

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2312

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONNIE (NMI) GIPSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-84-22-2)

(December 23, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Ronnie Gipson was convicted by a jury of conspiracy to pass counterfeit United States Treasury checks, in violation of 18 U.S.C. §§ 371, 471, and 472; passing or uttering a counterfeit United States Treasury check, in violation of 18 U.S.C. § 472; and destruction of property belonging to the United States Secret Service, in violation of 18 U.S.C. § 641. He was sentenced to

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

three years imprisonment for the offense of passing or uttering a counterfeit United States Treasury check. He was also sentenced to one-year imprisonment terms for each of the other two offenses; however, these sentences were suspended, and he was placed on one year of supervised probation for each of these offenses. His terms of supervised probation were to run concurrently to each other but consecutively to his three years of imprisonment. He now appeals his conviction and sentence. We affirm the district court's judgment of conviction and sentence.

I.

A. *Factual Background*

Ronnie Gipson (Gipson) worked as a computer operator trainee for the United States Department of the Treasury at its Disbursement Center in Austin, Texas, from June to December of 1980. According to Joseph Labermeyer, Gipson's supervisor at the Center, Gipson had the responsibility of operating a punching machine that recorded payees' names, check numbers, payment amounts, addresses, social security numbers, and other information on government checks. As a computer operator trainee, Gipson also had free access to the vault in which government checks were stored because one of his duties was to retrieve checks from the vault. Gipson, however, appeared to have personal problems and was frequently absent from work.

During a March 1981 inventory, eleven replacement railroad retirement benefit checks, numbered 270,075 through 270,085, were

determined missing. Ronald Johnson, a Special Agent with the United States Secret Service, investigated the missing checks and determined that one of the missing checks for \$2500 had been made payable to a person named Daryl Cloud and was negotiated at a bank in Houston, Texas, by a man named J.R. Lave on December 31, 1980. As requested, the bank interviewed Lave and from that interview received information, which it passed on to Agent Johnson, that Gipson was also involved in the negotiation of the check.

When Agent Johnson contacted Gipson on May 13, 1981, Gipson denied any knowledge of the check but stated that he knew both Lave and Cloud, that he had been staying at Lave's home on December 31, 1980, and that he had no knowledge of Cloud's being in Houston at that time. Gipson also told Agent Johnson that he had worked at the Austin Disbursement Center, but that he worked in the equipment operating room and had no access to the type of check in question.

Five days later, Agent Johnson contacted Cloud, who admitted that he had been in Houston on December 31, that he had negotiated the check with Lave as a co-signer because he was from out of town, and that he had spent December 31 at Lave's home. Cloud also denied any involvement in creating the check, but stated that he had received \$800 of the proceeds from the check, which was stolen shortly thereafter.

On June 3, 1981, Agent Johnson again interviewed Gipson, who now stated that he had "bumped into" Cloud in Houston around

Christmas time and that Cloud had sought his help in cashing a check. Gipson also stated that he had introduced Cloud to Lave. He maintained, however, that he knew nothing about the check in question or whether Cloud had actually cashed it.

Agent Johnson also interviewed Denise Lave, Gipson's girlfriend and Lave's daughter, at the same time. She at first claimed that she did not know that Cloud was in Houston in December 1980 or that he had visited with her father. She later stated that Cloud may have been in Houston in December 1980 and visited with her father without her knowing about it because she had been staying at a friend's house several nights during the Christmas holidays.

Cloud was interviewed for a third time in August 1981. Cloud again admitted that he had negotiated the check with Lave's help on December 31, 1980, and that he had spent the holiday with Gipson and Denise Lave in Houston at J.R. Lave's house.

As the investigation progressed, Cloud agreed to allow the Secret Service to tape record a telephone conversation between himself and Gipson. Cloud then called Gipson and arranged to meet him in person. Before the meeting, Secret Service Agent Kirk Roach equipped Cloud with a recorder and transmitter. Agents then followed Cloud to Gipson's apartment, monitoring the meeting from across the street. Cloud remained in Gipson's apartment for approximately twenty minutes, at which point Gipson discovered the recorder. Although the tape from the recorder had

been ruined, the recording made from the transmitter was unharmed.

During the conversation in Gipson's apartment, Cloud told Gipson that he needed to talk about the check because he was going to be prosecuted for cashing it. Gipson replied, "Remember what we talked about when all the possibilities we talked about, I said if they try to prosecute either one of us, our strongest defense should be our witness for each other [I]f they try to prosecute you after they sent [it] in the mail to you, a lawyer will eat that [stuff] up." When Cloud then tried to explain that the story of the check arriving in the mail was not holding up as a defense, Gipson told him that the government was merely trying to scare him because the government had been unsuccessful in trying to "break down" Gipson and Denise Lave. Gipson also insisted that Cloud would not be prosecuted if Cloud just maintained his story that the check arrived in the mail and that he believed it was from the government.

B. *Procedural History*

On February 2, 1984, Gipson and Cloud were indicted on charges of conspiracy to pass counterfeit United States Treasury checks, in violation of 18 U.S.C. §§ 371, 471, and 472 (Count I). Gipson was also indicted on charges of forging or counterfeiting a United States Treasury check in violation of 18 U.S.C. § 471 (Count II); passing or uttering a counterfeit United States Treasury check in violation of 18 U.S.C. § 472 (Count III); and destruction of property belonging to the United States Secret

Service, in violation of 18 U.S.C. § 641 (Count IV). Cloud entered into a plea agreement with the government under which the conspiracy charge against him was dismissed, and he testified against Gipson at trial. Gipson was convicted by jury on Counts I, III, and IV. He was sentenced to three years imprisonment on Count III. He was also sentenced to one year imprisonment for each of Counts I and IV; however, these sentences were suspended, and he was placed on one year of supervised probation for each of these offenses. His terms of supervised probation were to run concurrently to each other but consecutively to his three years of imprisonment.

On March 3, 1987, Gipson filed a petition pursuant to 28 U.S.C. § 2255, in which he alleged that his conviction was obtained by use of a coerced confession, with illegally seized evidence, and in violation of his privilege against self-incrimination. He further asserted that the prosecution had failed to disclose exculpatory material, that his conviction violated his right against double jeopardy, and that he had been denied effective assistance of trial counsel. The government then requested a hearing on that petition, specifically to address Gipson's ineffective assistance of counsel claim.

On July 27, 1987, Gipson moved to file a delayed notice of appeal, claiming that his retained lawyer had requested an additional \$1500 to pursue an appeal but had failed to tell Gipson of the time limitation for requesting an appeal. A magistrate judge appointed counsel to represent Gipson with his

§ 2255 petition; however, before the evidentiary hearing on that petition, the district court granted Gipson's motion to file a delayed notice of appeal. Gipson then moved to withdraw his § 2255 petition, and the district court granted his motion.

This court then dismissed Gipson's appeal for lack of jurisdiction, stating that the district court had no authority to grant the motion for delayed notice of appeal. The dismissal was ordered without prejudice, however, so that Gipson could refile his § 2255 petition.

Gipson refiled his § 2255 petition on May 21, 1990. He claimed, inter alia, that he had been denied his right to appeal his conviction and sentence because of his trial counsel's ineffective assistance in failing to advise him of the time limitations for filing a notice of appeal. After holding an evidentiary hearing to determine whether the ineffective assistance of Gipson's trial counsel had deprived Gipson of his right to appeal, the district court denied Gipson's § 2255 petition. Gipson then timely appealed the district court's determination that he had not been denied his right to appeal because of ineffective assistance of counsel. This court vacated the judgment of the district court, thus allowing Gipson to proceed on direct appeal. The instant appeal then ensued.

II.

Gipson first contends that there was insufficient evidence to support his conviction for conspiracy to commit an offense

against the United States because Cloud did not voluntarily enter into the conspiracy. Specifically, he argues that Cloud entered into the conspiracy under duress.

In reviewing a sufficiency of the evidence challenge, this court must examine the evidence in the light most favorable to the verdict and uphold the conviction if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. United States v. Cardenas-Alvarez, 987 F.2d 1129, 1131 (5th Cir. 1993); United States v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991). Further, we must review all reasonable inferences and credibility choices in favor of the verdict. Cardenas-Alvarez, 987 F.2d at 1131. The evidence need not exclude all hypotheses of innocence. United States v. Chappell, 6 F.3d 1095, 1098 (5th Cir. 1993).

To obtain a conspiracy conviction under 18 U.S.C. § 371, the government must prove beyond a reasonable doubt (1) an agreement by two or more persons to violate the law of the United States, (2) an overt act by any co-conspirator in furtherance of the scheme, and (3) each defendant's knowing and voluntary participation. Id. We believe the evidence supports Gipson's conspiracy conviction.

At trial, Cloud testified that he had discussed cashing the check in question with Gipson and that he and Gipson travelled from Austin to Houston to cash the check. Cloud further testified that he had told Gipson that the attempt to cash the check might not be successful, but that he agreed to go through

with the attempt because Gipson was an aggressive and brash person and because he feared Gipson. Additionally, Cloud stated that Gipson was waiting in the car during the thirty-minute period in which Cloud negotiated the check in the bank with Lave and that after giving Gipson the \$2500 Cloud received from cashing the check, Gipson gave Cloud \$800.

The jury, as the trier of fact, was free to believe all, part, or none of Cloud's testimony. United States v. Pruneda-Gonzalez, 953 F.2d 190, 196 n.9 (5th Cir.), cert. denied, 112 S. Ct. 2952 (1992). Further, to prove duress, it must be shown, inter alia, that the person allegedly acting under duress "was under an unlawful and present, imminent, and impending [threat] of such a nature as to induce a well-grounded apprehension of death or serious bodily injury." United States v. Harper, 802 F.2d 115, 117 (5th Cir. 1986).

From Cloud's testimony, a reasonable jury could have inferred that Cloud voluntarily conspired with Gipson to cash the \$2500 check. Moreover, in light of Cloud's statement that Gipson was waiting in the car during the thirty-minute period in which Cloud was in the bank, a reasonable jury could have determined that Cloud was not under a "present, imminent, and impending" threat from Gipson. Gipson's sufficiency challenge is thus without merit.

III.

Gipson also contends that the admission into evidence of the recorded conversation between him and Cloud in his apartment violated his Fifth Amendment right to counsel under Miranda v. Arizona, 384 U.S. 436 (1966), and his Sixth Amendment right to counsel under Massiah v. United States, 377 U.S. 201 (1964). We disagree.

Because Gipson failed to object to the admission of the recording at trial, we review the district court's decision to admit the recording at trial for plain error that affected Gipson's substantial rights. United States v. Olano, 113 S. Ct. 1770, 1777-78 (1993); United States v. Martinez, 962 F.2d 1161, 1166 (5th Cir. 1992). An error is plain when it is clear or obvious. Olano, 113 S. Ct. at 1777. To show that a substantial right is affected, a party must generally show prejudice. Id. at 1777-78.

Gipson's argument fails for two reasons. First, Gipson's reliance on Massiah is misplaced. The defendant in Massiah was already indicted when federal agents sent a co-defendant to try to elicit incriminating statements from him. Massiah, 377 U.S. at 201. Gipson had not yet been formally charged when agents used Cloud to record the incriminating statements; therefore, Gipson's Sixth Amendment right to counsel had not yet attached. United States v. Howard, 991 F.2d 195, 201 (5th Cir.), cert. denied, 114 S. Ct. 395 (1993).

Second, Gipson's reliance on Miranda is also misplaced. The right to counsel in the context of interrogation, prior to formal charges, is implicated only if the subject of the interrogation is in the custody of his interrogators. Oregon v. Elstad, 470 U.S. 298, 309 (1985); Howard, 991 F.2d at 200. Because Gipson was not in custody at the time of the recording, his Fifth Amendment right to counsel under Miranda had not yet attached.

IV.

Gipson finally argues that his trial counsel provided ineffective assistance because counsel, inter alia, failed to adequately prepare or investigate Gipson's case, did not make an opening statement, conducted only a short direct examination of Gipson, and failed to make objections to hearsay statements. We find his argument to be without merit.

This court considers allegations of ineffective assistance of counsel on direct appeal only in "rare cases" in which the claim has not been raised before the district court and "the record allow[s] us to evaluate fairly the merits of the claim." See United States v. Higdon, 832 F.2d 312, 314 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). Gipson's trial counsel has not had an opportunity to explain the reasoning for his actions, and no evidence in the record exists by which to determine the rationale for trial counsel's actions. Because we cannot fully evaluate Gipson's claim of ineffective assistance of counsel on appeal and can only speculate on the basis for trial counsel's

actions, this case is not the "rare case" envisioned by our Higdon decision. Accordingly, we decline to address the merits of Gipson's ineffective assistance of counsel claim.

V.

For the foregoing reasons, the district court's judgment of conviction and sentence is AFFIRMED.