UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3406
Summary Calendar

STATE OF LOUISIANA,

Plaintiff,

VERSUS

ANTHONY SCIRE,

Defendant,

CLARENCE M. SMITH,

Defendant-Third Party Plaintiff-Appellant,

VERSUS

HARRY W. McSHERRY,

Third Party Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-0765-E2)

(January 26, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In issue is whether the district court abused its discretion in quashing state court subpoenas of a federal officer. We **AFFIRM**.

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Clarence Smith and Anthony Scire were convicted in Louisiana state court of capital murder of a federal witness, Robert Collins. *See* ***State v. Smith***, 600 So.2d 1319, 1320-23 (La. 1992) (reversing conviction). Collins was killed a few days after testifying in a drug conspiracy case. ***Id.*** at 1320. Smith and Scire's convictions were reversed on the basis of an improper jury instruction, ***id.*** at 1327-28; they are awaiting retrial.

Smith's conviction was based in part on the testimony of John Joseph "J.J." Hall and Carl Holley, both of whom admitted their involvement in the murder, and testified pursuant to plea agreements. *See* ***id.*** at 1320-21, 1323, 1327. Assistant United States Attorney Harry W. McSherry, the federal prosecutor at the drug trial in which Collins was a witness, also testified at Smith's trial, about the investigation of Collins' murder.

After Smith's conviction was reversed and new proceedings were underway, Smith moved for dismissal on grounds of government misconduct, claiming that state and federal government officials had suppressed ***Brady*** material[2] during his first trial, and had engaged in outrageous misconduct.[3] Smith had subpoenas issued for

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[2] ***Brady v. Maryland***, 373 U.S. 83 (1963) (providing for disclosure of exculpatory material to defendants).

[3] Smith contends, among other things, that the government did not disclose the entire consideration that Hall and Holley received in return for their testimony at his first trial; nor did the government disclose all the crimes for which Hall and Holley had been indicted, or to which they had confessed.

testimony and documents that he sought to present in support of his motion to dismiss; one was for McSherry.

By affidavit, Smith described the information he hoped to obtain from McSherry; *inter alia*, his contacts with Hall, Holley, the F.B.I., the A.T.F., the Orleans Parish District Attorney, and the United States Attorney's Office in Jacksonville and Tampa, Florida. He also requested documents "previously requested of [McSherry]" under the Freedom of Information Act (FOIA).

Pursuant to 28 U.S.C. § 1442(a)(1), the government, on behalf of McSherry, removed the subpoena proceedings to the federal district court for the Eastern District of Louisiana, where it moved to quash the subpoenas, based on sovereign immunity and on federal regulations preventing the disclosure of information contained in Department of Justice criminal investigation files.[4] After a hearing, the magistrate judge recommended granting the motion. The district court adopted the recommendation, quashed the subpoenas and dismissed the action on the basis of sovereign immunity, and remanded any remaining issues to state court.

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[4] 28 U.S.C. 1442(a) states, in pertinent part:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States...: (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office....

28 U.S.C. § 1442(a)(1). *See* ***Louisiana v. Sparks***, 978 F.2d 226 (5th Cir. 1992).

II.

Smith contends that the district court erred in quashing the subpoenas. We review that decision for abuse of discretion. ***United States v. Arditti***, 955 F.2d 331, 345 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 597; *see also* ***In Re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena***, 913 F.2d 1118, 1121 (5th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). We find none here.

The district court quashed the subpoenas on the bases that federal regulations, as well as sovereign immunity, precluded the enforcement of the subpoenas against McSherry, an employee of the United States Justice Department and thus of the United States. The Justice Department's regulations prevent him from disclosing the information Smith seeks to obtain with his subpoenas -- information relating to a criminal investigation -- without the consent of his superiors.[5] *See* 28 C.F.R. 16.21 *et seq*., *discussed in* ***Louisiana v. Sparks***, 978 F.2d 226, 234 (5th Cir. 1992). And, sovereign immunity prevents the enforcement of a subpoena against the United States, absent an express waiver. ***Sparks***, 978 F.2d at 234-36; ***United States v. Nordic Village, Inc.***, __ U.S. __, 112 S. Ct. 1011, 1014 (1992) (waiver of sovereign immunity cannot be

[5] *See especially* 28 C.F.R. § 16.22(a) (providing that prior approval is required before a Justice Department employee can produce materials acquired as a result of the employee's official duties); 28 C.F.R. § 16.26(b)(5) (providing that disclosure especially should not be made if it would reveal "investigatory records compiled for law enforcement purposes, or would interfere with enforcement proceedings or disclose investigative techniques...").

implied, but must be "unequivocally expressed"); ***United States v. Testan***, 424 U.S. 392, 399 (1976) (same).

No waiver has been given; indeed, as the district court noted, the United States has "invoked sovereign immunity specifically... as reflected in its removal and motion to quash." And, this court noted in ***Sparks*** that the very regulations cited *supra* "evince an intent *not* to waive the Justice Department's sovereign immunity" in cases such as this one.[6] ***Sparks*** at 234-36 (emphasis in original).

Smith concedes that ***Sparks*** "seem[s] to support" the subpoenas being quashed. Nonetheless, he urges us to apply a balancing test that would require the government to state a compelling interest sufficient to override his need for the information he alleges McSherry could provide. In this circuit, however, "one panel may not overrule the decision, right or wrong, of a prior panel in the absence of en banc reconsideration or superseding decision of the Supreme Court." ***Batts v. Tow-Motor Forklift Co.***, 978 F.2d 1386, 1393 & n.15 (5th Cir. 1992) (quoting ***Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees***, 961 F.2d 86, 89 (5th

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[6] Smith nevertheless contends that the government waived sovereign immunity by allowing McSherry to divulge information and testify at Smith's trial. The authority he cites in support of this proposition is inapposite; sovereign immunity was not a factor in either of the cases cited. *See* ***Florida v. Cohen***, 887 F.2d 1451 (11th Cir. 1989) (remanding case, for consideration of new facts, where subpoenas were opposed only on basis of federal anti-disclosure regulations); ***Wisconsin v. Schaffer***, 565 F.2d 961, 967 (7th Cir. 1977) (allowing production of grand jury minutes, and imposing conditions to prevent unnecessary disclosures, after grand jury had concluded its investigation). Certainly the government has not made an unequivocal, express waiver of sovereign immunity, as required. ***Testan***, 424 U.S. at 399. Smith's contention is meritless.

Cir. 1992) (citations and internal quotations omitted)), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1028 (1993). We find ***Sparks*** controlling.[7]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[7] As noted by the government, Smith may have an available administrative remedy under the Freedom of Information Act (FOIA) or Administrative Procedure Act. *See* ***Sparks***, 978 F.2d at 236 n. 18. His affidavits in support of the subpoenas indicate that he is pursuing that. Of course, our decision in no way precludes Smith from doing so. ***Id.***