

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8591
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY LEE LEACH,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(W 88 CR 87 1)

(September 13, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant Roy Lee Leach (Leach) appeals the district court's denial of his post-conviction motion for a new trial. Because the district court did not abuse its discretion in denying Leach's motion, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Prior Proceedings

By superseding indictment, Leach was charged in two of seven counts with (1) conspiracy to manufacture methamphetamine with Douglas Allen Smith (Smith), and (2) conspiracy to distribute methamphetamine with Morris Allen Pritchett (Pritchett).¹ A jury convicted him of both counts. Leach appealed his convictions and sentences. In November 1990, our Court affirmed his conviction and sentence for conspiracy to manufacture methamphetamine but reversed his conviction for conspiracy to distribute methamphetamine based on the introduction of improper evidence. *United States v. Leach*, 918 F.2d 464 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2802 (1991). During Leach's trial, the prosecutor elicited testimony from a government witness that Leach's co-conspirator Pritchett had been found guilty of the conspiracy-to-distribute count.² We held that the government committed reversible error when it referred to Pritchett's guilt before the jury, without calling him to testify, although he was available to be a witness. *Id.* at 468.

On August 17, 1992, Leach timely moved for a new trial under Fed. R. Crim. P. 33 based on newly discovered evidence. His motion, and a supplemental motion filed subsequently, were supported by two affidavits purporting to provide new evidence of his innocence in the manufacturing conspiracy. The district court

¹ The facts underlying these charges are set forth in this Court's opinion on direct appeal. *United States v. Leach*, 918 F.2d 464, 465-466 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2802 (1991).

² This was incorrect; Pritchett had pleaded guilty to that count.

denied his motion. Leach now appeals that denial.

Discussion

Motions for new trials based on newly discovered evidence are disfavored generally, and a district court's denial of such a motion will not be disturbed absent a showing of a clear abuse of discretion. *United States v. Peña*, 949 F.2d 751, 758 (5th Cir. 1991). Newly discovered evidence may justify a new trial if: (1) the evidence was discovered after trial and was unknown to the defendant at the time of trial; (2) the failure to discover the evidence was not due to any lack of diligence on the part of the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) a new trial would probably produce a new result. *United States v. Williams*, 985 F.2d 749, 757 (5th Cir. 1993).

The evidence that Leach submitted to the district court in support of his motion for new trial consists of two affidavits: one of Pritchett, his co-conspirator in the distribution conspiracy, and the other of Cheryl Davis, a friend of David Lonnie Mangrum, who was one of Leach's co-conspirators in the distribution conspiracy. Neither of these affidavits meets the criteria of new evidence justifying a new trial.

Pritchett stated in his affidavit that Smith had told him that his laboratory was clandestine and that it was not any of Leach's or Pritchett's business. "My evidence to any court would be that the laboratory run by Smith was clandestine in nature and secret from Leach. . . . I knew [Leach] was not involved with Smith's drug business." Pritchett claimed that the drugs he distributed

came primarily from Smith, and stated that Smith had boasted "on many occasions that he was the soul [sic] manufacturer and that Leach never manufactured anything."

Cheryl Davis stated in her affidavit that she heard Leach tell Mangrum that he had run Smith off from their auto salvage business because he thought Smith was involved in drugs and that Smith's involvement might implicate him. The other portion of her affidavit describes the animosity between Smith and Leach that followed the dissolution of their auto salvage partnership.

Leach has not met the requirements set forth above so as to be entitled to a new trial. First, the evidence proffered through Pritchett's affidavit is not, by its own terms, newly discovered. The affidavit reveals that Leach's own trial attorney knew the content of Pritchett's purported testimony at Leach's trial and persuaded Pritchett not to testify because of the consequences of cross-examination by the government.³ Nor does Leach show that Davis's testimony is newly discovered. Certainly Leach knew of her relation to his co-conspirator Mangrum and of any evidence that she

³ Paragraph Seven of Pritchett's affidavit reveals that both Leach's attorney and the prosecutor were aware of the nature of Pritchett's testimony were he to be called at trial:

"At the time of the trial Leach's attorney (Russ Hunt) came to see me and suggested that I not testify in behalf of Leach. He stressed that the prosecutor would be merciless in cross-examination. The prosecutor also visited me for the purpose of requesting that I testify against Leach for the government. In truth and in honor I could not do this because I knew he was not involved with Smith's drug business. When I explained that to my certain knowledge Leach had no contact with nor participation in any drug scheme the prosecutor became so angered he swore that he would make certain I received a long sentence. This he carried out."

might have in his favor; nothing in the record suggests otherwise.

Second, there is no evidence that Leach attempted to obtain either Pritchett's or Davis's testimony at trial through subpoena or otherwise; indeed, as noted above, Leach's attorney expressly rejected Pritchett's testimony. Although Leach argues that Pritchett was not available to testify because he was in custody, we noted in our opinion on direct appeal that Pritchett was available but was not called. *Leach*, 918 F.2d at 466.

Third, much of the newly offered evidence, although perhaps material, would serve only to impeach the testimony of witnesses for the government who described Leach's involvement in the manufacturing conspiracy.⁴

⁴ Smith, Leach's co-conspirator in the manufacturing conspiracy and a witness for the government at Leach's trial, testified that he met Leach while the two were inmates at the Federal Correctional Institution at La Tuna, New Mexico, where Leach informed him of a new process for manufacturing methamphetamine using high-pressure containers such as fire extinguishers to speed up the chemical reactions. Following release from prison, Leach and Smith formed a partnership to run a used auto sales and salvage operation; the business, according to Smith's testimony at Leach's trial, served to launder money for their methamphetamine operation. Smith testified that Leach oversaw his education in the process of manufacturing methamphetamine. He described times when he and Leach manufactured methamphetamine together.

Robert Wilkerson, a Narcotics Investigator with the Texas Department of Public Safety, was present when law enforcement officers executed a search warrant for Leach's residence. He testified at length concerning the items found during the search. These items included precursor chemicals and laboratory equipment commonly used in the manufacture of methamphetamine. In addition, the officers seized chemistry books, electronic scales, syringes, small plastic ziploc baggies, and other drug paraphernalia. Also found during the search was sophisticated countersurveillance equipment used to protect the residence, handwritten lists of items needed to manufacture methamphetamine (one of which was in Leach's handwriting), and small quantities of methamphetamine and amphetamine.

David Sutton, another witness for the government, testified

Finally, the testimony in the affidavits probably would not result in acquittal if offered at a new trial. The evidence presented at Leach's trial implicating him in the manufacturing conspiracy was substantial. *See supra*, note 4.

Leach argues that the government used false testimony at his trial and that he must be granted a new trial as a result. *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (in the event that the government's case included false testimony and the prosecution knew or should have known of the falsehood, a new trial must be held if it was reasonably likely that the false testimony would have affected the judgment of the jury). The false statement to which he refers, however, is apparently the government's statement that Pritchett was found guilty of the distribution conspiracy, when in fact he had pleaded guilty to that offense. Even assuming that the statement amounted to false testimony, any error was cured when this Court reversed Leach's conviction for the distribution conspiracy. As the "false statement" did not involve the manufacturing conspiracy, this argument has no bearing on his motion for new trial on the manufacturing charge.

In addition, Leach seems to assume that, because we found fault, on direct appeal, with the government's improper introduction of evidence of Pritchett's conviction, we have already established error sufficient to require reversal of the district

that he had bought methamphetamine from Pritchett for his own use and to sell for money to support his habit. He testified that he was present at Pritchett's house one day when Leach arrived; Pritchett identified Leach to Sutton as "the man," a reference that Sutton understood to designate Leach as Pritchett's source of methamphetamine.

court's denial of his motion for new trial. Leach misinterprets our opinion: the error discussed there was the government's improper introduction of evidence of Pritchett's conviction, not the error of failing to introduce Pritchett's testimony on Leach's behalf. Further, any error on the part of the district court in allowing the government's evidence during Leach's trial does not in any way create an abuse of discretion in denying a motion for new trial based upon different, and allegedly new, evidence.

The district court did not abuse its discretion in denying Leach's motion for a new trial.

Conclusion

For the reasons stated above, the district court's denial of Leach's motion for new trial is

AFFIRMED.