a week before the fire, Stearman asked him whether the store had adequate fire insurance. The fire insurance in effect on the Floor Store on the date of the fire was $100,000 on the building and $40,000 on personal property. On that date, the insurance agent received a request, in Stearman's handwriting, for an increase in the coverage to $120,000 on the building and $50,000 on personal property. A Floor Store check dated September 19, 19__, for $923.81 to pay past-due premiums accompanied the request.

Donald Womble, an auditor with the Bureau of Alcohol, Tobacco and Firearms, examined the Floor Store's financial records and bank records relative to Stearman's other business activities. Womble testified that for the period of October 1985 through September 1986, the Floor Store suffered a negative cash flow of "possibly $2,500," despite investments by the owners and bank loans totalling approximately $90,000. According to Womble, Stearman's real estate business showed a net loss of $18,000 for the period from January to September 1986.

At his trial, Stearman testified that after waking up at about 4:00 on the morning of the fire, he went to check the store. He

said that when he served in the military, he had developed a pattern of waking up at night, working, and then going back to sleep. He said that when he opened the upstairs door at the back of the store, he was hit with fire, or a ball of fire. Stearman testified that he did not recall leaving or going to the hospital. Concerning his wife's statement that he never left home without telling her, he testified: "Well, I don't just leave completely. She considers the store or the office where I work part of my home because I almost live there."

Stearman raises five issues on appeal:

1) The government obtained the indictment through the use of perjured or inflammatory testimony; 2) the district court violated Stearman's Sixth Amendment right to represent himself; 3) the district court improperly conditioned his pretrial release on acceptance of court-appointed counsel; 4) the district court failed to advise him of his right to standby counsel; and (5) he was denied the right to effective assistance of counsel. We consider these arguments below.

II.

A.

Stearman contends that the district court's denial of his motion to dismiss the indictment denied him due process and a fair trial. In an addendum to his motion to dismiss, he asserted that the indictment resulted from perjured testimony of ATF Agent Karl Anglin, the principal grand jury witness. After a hearing, the court found the evidence insufficient to demonstrate (1) that

Anglin intentionally misrepresented any fact in his grand jury testimony; (2) that any of his testimony which was incomplete or inaccurate was likely to have caused the grand jury to indict; and (3) that any prosecutorial misconduct occurred.

To establish his claim that the indictment was defective, Stearman must show either the use of perjured testimony or government misconduct. **See United States v. Bourgeois**, 950 F.2d 980, 985 (5th Cir. 1992); **see also United States v. Sullivan**, 578 F.2d 121, 124 (5th Cir. l978) ("[A]bsent perjury or government misconduct, an indictment is [not] flawed simply because it is based on testimony that later may prove to be questionable."). The district court's findings concerning these elements can be set aside only if this Court finds them to be clearly erroneous. **See Boureois**, 950 F.2d at 984 (prosecutorial misconduct); **Sullivan**, 578 F.2d at 124 (deferring to trial court's finding of no perjury).

The district court credited Agent Anglin's testimony over that of Stearman and his witnesses. Rule 52(a), Fed. R. Civ. P., provides in part, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Accordingly, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." **Anderson v.**

City of Bessemer City, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The Rule 52(a) "clearly erroneous" standard also applies to the court's findings in criminal cases. **See United States v. Wright**, 797 F.2d 245, 249 (5th Cir. 1986), **cert denied**, 48l U.S. l0l3 (l987).

Stearman relies on six excerpts from Agent Anglin's testimony, each of which he contends was false. We have carefully reviewed all of these statements and Stearman's contention that they are false and prejudicial. Agent Anglin had a factual basis for all of these statements. In most instances, Stearman disputed the factual basis agent Anglin relied upon. But the district court did not clearly err in finding that agent Anglin did not intentionally misrepresent facts or otherwise attempt to mislead or prejudice the grand jury. This argument is without merit.

B.

Stearman next contends that the prosecution and the magistrate judge deprived him of due process and a fair trial by compelling him to accept appointed counsel and not allowing him to exercise his requested right of self-representation. In support of these contentions he relies principally on his Affidavit A, which he executed almost a year after his trial. Because this affidavit was not considered by the district court and is not part of the record on appeal, we decline to consider it. **See United States v. Hatch**, 926 F.2d 387, 395 (5th Cir.), **cert. denied**, 111 S.Ct. 2239 (1991).

After being indicted, Stearman appeared before the magistrate judge on October 18, 1990, and was committed without bail. The

next day, the Government moved for Stearman's detention pending trial and for a psychiatric examination. On October 23, 1990, the magistrate judge released him on his personal recognizance. The court appointed the Federal Public Defender as Stearman's counsel of record.

Also on October 23, 1990, the Government moved to withdraw its motion for a psychiatric examination, "on the grounds that the defendant has now accepted appointed counsel who will be able to initially determine whether the defendant is mentally competent to stand trial." The district court granted the motion.

Stearman filed a pro se pretrial motion, requesting that the court recognize his "right to question the government witnesses ... and to present all or part of the opening and closing statements." At the pretrial hearing the court denied this motion and advised the defendant that he could not participate during the trial except through his attorney. The day after the jury was sworn, Stearman filed a pro se motion to replace the Public Defender asserting incompetence of his counsel. Stearman did not suggest that he wished to proceed pro se but rather asked that the court replace his attorney by appointing "competent and effective counsel." The court denied this motion after the prosecutor's opening statement.

Stearman asserts that at his initial detention hearing he asked to represent himself throughout the proceedings. He avers that "the government stated it would insist on a psychiatric examination unless Stearman accepted appointed trial counsel." As a result, he states, "he accepted appointed trial counsel, with

assurance from the magistrate that Stearman could act as co-counsel, question[] witnesses, and make an opening and closing statement." To support these contentions, he again refers to his Affidavit A.

We will not consider Stearman's affidavit in support of his contentions. **See Hatch**, 926 F.2d at 395. Whether these events occurred as Stearman says they did could be determined by the transcripts of the October 18 and 23, 1990, proceedings before the magistrate judge. Stearman has not included them in the appellate record, however. As appellant, Stearman is responsible for ordering those parts of the record on which he relies to support his claims of error, "and his failure to do so prevents us from reviewing this assignment of error." **United States v. O'Brien**, 898 F.2d 983, 985 (5th Cir. 1990); **see also** Fed. R. App. P. 11(a).

The record does not show that Stearman was compelled to accept appointed counsel by the Government's insistence on a psychiatric examination unless he did so. The motion for an examination was based on Stearman's "conduct and the nature of the offense," with no mention of whether he was to be represented by counsel.

Stearman had an absolute right of self-representation, **Faretta v. California**, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), as the district judge advised him at the pretrial hearing. Unlike Faretta, however, Stearman never unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. Rather than requesting leave to proceed pro se, Stearman moved for the appointment of new counsel to replace the

public defender. The record does not reveal that he ever asked to proceed pro se. These circumstances refute Stearman's claim that he was wrongfully induced to proceed with court-appointed counsel rather than pro se.

Stearman's motion for permission to question government witnesses and to present opening and closing statements at his discretion requested a hybrid representation to which he was not entitled. **United States v. Norris**, 780 F.2d 1207, 1211 (5th Cir. 1986).

At the pretrial hearing, the district judge advised Stearman that he could not both proceed pro se and be represented by counsel. Stearman said only, "At the hearing on our release I was under the understanding . . . that I could ask questions of witnesses." He said nothing about the magistrate judge's assuring him that he could do so. There is no record evidence to support Stearman's assertion that the magistrate judge told him that he could act as co-counsel, which would have been contrary to settled law.

Stearman is entitled to no relief on this claim.

C.

Stearman contends that his conviction should be reversed on grounds that the magistrate judge compelled him to accept court-appointed counsel as a prerequisite to his release on his own recognizance. He argues that this violated his Eighth Amendment right to be free from excessive bail.

This contention merits no relief because of its mootness. An Eighth Amendment claim regarding pretrial bail is moot following the defendant's conviction. **See Murphy v. Hunt,** 455 U.S. 478, 48l, l02 S.Ct. ll8l, 7l L.Ed.2d 353 (l982).

D.

Stearman also seeks reversal on grounds that the magistrate judge and trial judge failed to advise him of his presumed right to standby counsel. He relies on two cases which hold that a trial court may appoint standby counsel for a defendant, **Faretta v. California**, 422 U.S. at 835 n.46; and **United States v. Kelley**, 539 F.2d 1199, 1201 n.3 (9th Cir.), **cert. denied**, 429 U.S. 963 (1976). This Court has held, however, that while this is "the preferred practice," it is "not mandatory." **Neal v. Texas**, 870 F.2d 312, 316 (5th Cir. 1989) (quoting **McQueen v. Blackburn**, 755 F.2d 1174, 1178 (5th Cir.), **cert. denied**, 474 U.S. 852 (1985)). Accordingly, the district court was not required to inform Stearman that standby counsel could be appointed in the event that he desired to proceed pro se.

E.

Stearman finally contends that his appointed attorney failed to provide him effective assistance of counsel. Stearman asserts that his attorney erred by not offering into evidence at trial "significant exculpatory evidence regarding profitability of the business." He alleged ineffective assistance in his pretrial motion to replace his counsel and in his post-trial motion for acquittal or new trial, but not on this specific ground. Stearman

relies on his Affidavit B, another post-trial affidavit which is not part of the record. The court declined to consider this affidavit. **See Hatch**, 926 F.2d at 395.

This court considers alleged ineffective assistance of counsel on direct appeal only in "rare cases where the record allow[s] us to evaluate fairly the merits of the claim." **United States v. Higdon**, 832 F.2d 312, 314 (5th Cir. 1987), **cert. denied**, 484 U.S. 1075 (1988). Because this is not such a "rare case," we decline to consider the issue, without prejudice to Stearman's right to raise the issue in a proper proceeding pursuant to 28 U.S.C. § 2255. **See id.**

Stearman's conviction is AFFIRMED.