

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3448
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD AGEE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-92-360)

(March 29, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

A jury convicted Agee of conspiracy to distribute cocaine and he appeals. We affirm.

Appellant first contends that the prosecutor's cross-examination of him violated his right to due process as formulated in Doyle v. Ohio, 426 U.S. 610 (1976). Agee's defense was that he was blackmailed by another and thereby forced to participate in the drug distribution. On cross-examination the prosecutor asked broad

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

questions about why Appellant had not related this alleged blackmail to anyone before trial. The clear purpose of the prosecutor's questioning was to create the inference that Agee's trial testimony of blackmail was a recent fabrication.

In Doyle v. Ohio, the Supreme Court held that the use for impeachment purposes of a defendant's silence, at the time of arrest and after receiving Miranda warnings, violates the Due Process Clause of the Fourteenth Amendment. We do not find a Doyle violation. United States v. Laury, 985 F.2d 1293 (5th Cir. 1993), directs that we examine the issue in reference to three separate time periods: (1) prior to arrest, (2) after arrest and Miranda warnings, and (3) during the time prior to trial but following arrest. Id. at 1301-02.

As to the period before arrest, the claim has no merit because no governmental action induced Agee to remain silent. Laury, 985 F.2d at 1302 (citing Jenkins v. Anderson, 447 U.S. 231, 204 (1980)).

As to the time periods from arrest to trial, the record does not show that Agee was ever given Miranda or similar warnings and he does not claim that he was given them. In Fletcher v. Weir, 455 U.S. 603, 604-07 (1982), the Supreme Court held that the rule of Doyle v. Ohio applies only where the Government has induced the defendant to remain silent by giving him Miranda or similar warnings, stating that "[i]n the absence of the sort of affirmative assurances embodied in the Miranda warnings," it did not violate due process to permit cross-examination regarding a defendant's

post-arrest silence to impeach the defendant's testimony.

On the last day of trial, Agee's co-defendant entered a guilty plea and testified for the Government. Agee complains that his cross-examination of this witness was limited by the district court to such an extent that his rights under the Confrontation Clause were violated. The scope of cross-examination is within the trial court's discretion once the Confrontation Clause is satisfied. The Confrontation Clause is satisfied when defense counsel has been "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." United States v. Restivo, 8 F.3d 274, 278 (5th Cir. 1993) (internal quotation marks and citation omitted). The district court limited the cross-examination relating to why the witness pleaded guilty and whether his decision was difficult. Our review of the record, and in particular the district court's rephrasing of counsel's very confusing question, makes clear that the jury had before it all the relevant information in order to judge the witness's credibility. It was clear that the witness testified that he expected that, because of his testimony, he might receive a lesser sentence. We find no abuse of discretion.

AFFIRMED.

