

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1012
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS SHANNON DARR, a/k/a Shannon Darr,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:88 CR 157 G)

(June 9, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

PER CURIAM:

Appellant Darr was convicted for numerous offenses related to his involvement in a large-scale amphetamine/methamphetamine distribution ring. Nearly two years after conviction, he filed a motion for new trial, alleging that he has just discovered that one of the government's witnesses, Helen Romines, lied about her previous involvement in narcotics trafficking. He alleges that the government knew about her

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

perjury, and that if the jury had known the truth, it is reasonably likely that the truth would have produced a different verdict. Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, ____ (1972); United States v. Antoine, 603 F.2d 566, 569-70 (5th Cir. 1979). The district court declined to grant a motion for new trial. We find no reversible error and affirm.

Darr complains that the district court incorrectly used the Fed. Rule Crim. Pro. 33 standard to evaluate whether the newly discovered evidence should result in a new trial. The constitutional standard may not require the same proof of "newness," diligence, and materiality that are required to prevail under Rule 33. Antoine, supra. Darr did not clearly differentiate the standards in the trial court, a fact that explains if it does not fully excuse the court's application of Rule 33.

Be that as it may, Darr cannot prevail even under the constitutional standard. Ms. Romines acknowledged that she purchased amphetamine and methamphetamine from Darr approximately 20 times over a one-year period. Darr asserts that she lied in attempting to confine her drug dealing to that period of time, because the Amarillo police were aware she had been dealing drugs for many years in the past. Had the jury known of her real history, Darr contends her credibility would have been thoroughly impeached.

Although courts must be ever vigilant to insure that the government does not obtain criminal convictions by foul means such as the knowing use of perjured testimony, the rule of Napue v.

Illinois, 360 U.S. 264, 79 S. Ct. 1173 (1959), and Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785 (1967), is not immune to the realities of the trial process. In U.S. v. Antoine, supra, for instance, this court applied the constitutional test to a motion for new trial based on false testimony and denied relief. Antoine is factually similar to this case and binds our decision. The witness there falsely testified that the government did not pay his attorney's fees. As the court realized, this information pertained to the witness's credibility. The court recognized that it had to determine "whether disclosure of this information would undermine his credibility so as to introduce an element of reasonable doubt." 603 F.2d at 570. Reviewing the entire substance and context of the witness's testimony, this court affirmed the trial court's decision against a new trial and concluded that, "the falsification about the attorney's fees in the instant case is immaterial when viewed in the context of the entire record." 603 F.2d at 571.

In this case, numerous witnesses testified to Darr's involvement in the drug trafficking scheme. Romines's testimony was partially corroborated by tape recordings and by the involvement of an undercover agent on at least one occasion when Darr delivered drugs to Romines. Thus, revelation of the fact that Romines had been involved in drug-trafficking for longer than she testified could not reasonably have affected the jury's verdict. Her criminal involvement, though it bore on her credibility, was "immaterial when viewed in the context of the entire record." Antoine, id.

Accordingly, the judgment of the district court is
AFFIRMED.