IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5073
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILEY BENTON,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 92-CR-30033-01
- - - - - - - - - - -
(July 20, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:[*]

Wiley Benton first challenges the "introduction of irrelevant, extraneous material into evidence at trial." This Court reviews trial court rulings concerning the admissibility of evidence for an abuse of discretion. United States v. Follin, 979 F.2d 369, 375 (5th Cir. 1992), cert. denied, 113 S.Ct. 3004 (1993). Over Benton's objection, the district court permitted a police officer to testify that a portion of the video tape admitted into evidence involved an unrelated drug transaction.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The court allowed the testimony to be admitted for the sole purpose of informing the jury why the entire video tape could not be played. Benton's defense was not prejudiced by the admission of the complained-of testimony. Accordingly, no abuse of discretion has been shown.

Benton also contends that the trial court erred in denying his motion to dismiss the indictment based on prosecutorial intimidation of two potential witnesses, Frank Tucker and Robert Carr.

"[S]ubstantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant." United States v. Whittington, 783 F.2d 1210, 1219 (5th Cir.), cert. denied, 479 U.S. 882 (5th Cir. 1986). To prevail on this type of claim, "the defendant now must show how [he] was prejudiced by the interference, e.g., that the witness was intimidated, or refused to testify, as a result of the Government's actions, or that the witness would have offered exculpatory testimony but was prevented from doing so." United States v. Anderson, No. 93-7490 (5th Cir. Jan. 19, 1994) (unpublished; copy attached) at 6; see United States v. Viera, 839 F.2d 1113, 1115 (5th Cir. 1988) (en banc); United States v. Weddell, 800 F.2d 1404, 1410-12 (5th Cir.), as modified, 804 F.2d 1343 (5th Cir. 1986).

Benton has not met his burden. He did not call either Tucker or Carr to testify and has not shown that they were intimidated into not testifying by the prosecutor's attempt to interview them or that they would have refused to testify had

they been called. Moreover, he has failed to show that these individuals would have provided any exculpatory testimony. To the extent Benton is alleging that the prosecutor violated the Fifth and Sixth Amendment rights of Carr and Tucker, his argument need not be addressed since neither of these individuals is a defendant in this case. As Benton was not prejudiced by the Government's actions, he was not deprived of his due process right to a fair trial.

Benton also challenges the prosecutor's remarks during closing argument but fails to brief this issue adequately for appellate review. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

Benton's challenges to his sentence are also without merit. Notwithstanding his assertion to the contrary, the record reflects that he had adequate notice that the Government would seek a two-level increase in his base offense level pursuant to U.S.S.G. § 3B1.1(c) for his role in the offense.

The record also supports the district court's finding that Benton committed perjury at his trial. Though the court may not penalize a defendant for denying his guilt as an exercise of his constitutional rights, an obstruction of justice enhancement based upon perjury is permissible. United States v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993); see United States v. Dunnigan, ___ U.S. ___, 113 S.Ct. 1111, 1115-17, 122 L.Ed.2d 445 (1993). Thus, the district court did not clearly err in adding two points to Benton's base offense level for obstruction of justice under § 3C1.1. See Laury, 985 F.2d at 1308.

Benton also argues that he should have received a two-point reduction for acceptance of responsibility. The commentary to § 3E1.1 provides that the adjustment is not intended for "a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." § 3E1.1, comment. (n.2). Benton did not plead guilty but rather proceeded to trial, where his counsel argued that Benton had been entrapped. At trial, Benton engaged in conduct which was inconsistent with acceptance of responsibility when he committed perjury. In the light of these facts, the district court's finding that Benton had not accepted responsibility was not without foundation and will not be disturbed. See United States v. Lara, 975 F.2d 1120, 1129 (5th Cir. 1992).

AFFIRMED.