IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8408

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

O'NEILL WILLIAMS, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
90 CR 357 H

May 6, 1993

Before KING, HIGGINBOTHAM, and DEMOSS, Circuit Judges.

PER CURIAM:[*]

O'Neill Williams appeals his convictions of one count of perjury and one count of making false declarations under oath to a court, see 18 U.S.C. §§ 1621, 1623, for which he was sentenced to two concurrent twenty-one month terms of imprisonment and two concurrent three-year terms of supervised release. Finding that the Government failed to prove an essential element of both

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

offenses, we reverse his conviction.

I.

On April 5, 1990, Williams was a passenger onboard a commercial airline flight from San Francisco to Houston. A crew member of the airline accused Williams of intimidating and threatening her.[1] In response to that accusation, the flight crew reported Williams' alleged actions to the Federal Bureau of Investigation, who arrested Williams and took him into custody for allegedly violating § 1472(j) when the plane made an intermediate stop in El Paso, Texas.

The next day, April 6, 1990, pursuant to Rule 5 of the Federal Rules of Criminal Procedure, Williams was taken before a federal magistrate for his initial appearance. At that hearing, at which Williams was under oath, the magistrate read Williams his rights and inquired about the necessity of appointing Williams counsel. Concurrently with Williams' initial appearance, the magistrate also sought to set bail, although it was not clear until the conclusion of the hearing that the magistrate believed that she was not simply conducting an initial-appearance hearing pursuant to Rule 5.[2] Apparently with regard to the issue of bail, the magistrate specifically asked Williams, "[h]ave you ever been arrested before anytime,

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[1] Federal law criminalizes the "intimidation" of a commercial airline's flight crew members "so as to interfere with" the performance of their duties. See 49 U.S.C. § 1472(j); see also United States v. Hicks, 980 F.2d 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 1618 (1993).

[2] See infra.

anyplace, for anything," to which Williams responded, "no." It is undisputed that Williams was lying in making this response to the magistrate's query; Williams in fact had been arrested in the past.

At the conclusion of the hearing, the magistrate stated:

> Mr. Williams, I'm appointing the Federal Public Defender to represent you. Your next court appearance is called a [p]reliminary [h]earing. [But] before I get to that, I'm setting your bond in the amount of $40,000 cash or corporate surety.

At that point in the hearing, the magistrate was interrupted by her law clerk, who informed the magistrate that, prior to the hearing, the Government had filed both a motion to detain Williams without bond and a motion for a continuance in the detention hearing, pursuant to 18 U.S.C. § 3142(f)(2).[3] Upon realizing that the Government had previously filed the motions, the magistrate stated:

> Oh, I didn't see it. Okay. Okay, just one minute. Forget it. Forget that. Forget what I just said. Okay. My mistake. The Government has filed a motion to detain you. Therefore, the next court appearance is called a [p]reliminary [h]earing and a [d]etention

[3] That provision of the pre-trial detention statute states that "[u]pon motion of the attorney for the Government . . . [a] judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth . . . will reasonably assure the appearance of the [defendant] as required and [assure] the safety of any other person and the community . . . ." That provision further states a detention hearing "shall be held immediately upon the [defendant's initial] appearance before [a] judicial officer unless . . . the attorney for the Government . . . seeks a continuance. . . . [A] continuance on the motion of the attorney for the Government may not exceed three days." (emphasis added).

> [h]earing, and I will set those two hearings for Next Wednesday, April 11 [1990] . . ."[4]

As scheduled, on April 11, the magistrate conducted a preliminary hearing pursuant to 18 U.S.C. § 3060 and Rule 5(c) of the Federal Rules of Criminal Procedure.[5] At that hearing, the magistrate determined that there was no probable cause and dismissed the charges against Williams that had been filed under 49 U.S.C. § 1472(j). Because the charges were dismissed, the magistrate had no need to conduct a detention hearing.

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[4] Once the Government files a motion for continuance in a pre-trial detention hearing, the plain language of the statute governing such hearings, 18 U.S.C. § 3142(f)(2), appears to require an automatic delay of three days without the need for the Government to show any cause. See § 3142(f)(2) ("The hearing shall be held immediately upon the person's first appearance before the judicial officer unless . . . the attorney for the Government[] seeks a continuance.") (emphasis added). From the magistrate's remarks, this is obviously how she read the statute. That is, she believed that the Government's filing a motion to detain and a motion for continuance had deprived her of the authority to set bail on April 6, 1990.

We also note that the Seventh Circuit has stated that, "the legislative history [of that provision] does suggest that . . . automatic continuances are available to facilitate preparation for a detention hearing . . . ." United States v. Dominquez, 783 F.2d 702, 704 & n.3 (7th Cir. 1986) (citing *S. Rep*. No. 225, 98th Cong., 1st Sess., at 21-22, reprinted in 1984 U.S. CODE & ADMIN. NEWS 3182, 3204-05). Although § 3142(f)(2) at one point uses the phrase "good cause" -- which would suggest that a judicial officer is vested with some discretion regarding continuances -- the legislative history reveals that the expression "good cause" refers to what the Government must show in order to extend the continuance beyond the statutory three-day period. See *S. Rep.*, supra, U.S. CODE & ADMIN. NEWS at 3205; but cf. United States v. Montalvo-Murillo, 495 U.S. 711, 715 (1990) (although not directly addressing issue and not citing legislative history, suggesting that "good cause" must be shown for granting of continuance in the first place).

[5] A preliminary hearing is a pre-trial criminal proceeding conducted by a judicial officer that serves the same purpose as a grand jury proceeding. See Yale Kamisar et al., MODERN CRIMINAL PROCEDURE 886-92 (7th ed. 1990).

Several months later, Williams was indicted for perjury and making false declarations under oath,[6] arrested in California, and ultimately returned to El Paso for trial. A bench trial was conducted at which the Government argued that Williams had violated federal statutes criminalizing both perjury and the making of false declarations under oath when Williams informed the magistrate on April 6, 1990, that he had never been arrested for any other crime. At the close of the Government's case, Williams moved for a judgment of acquittal. Specifically, Williams argued that the Government had failed to show that Williams' admittedly false statement was "material" in any way to the judicial proceedings at which it was made, and that materiality of the false statement was an element of both offenses charged in the indictment. The prosecutor conceded that the issue of Williams' prior arrests was not material to the April 6, 1990 initial appearance. Instead, the prosecutor argued, the issue of Williams' prior arrest record was material in that it was highly relevant to the prospective detention hearing that was scheduled to occur if the magistrate had found probable cause at the threshold preliminary hearing, conducted on April 11, 1990.

The district court denied Williams' motion and ultimately convicted Williams for both counts. The court stated that Williams' false statement given under oath was "material":

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[6] See 18 U.S.C. §§ 1621, 1623.

> The real issue in the case, as raised by the defense, is whether or not the statement was material. I find from the evidence as a whole, and in the context of the entire situation that the magistrate judge was conducting at one and the same time [on April 6, 1990] both a proceeding to determine whether or not Mr. Williams was eligible for appointed counsel, and also a proceeding to determine whether or not bail should be set. The [m]agistrate [j]udge was . . . obviously unaware of the fact that [the Government] had filed a motion asking for her to detain [Williams] without bond [and also to continue the detention hearing]. . . . [T]he question that she asked about prior arrests and the answer that he gave, which was a false answer, was definitely material to [the detention hearing]. And so I'm going to find that the statement [that Williams gave in response to the magistrate's question] was made as to a material matter.

Following his conviction and sentence, Williams filed a timely notice of appeal. We reverse.

II.

Williams was convicted under two related statutes, both of which criminalize falsehoods made under oath in connection with federal judicial proceedings. 18 U.S.C. § 1621, captioned "Perjury generally," provides that "[w]hoever[,] having taken an oath before a competent tribunal . . ., in any case in which the law of the United States authorizes an oath to be administered, . . . willfully and contrary to such oath states or subscribes to any material matter which he does not believe to be true . . . is guilty of perjury." 18 U.S.C. § 1623, captioned "False declarations before grand jury or court," makes it a crime to "knowingly make[] any false material declaration" while "under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States." Williams argues that the Government failed to prove an essential element of both offenses

of conviction -- namely, the materiality of his claim that he had never been arrested.

Williams' claim is essentially a challenge to the sufficiency of the evidence. We ordinarily review sufficiency claims by determining whether, in view of all the evidence and in a light most favorable to the verdict, a rational fact-finder could have found all the elements of a crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319-20 (1979); Glasser v. United States, 315 U.S. 60, 80 (1942). We observe, however, that sufficiency review of convictions under 18 U.S.C. §§ 1621 or 1623 does not require that the Government prove that a rational fact-finder could find materiality beyond a reasonable doubt because materiality is ultimately a legal question reviewed de novo on appeal. See United States v. Abroms, 947 F.2d 1241, 1246-48 & nn. 4-5 (5th Cir. 1991) (citing cases). The Government must only produce "some evidence" of materiality. See id. at 1247 n. 4; see also United States v. Allen, 892 F.2d 66, 67 (10th Cir. 1989) (citing United States v. Farnham, 791 F.2d 331, 334 (4th Cir. 1986)). Cf. Thompson v. Louisville, 362 U.S. 199 (1960) (applying the "no-evidence" standard of constitutional sufficiency review).

There is no question that Williams lied to the magistrate under oath. Yet we believe that the Government failed to establish the essential element of materiality required for conviction under both § 1621 and § 1623. "The test for materiality is whether the false testimony is capable of

influencing the tribunal on the issue before it." United States v. Abroms, 947 F.2d 1241, 1248 (5th Cir. 1991) (citations and internal quotations omitted); see generally Annotation, *Determination of the Materiality of Alleged Perjurious Testimony in Prosecutions Under 18 U.S.C.S. §§ 1621, 1622*, 22 A.L.R.FED. 379. In the instant case, Williams' false answer to the magistrate's question was not capable of influencing the magistrate on the issue before the tribunal on April 6, 1990.

As discussed in supra Part I, the only issues that the magistrate was authorized under law to address on April 6, 1990, were those issues arising during Williams' initial appearance pursuant to Rule 5 of the Federal Rules of Criminal Procedure. The ambit of that hearing included the necessity of warning Williams of his constitutional rights and an inquiry into whether Williams was indigent and thus in need of court-appointed counsel. Notably, because the Government had, prior the commencement of Williams' initial appearance, filed a motion to detain Williams without bond and a related motion to continue Williams' detention hearing, the magistrate was not authorized to reach the question of Williams' bail on April 6, 1990. See supra note 4. Rather, the continuance sought by the Government was automatic. The magistrate delayed the commencement of the detention proceedings, and scheduled it to occur on April 11, 1990, contingent on the outcome of the preliminary hearing also scheduled for April 11, 1990. The detention hearing, of course, never was conducted. Instead, at the preliminary hearing

conducted on April 11, the magistrate determined that there was no probable cause. The charges under 49 U.S.C. § 1472(j) were dismissed, and Williams was thereafter released.

On appeal, the Government argues that the detention hearing was in fact commenced on April 6th, and that the magistrate merely continued it until April 11th. Thus, the Government argues, Williams' false statement was material to the issue of bail that was properly before the tribunal on April 6th. We disagree. The magistrate initially considered the question of Williams' bail on April 6th, even issuing a ruling, but immediately rescinded the ruling once she realized that the Government had previously filed a joint motion to detain Williams without bond and to continue the detention hearing. The magistrate's ruling on the bond issue was thus a legal nullity ab initio, as the Government's prior filing of the two motions deprived her of the authority to rule on April 6, 1990, on whether bail was appropriate for Williams.

In view of the peculiar situation that ultimately transpired here, we also reject the argument that Williams' April 6th falsehood was material because, as of that date, there was still a potential that Williams' false statement was capable of influencing any ruling that the magistrate might make on the detention issue at the hearing scheduled on April 11, 1990. That potential was unrealized because the magistrate found no probable cause at the preliminary hearing that preceded the scheduled detention hearing. Once the magistrate found no probable cause,

Williams was released. The whole issue of whether to detain Williams or release him on bail became moot. Accordingly, Williams' false statement made on April 6th did not -- and, more importantly, was not capable of -- influencing any issue that was ever properly before the tribunal.[7]

We realize that Williams could not have foreseen on April 6th that his falsehood would ultimately not prove to be material. While we strongly condemn Williams' contempt shown for the integrity of judicial proceedings by intentionally lying under oath to the magistrate, fortuitously for Williams, we cannot say that it was "material" under 18 U.S.C. § 1621 or § 1623.

III.

For the foregoing reasons, we REVERSE Williams' convictions under 18 U.S.C. § 1621 and § 1623. Because our decision to reverse is based on the insufficiency of the evidence, Williams cannot be retried under either of those statutes. See Burks v. United States, 437 U.S. 1 (1978). We order that the mandate shall issue forthwith.

[7] We see no need to address the hypothetical question of whether Williams' false statement made on April 6th would have been material had the magistrate determined that probable cause existed at the April 11th preliminary hearing and thus proceeded to conduct the detention hearing.