IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1578

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVY HILLING,

Defendant-Appellant.

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No. 92-l579

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID P. NEUBAUER,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(CR-3-89-024-R)

May 6, 1993

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

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[*] Local Rule 47.5.1 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

Davy Hilling and David Neubauer were indicted on nine counts relating to the abuse of their positions of authority at Irving Savings Association, Irving, Texas ("Irving Savings"). The district court denied their pretrial motion to dismiss the indictment on double jeopardy and collateral estoppel grounds, and this interlocutory appeal ensued. We affirm.

I.

In 1983, Hilling and Neubauer acquired Irving Savings. Hilling served as chairman of the board, while Neubauer was chief of staff. On September 11, 1984, they consented to be removed from these positions.

On July 24, 1986, Hilling and Neubauer were indicted in federal court in the Western District of Washington. Count I charged them)) together with five other defendants)) with conspiracy to commit wire fraud in violation of 18 U.S.C. § 371. Among the overt acts in furtherance of the conspiracy were the following: (1) They caused $1,391,752.58 to be transferred to an escrow account in the name of Tahoe Marina Development; (2) they received a payment of $500,000 as a "kickback" for providing a $5,000,000 loan to Tahoe Marina Development; and (3) they issued three letters of credit without authorization to Raymond Gray in order to benefit themselves financially. The alleged purpose of the conspiracy was to obtain money from three financial institu-

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on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

tions controlled by the co-conspirators through a series of fraudulent loans and credits.

The Washington indictment also charged substantive offenses, including (1) wire fraud in violation of 18 U.S.C. §§ 1343 and 2 in count III and (2) interstate transportation of money obtained by fraud in violation of 18 U.S.C. §§ 2314 and 2 in count IV. The crux of these two counts was that Hilling and Neubauer caused the fraudulent transfer of $2,346,000 by wire from Home Savings and Loan Association, Seattle, Washington ("Home Savings"), to Alliance Federal Savings and Loan Association, Irving, Texas ("Alliance Federal"). Hilling and Neubauer were not charged with the substantive offense of illegally transferring the $1,391,752.58, receiving the $500,000 kickback in connection with the Tahoe Marina Development loan, or issuing the three unauthorized letters of credit to Gray.

In March 1987, a jury convicted Hilling and Neubauer of the conspiracy count and acquitted them of the underlying substantive offenses. They were sentenced to five years' imprisonment and were ordered to make restitution of $17,559,910 jointly and severally with the other defendants found guilty of participating in the conspiracy. The Ninth Circuit reversed the conviction based solely upon improper instruction of the jury under McNally v. United States, 483 U.S. 350 (1987), and specifically stated that no obstacle existed to retrial. United States v. Hilling, 863 F.2d 677, 681 (9th Cir. 1988).

On September 3, 1987, Hilling and Neubauer, along with another

defendant, were indicted in federal court in the District of Montana. The indictment did not charge the defendants with engaging in a conspiracy but did allege the commission of various substantive offenses, including bank bribery in violation of 18 U.S.C. § 215(a)(1) and making false statements to influence the actions of a federally insured financial institution in violation of 18 U.S.C. §§ 1343, 1006, and 2. The counts against Hilling and Neubauer centered on loans they caused to be made to Virgil Jahnke and Stephen McMullen that allegedly resulted in several kickbacks to Hilling and Neubauer, ranging from $5,257.57 to $1,400,000. The indictment, like the Washington indictment, did not charge Hilling and Neubauer with the substantive offense of illegally transferring the $1,391,752.58, receiving the $500,000 kickback in connection with the Tahoe Marina Development loan, or issuing the three unauthorized letters of credit to Gray.

Hilling and Neubauer moved to dismiss the Montana indictment on the grounds that the double jeopardy clause of the Fifth Amendment and collateral estoppel barred it. After the district court denied their motion, Hilling and Neubauer filed an interlocutory appeal. The Ninth Circuit affirmed the district court's denial. United States v. Hilling, Nos. 88-3152 and 88-3153 (9th Cir. Apr. 20, 1989). Hilling was subsequently convicted of the charges, while Neubauer was acquitted.

On January 26, 1989, Hilling and Neubauer were indicted in the case sub judice for various substantive offenses they allegedly had committed during their tenure as Irving Savings; they were not

indicted for conspiracy. Discussing the object of their activities, count 1 alleged that Hilling and Neubauer engaged in a scheme to defraud Irving Savings through a series of unsound and fraudulent loans and credits. Specifically, count 1 charged that they allegedly transferred $1,391,752.58 by wire from Irving Savings to Nevada National Bank, Reno, Nevada ("Nevada National"), in violation of 18 U.S.C. §§ 1343 and 2. Count 2 charged them with misapplying the same $1,391,752.58 in violation of 18 U.S.C. §§ 657 and 2. Counts 3 and 4 focused on the $500,000 kickback they received from Gray in violation of 18 U.S.C. §§ 2314, 1006, and 2. Count 5 charged wire fraud in violation of 18 U.S.C. §§ 1343 and 2 for confirming by wire an unauthorized letter of credit for $2,500,000 to Gray. Counts 6 through 9 alleged violations of 18 U.S.C. §§ 1006 and 2 for unauthorized commitments by Irving Savings of $4,000,000 to the DeVille Casino in Las Vegas, $5,675,000 to Harold Caldwell and Colorado Chain O'Mines, $5,000,000 to Woodson Company, and $500,000 to the Pearl of Reno Timeshare Owners Association.

Hilling and Neubauer moved to dismiss the Texas indictment based upon double jeopardy and collateral estoppel arising from the indictments and trials in the Washington and Montana cases. The district court, calling their claims "baseless," denied the motion.

II.

Hilling and Neubauer argue that the Double Jeopardy Clause of the Fifth Amendment forbids the Texas prosecution because the

clause bars successive prosecutions for separate offenses arising out of the same conduct. They maintain that although a Washington jury acquitted them of the substantive acts of wire fraud and illegal interstate transportation of funds obtained by fraud, the government is prosecuting them in Texas once again for the same substantive acts. In addition, they claim that the substantive acts that the Texas indictment alleges they committed were "specifically . . . overt act(s) alleged to have [been] performed by Hilling and Neubauer as a substantive offense" in the Washington indictment. A closer examination of the Washington indictment shows that the overt acts referred to were not substantive offenses, but rather were raised under the conspiracy count as allegations of overt acts that they committed in furtherance of the conspiracy. We assume that the defendants' argument is that they may not be tried in Texas for substantive offenses that have served previously as evidence of overt acts in furtherance of a conspiracy of which they were tried in Washington.

A.

We tackle first the argument that the substantive offenses of wire fraud and interstate transportation of funds obtained by fraud, for which Hilling and Neubauer were indicted in Texas, are the same as the allegations of wire fraud and interstate transportation of funds obtained by fraud in the Washington indictment. We reject this argument.

In the Washington indictment, the wire fraud and interstate

transportation allegations were based upon the wire transfer of $2,346,000 from Home Savings to Alliance Federal on September 27, 1984. The Texas indictment charges Hilling and Neubauer not with the substantive offense of transferring this $2,346,000 but with the substantive offenses of transferring by wire $1,391,752.58 from Irving Savings to Nevada National on February 2, 1984, in counts 1 and 2, the $500,000 kickback in counts 3 and 4, and the wire confirmation of an unauthorized letter of credit of $2,500,000 to Gray in count 5.

While the Washington and Texas indictments allege violations of 18 U.S.C. §§ 1343 and 2314, the underlying transactions in the respective indictments are different. In United States v. Lemons, 941 F.2d 309, 318 (5th Cir. 1991) (per curiam), we stated that section 1343 "expressly punish[es] separate acts in execution of a scheme to defraud . . . . [E]ach act in execution of a scheme is a punishable offense under the . . . wire fraud statute . . . ." Likewise, the language of section 2314 is similar enough to that of section 1343 that it is obvious that each interstate transportation is a separate, punishable offense.[1]

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[1] Compare the similar language of the two sections. Section 2314 states,

> Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting
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> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,

(continued...)

It is also obvious that the test for double jeopardy under Blockburger v. United States, 284 U.S. 297, 304 (1932), is met. There, the Court stated,

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. (citation omitted).

First, we note that the same act or transaction is not at issue in both cases. Rather, the Texas indictment alleges entirely distinct transactions from those in the Washington indictment. Moreover, the Washington indictment requires proof of facts that the Texas indictment does not, namely, that in the Washington

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(...continued)

> transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; . . .
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> . . . .
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> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
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> . . . .
>
> Section 1343 states,
>
> Fraud by wire, radio, or television
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> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such persons shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

indictment proof of the wire transfer of $2,346,000 from Home Savings to Alliance Federal is required)) proof of a fact irrelevant to the Texas indictment. The defendants' argument fails, because the Texas indictment includes only allegations of substantive offenses not included as substantive offenses in either the Washington or Montana indictment.[2]

In Grady v. Corbin, 495 U.S. 508, 521 (1990), the Court refined the Blockburger test for cases involving successive prosecutions by declaring that the

> Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted . . . . As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. [Footnote and citation omitted.]

Although the government has presented evidence in the Washington indictment that overlaps substantially with the nine counts alleged in the Texas indictment, the conduct that the government must prove in the Texas trial is not conduct that "constitutes an offense for which the defendant has already been prosecuted." On the contrary, neither Hilling nor Neubauer was prosecuted in Washington for substantive offenses based upon their conduct of transferring by wire the $1,391,752.58 from Irving Savings to Nevada National or

[2] As for the Montana indictment, Hilling and Neubauer admit that "the Montana case was concerned with specific loan or credit transactions which do not overlap the Washington or Texas indictments." The Montana indictment centers on illegal loans made to Jahnke and McMullen, substantive offenses not alleged in the Texas indictment. Therefore, the Texas indictment is not barred by double jeopardy as a result of the Montana indictment.

receiving the $500,000 kickback they allegedly received from Gray. Evidence of that conduct was presented in Washington merely to show the existence of overt acts in furtherance of a conspiracy, not to prosecute them for the substantive acts themselves.

B.

We next examine the defendants' contention that because the substantive offenses alleged in the Texas indictment constitute overt acts in furtherance of the conspiracy that the Washington indictment alleged, the double jeopardy clause bars the Texas prosecution. Basically, they argue that since they initially were convicted of a conspiracy that was composed of several overt acts, they cannot be tried again for the substantive offenses of which the conspiracy was comprised. We do not accept this argument.

In United States v. Kalish, 734 F.2d 194, 195 (5th Cir.), cert. denied, 469 U.S. 1207 (1984), two defendants were indicted for a conspiracy to possess with intent to distribute marihuana and also for possession with intent to deliver marihuana. The defendants claimed that the Double Jeopardy Clause precluded the government from first prosecuting them for conspiracy to commit a crime, and then, in a separate proceeding, charging the same defendants with the underlying substantive offense that was an object of the conspiracy. Id. at 196. We rejected the defendants' argument, holding that "the offenses of conspiracy to commit a crime and the crime itself are separate offenses." Id. at 198 (citing Iannelli v. United States, 420 U.S. 770 (1975)).

Under Kalish, we must reject Hilling's and Neubauer's claim that the Double Jeopardy Clause precludes the government from prosecuting them in Texas for the substantive offenses that formed the overt acts in furtherance of a conspiracy for which they were tried in Washington. Hilling and Neubauer were not tried in Washington for the substantive offenses that the Texas indictment now alleges they committed. The Washington indictment simply listed these acts as overt acts committed in furtherance of a conspiracy for which they were tried. Since they have not been tried for the substantive offenses in either Washington or Montana, no bar exists to the government's present indictment of Hilling and Neubauer in Texas for the substantive offenses.

III.

As a final claim, Hilling and Neubauer maintain that the principle of collateral estoppel bars the Texas indictment. In Ashe v. Swenson, 397 U.S. 436, 443 (1970), the Court stated that collateral estoppel means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." The Court went on to decide that a defendant who robbed six men engaged in a poker game, and was first tried and acquitted for the robbery of one of the participants in the poker game, could not be then prosecuted in a separate proceeding for the robbery of another participant. Id. at 445. The Court also instructed reviewing courts to apply the rule of collateral estoppel with

"realism and rationality" and to examine the prior proceeding to determine "`whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" Id. at 444 (citation omitted).

Hilling and Neubauer assert that since they were acquitted in Washington of "general allegations" of wire fraud and interstate transportation of funds obtained by fraud, they may not be tried in Texas for the "same conduct on later loans." Unfortunately for the defendants, the Texas indictment charges them with conduct different from the substantive offenses of which they were acquitted in Washington. As distinguished from its efforts, in Ashe, the government does not now seek to try Hilling and Neubauer for illegal actions surrounding the same loans at issue in the substantive charges in Washington)) specifically, the illegal wire and transportation of the $2,346,000 loan from Home Savings to Alliance Federal on September 27, 1984. Instead, the Texas indictment centers on illegal action concerning a different set of loans)) the illegal wire and transportation of the $1,391,752.58 from Irving Savings to Nevada National on February 2, 1984.

Ashe basically prohibits the government from relitigating an issue against the same parties once that specific issue has already been decided in one suit. In this case, no jury previously has decided the substantive issues contained in the Texas indictment. Therefore, the defendants' collateral estoppel argument fails.

IV.

Since we conclude that neither the Double Jeopardy Clause of the Fifth Amendment nor collateral estoppel precludes the government from prosecuting Hilling and Neubauer under the Texas indictment, we AFFIRM the district court's denial of the defendants' motion to dismiss the indictment.