

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1168  
Summary Calendar  
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UNITED STATES OF AMERICA, ET AL.,

Plaintiffs-Appellees,

versus

WILLIAM BREWER and  
JANYNE BREWER,

Defendants,

JANYNE BREWER,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Northern District of Texas  
(3:91 CV 1588 H)

S)))))))))Q

July 23, 1993

Before GARWOOD, BARKSDALE and DeMOSS, Circuit Judges.\*

PER CURIAM:

The government petitioned the district court for an order to enforce IRS summonses for William and Janyne Brewer to testify and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to produce various records as to their income, including records for the period January 1, 1990, through February 28, 1991. After conducting a hearing on the matter, the district court on September 20, 1991, ordered William and Janyne to obey the summonses by producing the required documents and testifying on October 4, 1991. This order was not appealed.

On October 22, 1991, the government moved for civil contempt based upon the Brewers' refusal to answer the revenue officer's questions. The district court granted the motion for civil contempt and ordered the Brewers to appear and show cause why they should not be held in civil contempt. After the hearing, the district court on January 10, 1992, adjudged William and Janyne to be in civil contempt of the court's order of September 20, 1991, and ordered the Brewers to comply fully with the order within a certain time or face incarceration and fine until they do comply.

The Brewers moved for vacation of the contempt order based upon their lack of counsel at the hearing. The district court ordered them to complete the *in forma pauperis* (IFP) application. For the hearing scheduled to rule on the Brewers' motion, the court appointed counsel. At that hearing, the district court permitted the appointed counsel to withdraw as Janyne's counsel in light of a possible conflict of interest. The district court continued with the hearing as to only William Brewer. On February 28, 1992, William's motion was denied, and he was incarcerated and fined until he purged himself of the civil contempt. William's civil contempt was affirmed by this Court without opinion, and he is not

part of this appeal. *United States v. Brewer*, No. 92-1180 (5th Cir. Sept. 3, 1992) (unpublished).

The government moved for a hearing to determine whether the order of civil contempt should be enforced against Janyne (hereinafter as Brewer). Brewer retained counsel, indicated her willingness to comply with the court's order to comply with the summons, partially filled out a form, and fired counsel. After several delays, the hearing was held on December 18, 1992, and the district court ordered the contempt order enforced; Brewer was ordered incarcerated, and fined for each day of noncompliance, until purged of the contempt by compliance.

This Court denied Brewer's petition for writ of mandamus and deemed her petition as a timely notice of appeal. *United States v. Brewer*, No. 93-1128 (Feb. 19, 1993) (unpublished).

Brewer argues that her incarceration is invalid because she did not have counsel at the December 18 hearing. Her argument focuses on an alleged denial of counsel. The government does not dispute that Brewer had a right to counsel. The issue, properly stated, is whether Brewer had a right to appointed counsel.

The district court appointed counsel for Brewer and her husband in February 1992. At the February 27, 1992, hearing, the district court allowed the appointed counsel, with Brewer's consent, to withdraw as her attorney in light of a possible conflict of interest from joint representation. The district court informed Brewer how to obtain appointed counsel: filling out the affidavit concerning indigency. Acknowledging Brewer's failure to

complete the required paperwork, the district court withdrew its order of court-appointed counsel as to her.

By August 13, 1992, Brewer had retained counsel. Brewer, however, fired counsel in October 1992. At the December 18, 1992, hearing, Brewer stated that she could not proceed because she did not have counsel. She did not ask for counsel to be appointed. In a motion filed by Brewer on December 17, 1992, Brewer included a request for assistance in obtaining counsel. Brewer, however, did not claim that she was indigent, thus not requesting appointed counsel. See 28 U.S.C. § 1915(d).

Assuming that Brewer's actions amounted to a request for appointed counsel, her request was denied properly. Neither to the district court nor to this Court does Brewer assert inability to pay. Moreover, the record includes a form signed by Brewer indicating that she had financial resources to obtain counsel, resources including \$80,000 in a Swiss bank account. Brewer failed in her burden to show inability to afford counsel. 28 U.S.C. § 1915(a) & (d).

Brewer also argues that the Assistant United States Attorney (AUSA) perpetrated a fraud upon the district court by failing to mention in the status report of October 19, 1992, Brewer's "Request for Clarification," which had been filed with the court a few days previously. Brewer argues that her incarceration is invalid due to this alleged fraud. The AUSA attached an affidavit of Revenue Officer Mary McKinney (McKinney) to the said status report, and that affidavit mentions Brewer's filed "Request for Clarification."

Therefore, even assuming that the "Request for Clarification" which was already filed with the court is something the AUSA should have noted in the status report itself, as opposed to being referenced in an attachment to the status report, the omission was, at most, harmless. Brewer's assertion of fraud is frivolous.

Brewer argues that portions of McKinney's testimony at the December 18 hearing should have been inadmissible because she testified about the taped meeting between Brewer, her retained counsel, and two revenue officers. Brewer argues that, because McKinney was not present at the meeting, McKinney could not testify as to the contents of the meeting without the government's first authenticating the tape as containing Brewer's voice under Fed. R. Evid. 901(b)(5).

Brewer did not object to McKinney's testimony. Therefore, this Court reviews for plain error. Fed. R. Evid. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."). The burden is on the appellant to show prejudice from the alleged error. *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993) (discussing plain error standard in context of Fed. R. Crim. P. 52(b)).

Brewer argues that the admission of the testimony perpetrated a fraud upon the district court and that the admission was improper under the Federal Rules of Evidence. She fails to show or to explain how her substantial rights were affected. See *Olano*, 113 S.Ct. at 1778. Moreover, the facts and the law indicated that her

substantial rights were not affected. Rule 901(b)(5) provides for voice identification "whether heard firsthand or through . . . electronic . . . recording, by opinion based upon *hearing the voice at any time* under circumstances connecting it with the alleged speaker." Fed. R. Evid. 901(b)(5) (emphasis added). McKinney's testimony also covered a phone conversation that McKinney had with Brewer in October. It seems plain that if objection had been made, the tape could have been authenticated. Therefore, there was no error affecting Brewer's substantial rights. See Fed. R. Evid. 103(d).

Also pending before this Court are Brewer's motion and amended motion for sanctions against the AUSA and for appellees' brief to be struck, or for permission for Brewer to view the sealed documents reference in appellees' brief. The sealed documents are the government's *ex parte* motion for substituted service filed November 5, 1992, and the district court's order granting the motion. These documents have no bearing on the issues raised by Brewer on appeal, and the motion for the striking of appellees' brief or for permission to view the documents is denied. Within these motions and throughout her appellate briefs, Brewer criticizes the behavior of the AUSA and asks for sanctions against her. The AUSA's oversight, if any, in the status report did not amount to fraud or any kind of misconduct. Nothing within the record indicates impropriety on her part. Brewer's motion for sanctions is denied.

Brewer's pending motions are all denied. The December 18, 1992, Order of Commitment of appellant Janyne Brewer is

AFFIRMED.