IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9540
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HENRY MELVIN JOSEPH, JR.,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana

(CR-90-445-I)

(November 19 , 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Henry Melvin Joseph, Jr. was convicted by a jury of mail fraud, presenting false claims, and fraudulent misrepresentation of a Social Security number, in violation of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

18 U.S.C. §§ 287 and 1341, and 42 U.S.C. § 408(g)(2). On appeal, Joseph insists that the district court abused its discretion in denying his motion for a new trial on grounds of newly discovered evidence. Joseph also insists that he was deprived of a fair trial by virtue of the prosecution's withholding of exculpatory evidence in violation of Brady v. Maryland. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Joseph was charged in a seven-count indictment with three counts of mail fraud, three counts of fraud against the government, and one count of Social Security fraud. After the jury convicted him on all seven counts, Joseph was sentenced to three years' imprisonment. His motion for new trial based on newly discovered evidence was denied. We had previously noticed potential problems with jurisdiction, which problems were resolved when the district court found that Joseph's delay in filing his notice of appeal was due to excusable neglect.

In 1984, while Joseph was a civilian employee with the Department of Defense (the DOD) residing in Mt. Clemens, Michigan, he requested a permanent change of station (PCS) move from Michigan to New Orleans. In May of 1985, Joseph contacted the Defense Contract Administration Services Region (DCASR) in Dallas, Texas, and requested a travel advance for this move. He claimed that he would incur costs for transfer travel and temporary quarters for 30 days for himself and his dependents--his wife, one daughter, and

two sons. The DOD issued Joseph's travel orders on May 31, 1985, authorizing the advance for transfer travel and temporary quarters expenses for Joseph, his wife, his daughter, and his younger son, but deleting the older son who was over 21 years of age.

The DCASR sent Joseph a check for the travel advance in the amount of $12,590. The check was issued on June 10, 1985. Joseph claimed that he did not receive the check in Michigan in time for the move but received it after he arrived in New Orleans.

Needing money for the trip, Joseph applied for and received a second travel advance in the amount of $10,541 from the United States Army Tank Automotive Command (TACOM) in Warren, Michigan, on June 7, 1985. The two advances were for the same expenses. According to Ms. Janie Eldridge, a travel voucher examiner for the Defense Logistics Agency, Joseph was entitled to only one advance and should have voided the check for $12,590 when he received it.

Joseph submitted a total of four travel vouchers to the DCASR claiming expenses of the move. The first one was filed in October of 1985. According to the Joint Travel Regulations, the voucher contains a section in which the claimant is required to list any travel advances received; and the claimant is required to attach the papers authorizing any advances to the voucher. When he submitted this first voucher, Joseph failed to reveal that he had received the travel advances of $12,590 and $10,541. The government was aware of the original advance for $12,590 issued from the DCASR, but at that time the DCASR was not aware of the additional advance for $10,541 issued from the TACOM in Michigan.

Joseph failed to reveal the two advances on his second voucher as well. He finally listed the $12,590 advance on his third voucher, which was submitted on May 30, 1986. The DCASR paid him for transfer travel and for temporary quarters for 57 days. This exceeded the entire $12,590 advance, so the DCASR mailed a check to Joseph, issued on June 17, 1986, for $6,295.06, to cover the amount by which his expenses exceeded the $12,590 advance. At that point the DCASR was still not aware that a second advance for $10,541 had been issued to Joseph in Michigan, and Joseph did not reveal this information. If the DCASR had known of the second advance, it clearly would not have issued the check for $6,295.06.

Shortly thereafter, the DCASR became aware of the second advance, realizing for the first time that Joseph had received advances in excess of his approved moving expenses, and thus owed the government a refund of approximately $10,550. Major E. R. Booker, Jr., Accounting and Finance Officer of the Defense Logistics Agency in Dallas, wrote to Joseph on September 28, 1986, requesting repayment of the excess. After he received this demand letter, Joseph submitted yet a fourth voucher, this one on October 6, 1986, requesting additional reimbursement. On this voucher the second advance of $10,541 was finally listed. Joseph testified that his failure to list his travel advances on the vouchers was just an oversight, and that he was not trying to hide the fact that he had received these monies.

Joseph disputed that he owed the government for overpayment for his travel expenses, contending that his expenses consumed the

entire amount of the advances. Ms. Eldridge referred the case to Joseph Satagaj, an attorney for the Defense Logistics Agency in Dallas, for investigation of possible fraud. Initially, the case was handled administratively. When Joseph failed to provide sufficient proof of his expenses, however, the government began docking his pay to recoup the overpayment. Questions of the truthfulness of his vouchers arose during the investigation. The investigation ultimately revealed numerous inconsistencies and false statements in Joseph's vouchers, leading to this prosecution.

Joseph maintained that any inconsistencies in his vouchers were honest mistakes and that he did not have any intent to defraud the government. The jury evidently did not believe him, convicting him on all counts. Joseph timely appealed.

II

ANALYSIS

A. Denial of Motion for New Trial

Joseph argues that the district court abused its discretion in denying his motion for new trial grounded in allegations of newly discovered evidence. The alleged new evidence was a letter dated September 17, 1985, from Major Booker to Joseph, informing Joseph that he had an outstanding advance in the amount of $23,131 and that he should either submit a travel voucher or a check to the DCASR in Dallas. Joseph averred that he had forgotten about this letter and that he inadvertently discovered it among some documents which he came across while cleaning his home. He urged that the letter was relevant to disproving that he had any intent to defraud

the government by failing to disclose that he had received advances. Joseph argued that the letter proves that the government was aware that he had received the advances, and that he knew of the government's awareness.

The district court denied the motion because the letter was in Joseph's possession all along, and he would have discovered it if he had exercised due diligence. The court also found that the letter was not exculpatory and would not have affected the outcome of the trial.

Motions for new trial based on newly discovered evidence are disfavored; denials of such motions are reversed only for abuse of discretion. United States v. Peña, 949 F.2d 751, 758 (5th Cir. 1991). A defendant moving for a new trial based on newly discovered evidence must show that 1) the evidence is newly discovered and was unknown to the defendant at the time of trial; 2) failure to detect the evidence was not due to lack of due diligence by defendant; 3) the evidence is material, not merely cumulative or impeaching; and 4) the evidence will probably produce an acquittal. Failure to satisfy any prong of this test requires denial of the motion for new trial. Id.

The letter was addressed to and mailed to Joseph. He admitted having it in his possession. His excuse for not using it at trial was that he had forgotten about it and had only found it by chance when going through other papers after the trial. The same situation was involved in United States v. Prior, 546 F.2d 1254, 1258-59 (5th Cir. 1977). The defendant moved for a new trial

because he found a letter in his records which had been misfiled and not located before trial. We concluded that the letter did not qualify as newly discovered evidence warranting a new trial. See also United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 736 (5th Cir. 1984) (due diligence would require that defendant's criminal attorney know about letter in possession of defendant's civil attorney). Here, the district court did not abuse its discretion in denying Joseph's motion for new trial because the alleged new evidence was in his possession and he failed to exercise due diligence. Although it is not necessary to our determination of this issue, we nevertheless observe additionally that production of the letter at trial almost certainly would not have produced an acquittal.

Joseph also argues that he was entitled to a new trial because the letter shows that government witnesses testified falsely. He cites United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979), in which we stated that a new trial must be held if it is shown that the government's case included false testimony, that the prosecution knew or should have known of the falsity, and that there is any reasonable likelihood that the false testimony would have affected the judgment of the jury. Joseph contends that the letter in question proves that the government witnesses testified falsely that they were not aware of the double advances when he submitted his vouchers. Joseph's reliance on such a contention is misplaced.

The letter does not prove that the government witnesses,

Satagaj and Eldridge, were lying about the government's knowledge of the two advances. Both witnesses stated in affidavits submitted by the government with its opposition to Joseph's motion for new trial that they had not seen the letter in question before and that it was not contained in the files in their possession which they reviewed prior to trial. Joseph is not entitled to a new trial based on false testimony.

B. Brady Violation

Joseph also argues that the failure of the prosecution to produce this letter constituted a Brady violation. We disagree.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that the suppression by the prosecution of evidence favorable to the accused, when the accused has requested such evidence, violates due process, if the evidence is material either to guilt or punishment. To establish a Brady violation, the defendant must show that 1) evidence was suppressed; 2) this evidence was favorable to the accused; and 3) the evidence was material to either guilt or punishment. United States v. Ellender, 947 F.2d 748, 756 (5th Cir. 1991). We have held that when "the defendant's own lack of reasonable diligence is the sole reason for not obtaining the pertinent material, there can be no Brady claim." Id. at 757.

Again, our decision in Prior is directly on point. We found no Brady violation in the prosecution's failure to provide defendant with a letter that he had in his own files. "[T]he government is not obliged under Brady to furnish a defendant with

information which he already has or, with any reasonable diligence, he can obtain himself." 546 F.2d at 1259.

The letter in question was in Joseph's possession and would have been available to him at trial if he had exercised due diligence to locate it. There was no Brady violation here. AFFIRMED.