

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1614
Summary Calendar

United States of America,

Plaintiff-Appellee,

VERSUS

David Davila,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CR 5 92 0029 C 01)

(March 19, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge*:

David Davila was convicted of violations of various federal firearms and narcotics laws and complains on appeal that the district court abused its discretion in denying his Motion for Continuance made several days before trial. We find no abuse of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

discretion and accordingly affirm Davila's conviction.

Facts and Prior Proceedings

David Davila, along with two other co-defendants, were arrested on January 17, 1992 after an undercover investigation that lasted eleven days. By January 23, 1992, the grand jury had returned a twelve (12) count indictment against all of the defendants.¹ On February 7, 1992, Davila filed various pre-trial motions including a discovery motion. Four days later, certain items of discovery were given to Davila, including copies of sixteen (16) cassette tapes. The tapes contained conversations of the firearms and narcotics transactions between Davila and the Government's undercover agents on which the criminal charges were based. The Government indicated that these tapes would be introduced at trial. On February 27, 1992, a superseding indictment was returned against Davila and the other defendants alleging the exact same violations as the original indictment.²

¹ The indictment alleged a conspiracy to possess with intent to distribute and to distribute less than one hundred (100) kilograms of marijuana in violation of Title 21, United States Code, Section 846; two counts of distribution of less than one hundred (100) kilograms of marijuana in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(c), and Title 18, United States Code, Section 2; one count of possession with intent to distribute less than one hundred (100) kilograms of marijuana in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(c) and Title 18, United States Code, Section 2; three counts of possession of unregistered firearms in violation of Title 26, United States Code, Sections 5861(d) and 5871, and Title 18, United States Code, Section 2; two counts of felon in possession of a firearm in violation of 18 United States Code, Section 922 (g)(1); and three counts of using and carrying a firearm during and in relation to a drug trafficking crime in violation of Title 18, United States Code, Sections 924(c)(1) and (2).

² The changes made to the original indictment were the addition of an alias name for defendant Ramirez and a correction in the serial number of one of the firearms.

Trial was set for March 9, 1992 but three days before trial, Davila filed a Motion for Continuance based on his inability to complete the review of the Government's transcripts of the 16 cassette tapes or to prepare his own transcripts. For the most part, the conversations on the tapes were in Spanish. The district court denied the Motion for Continuance. Davila's jury trial began on Monday, March 9, 1992, but was later recessed until Monday, March 23, 1992. The trial was completed on March 23, 1992 and the jury returned a verdict of guilty the following day. In addition, the district court granted a judgment of acquittal as to two of the counts in the indictment. Davila was sentenced to sixty-three (63) months on nine counts in the indictment, sentences to run concurrently, five (5) years supervised release and a \$450.00 mandatory special assessment. Davila timely appealed to this Court.

Discussion

Davila complains that the district court abused its discretion by denying his Motion for Continuance which requested additional time in order to prepare his own transcript of the tapes or to complete his review of the Government's transcript of the tapes. Davila stated that he needed the continuance because he was unable to prepare his own transcript within the twenty-five (25) days subsequent to receiving the tapes, and he could not thoroughly scrutinize the Government's transcript given only a few days prior to trial.

The decision to grant a continuance lies within the sound discretion of the trial court and that decision will be overturned

only if the appellant demonstrates an abuse of discretion resulting in serious prejudice. **U.S. v. Kelly**, 973 F.2d 1145, 1147-48 (5th Cir. 1992). When claims of insufficient time for preparation are advanced, the appellate court examines the totality of the circumstances to determine if a continuance should have been granted. **Kelly**, 973 F.2d at 1148. Consideration of the following factors is necessary: 1) the defendant's role in shortening the time needed; 2) the likelihood of prejudice from a denial; 3) the availability of discovery from the prosecution; and 4) the amount of time available. **U.S. v. Hopkins**, 916 F.2d 207, 217 (5th Cir. 1990).

In **United States v. Wilson**, 578 F.2d 67, 69-70 (5th Cir. 1978), this Court expounded on the value of a transcript for the limited purpose of aiding the jury in understanding tape recordings. The **Wilson** court approved a procedure outlined in **United States v. Onori**, 535 F.2d 938 (5th Cir. 1976) which suggested that the parties, as well as the district court, should make an effort to produce an "official" or "stipulated" transcript from tape recordings which will be introduced at trial. If such a transcript cannot be produced, then each side should produce its own transcript. **Wilson** at 70. In addition, each side may put on evidence supporting the accuracy of the other side's version. **Id.** Once it is established that the defense was given the opportunity to challenge the Government's transcript or prepare their own version, the defense cannot complain on appeal because they failed to take advantage of their trial opportunity. **Id.** The Government transcripts in this case consisted of the taped conversations

between the undercover agents and the defendants, which were in Spanish, as well as a translation of the conversations into English. This Court confronted a similar situation in **United States v. Llinas**, 603 F.2d 506 (5th Cir. 1979), **cert. denied**, 444 U.S. 1079 (1980). In **Llinas**, this Court held "that there is no requirement that the jury understand the language spoken on a tape recording of a conspiratorial conversation. Otherwise, persons would be free to engage in conspiracies in this country without fear that the government could show direct evidence of the conspiracy, as long as the conspirators addressed each other in a foreign language." **Id.** at 509. Further, the court in **Llinas** affirmed the procedure to be used as set out in **Wilson**. "[I]f there is a dispute as to the contents of a foreign language recording the burden will lie with the respective parties to present transcripts or other evidence to support their version of the conversation." **Llinas** at 510.

It is undisputed that the Government gave Davila copies of the tapes it planned to use at trial on February 11, 1992, well before the court-ordered deadline for discovery on February 26, 1992. Davila acknowledged in his Motion for Continuance that he had an interpreter working to translate the conversations on the tapes. Therefore, Davila had from February 11, 1992 until March 9, 1992 to produce his own transcript.³ The final version of the Government's transcripts was given to Davila on March 8, 1992 at 3:00 p.m. He complains that he only had one day to review the Government's

³ Davila had 25 days before trial to produce his own transcript from the tapes.

transcript before trial. Actually, Davila's counsel had one day to review the Government's proposed transcripts before the trial commenced, but he had four days between the first day and the second day of trial. When the trial resumed for the second day, both parties were informed that the trial would be continued in another ten days. Therefore, Davila's counsel actually had the Government's transcript for two weeks before time to controvert the transcripts had expired during trial. Indeed, Davila's counsel was advised by the court during the first recess, that if he could find a witness to controvert the Government's transcription of the tapes, such evidence would be admitted. Despite the court's suggestion, another interpretation of the transcript was not offered nor was any expert testimony regarding the accuracy of the Government's transcription of the tapes.

The prejudice allegedly suffered by Davila as a result of the court's denial of the Motion for Continuance was also mitigated at trial. Although Davila made a running objection to the use of the Government's transcripts, counsel conceded that he failed to present evidence that the interpretations were inaccurate by using his own expert witnesses or by other means. Moreover, during the trial, the court advised the jury: "I will instruct the jury that this [transcript] is being admitted solely as really secondary evidence. The primary evidence is the audio tape itself. The transcript is being admitted simply for your convenience. I will caution you that if you note any difference between what you hear on the tape versus what you see on the transcript, then what you hear controls."

While Davila's counsel argues that he did not have adequate opportunity to familiarize himself with the Government's transcripts, he conducted a thorough cross-examination of the Investigators and pointed out numerous errors in the transcripts. For example, Davila's counsel pointed out an error in the punctuation on the transcript regarding a conversation concerning whether Investigator Esquivel was asking Davila if he handled guns or whether he was telling codefendant Ramirez that Davila handled guns. In addition, Davila's counsel solicited information from Esquivel about intimate details of the transactions and had Esquivel reveal that the sequence of events transcribed on some of the exhibits were out of order. He was also able to extract an admission from Investigator Garcia that the tapes were hastily transcribed and that the transcriptions were "rough" or in need of editing. Accordingly, the amount of time afforded Davila's counsel was not limited to such an extent that he could not adequately prepare for cross-examination.

Finally, in support of the Motion for Continuance, Davila's counsel argued that the case was extremely complex because it involved three hours of Spanish conversations translated into English. On the contrary, based on the evidence presented at trial, the facts of this case were not complex. The Government correctly argues that the case was a four-witness case as to Davila's involvement; the other three witnesses were a chemist who analyzed the drugs, a firearms expert, and a police sergeant who verified Davila's prior conviction.

The Court in **Wilson** clearly noted that if a defendant could

have challenged specific portions of the Government's transcript or prepared an alternative version, then the defendant cannot complain on appeal if he failed to take advantage of that opportunity at trial. 578 F.2d at 70. **See also U.S. v. Onori**, 535 F.2d at 948-49. Counsel for Davila is precluded from now challenging the accuracy of the transcripts when time permitted his preparation of an alternate version or production of an interpreter, and additionally because the trial transcript indicates that he was well acquainted enough with the transcripts to prepare for a thorough cross-examination of the Government Investigators. Davila has not demonstrated that the court abused its discretion in denying his Motion for Continuance, thereby subjecting him to serious prejudice.

Conclusion

Accordingly, we affirm.