

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7057

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES DWIGHT KELLEY,
a/k/a D. L. Kelley,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CR-J91-58(W))

(February 25, 1994)

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

PER CURIAM:¹

Charles Dwight Kelley appeals his conviction and sentence for two counts of wire fraud under 18 U.S.C. § 1343. We affirm.

I.

In 1988, Kelley induced Bill Jones, an aircraft parts broker in Jackson, Mississippi, to place a \$10,000 deposit on the purchase of helicopter blades and a \$25,000 deposit on the purchase of a helicopter. Kelley never delivered the blades or the helicopter and ultimately disappeared. Kelley was indicted in July 1991 on

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

two counts of wire fraud pursuant to 18 U.S.C. § 1343, involving communications between Kelley in Colorado and Jones in Mississippi about the transactions. Kelley was arrested in June 1992 in Oklahoma and tried in January 1993. Kelley raises a number of challenges to his conviction and sentence, which we consider below.

II.

Kelley argues first that his right to a speedy trial was violated by the 35-month delay between the commission of the offense and the indictment. Kelley's argument fails because he did not establish that the government intended to gain a tactical advantage in delaying his indictment. Nor has Kelley demonstrated that he suffered prejudice due to the intervening deaths of his brother and father, whom he alleges could have testified on his behalf; Kelley admitted that the same testimony was available through other witnesses. **See United States v. Amuny**, 767 F.2d 1113, 1119 (5th Cir. 1985); **United States v. Ballard**, 779 F.2d 287, 293 (5th Cir.), **cert. denied**, 495 U.S. 1109 (1986) (defendant bears burden of establishing intent to gain tactical advantage and prejudice).

Kelley argues next that the delay between his indictment and conviction violated his Sixth Amendment right to a speedy trial and Fed. R. Crim. P. 48(b). The same factors govern both Kelley's Sixth Amendment claim and his Rule 48(b) claim. **See United States v. Hill**, 622 F.2d 900 (5th Cir. 1980); **United States v. Harrison**, 918 F.2d 469, 474 (5th Cir. 1990). These factors are: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his rights; and (4) the prejudice to defendant

resulting from the delay. **Barker v. Wingo**, 407 U.S. 514, 530 (1972).

The government concedes that the delay in this case was "presumptively prejudicial." **Millard v. Lynaugh**, 810 F.2d 1403, 1406 (5th Cir.), **cert. denied**, 484 U.S. 838 (1987). But the presumption is overcome because Kelley did not leave a forwarding address every time he moved, and as a result, the government was unable to locate him for 12 months following his indictment. Also, through no fault of the government, further delays occurred after Kelley's arrest because of legal proceedings related to his removal from Oklahoma (where he was arrested) to Mississippi (where the indictment was returned). Moreover, the government was prepared to try Kelley less than two months after he asserted his right to a speedy jury trial in August 1992, but Kelley moved to continue the trial. Finally, Kelley failed to establish actual prejudice from the delay.

We also reject Kelley's argument that the district court lacked jurisdiction. The jurisdictional requirement of 18 U.S.C. § 1343 is satisfied by the use of wire or mail to obtain proceeds in furtherance of a scheme to defraud, regardless of the direction the transmission flows. **See, e.g., United States v. Sindona**, 636 F.2d 792, 802 (2d Cir. 1980).

Kelley's challenge to the district court's refusal to give his proffered "good faith" instruction also must be rejected. Kelley's failure to insure that the proffered instruction was included in the record on appeal precludes appellate review of this issue. **United States v. O'Brien**, 898 F.2d 983, 985 (5th Cir. 1990).

Kelley's contention that the prosecutor's closing remarks were improper is also meritless. The prosecutor's remarks did not amount to an accusation of money laundering, but rather were directed toward proving an intent to defraud, an essential element of the offense charged. **See 18 U.S.C. § 1343; United States v. Solomon**, 825 F.2d 1292 (9th Cir. 1987).

Moreover, the prosecutor did not make impermissible comments on Kelley's failure to testify. The prosecutor was entitled to point to defendant's failure to produce evidence tending to show the legitimate nature of his business. **See United States v. Borchardt**, 809 F.2d 1115, 1119 (5th Cir. 1987). The prosecutor's comment was not one that the jury would "naturally and necessarily" construe as a comment on Kelley's failure to testify. **United States v. Bright**, 630 F.2d 804, 825 (5th Cir. 1980).

III.

Kelley argues that the district court improperly treated four other incidents involving similar scams as relevant conduct because Kelley reimbursed some of the victims. He also argues that the amount of loss to the victims should be reduced by the amount Kelley repaid.

The district court properly increased Kelley's offense level by six for relevant conduct under § 1B1.3(a)(2). The district court's determination that the four other incidents of fraud were temporally connected to the charged offense was not clearly erroneous. **See United States v. Harris**, 932 F.2d 1529 (5th Cir.), **cert. denied**, 112 S. Ct. 270 (1991) (temporally connected

activities are properly considered relevant conduct); **United States v. Lokey**, 945 F.2d 825, 839-40 (5th Cir. 1991) (relevant conduct determination subject to clearly erroneous review). Although Kelley reimbursed three of the victims, he did not do so promptly or voluntarily. Each victim threatened to take legal action against Kelley before he agreed to return the money. One of the victims threatened legal recourse, another made several phone calls complaining to the Securities and Exchange Commission and the third victim filed a formal complaint with the District Attorney of Jefferson County, Colorado. Under these circumstances, the district court did not err in including the amounts repaid to these victims.

Kelley also argues that his repayment to some of the victims entitles him to a reduction under § 3E1.1 for acceptance of responsibility. This argument is frivolous. Kelley did not repay Jones and still does not accept responsibility for defrauding Jones. **See United States v. Gordon**, 876 F.2d 1121, 1127-28 (5th Cir. 1989).

IV.

For the reasons stated above, Kelley's conviction and sentence are affirmed.

AFFIRMED.