UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8820
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT STANLEY ORTLOFF,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(W-93-CA-182 (W-86-CR-4))

(December 16, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM, and EMILIO G. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Robert Stanley Ortloff was convicted of multiple offenses arising from the manufacture, mailing, and injurious detonation of an illegal explosive device. We AFFIRMED on direct appeal.[1]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] **United States v. Ortloff**, 818 F.2d 863 (5th Cir.1987) (unpublished opinion).

Ortloff now moves to vacate his convictions under 28 U.S.C. § 2255. The district court denied relief; we affirm.

Background

On January 11, 1986, Thad Gulczynski, a serviceman stationed in Fort Hood, Texas, was injured by the explosion of a package addressed to him which bore no return address. Ortloff, formerly involved with Gulczynski's girlfriend, was charged in a three-count indictment with assault with intent to commit murder by mailing an explosive device[2], unlawfully using an explosive device during and in relation to a crime of violence[3], and mailing an unmailable item.[4]

After trial on these three counts ended in a mistrial, the government filed a superseding indictment charging Ortloff with the original three counts and a fourth count of obstructing the administration of justice[5] by endeavoring to have a potential witness murdered and by creating the appearance that someone else had been responsible for the manufacture and mailing of the explosive device. Ortloff was found guilty on all counts and sentenced to a total of fifty years in prison. He appealed and we affirmed.

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[2] 18 U.S.C. § 113(a).

[3] 18 U.S.C. § 1716(a).

[4] 18 U.S.C. § 1716(h).

[5] 18 U.S.C. § 1503.

Ortloff then filed the instant section 2255 motion claiming inadequate time to prepare for trial, a conflict with his attorneys causing ineffective assistance of counsel, prejudice because both juries were picked from the same venire, and suppression of exculpatory evidence. He then faulted the cumulative effect of these alleged shortcomings. He also sought recusal of the district judge and complained because the transcript of his arraignment hearing on the superseding indictment was not made part of the record. The district court denied all motions; Ortloff timely appealed.

Analysis

The claim that Ortloff was not allowed the statutory[6] 30 days between arraignment and trial may not be raised in this collateral proceeding which is limited to violations which reach "constitutional or jurisdictional magnitude."[7]

The second claim, ineffective assistance of counsel, is based on the allegation that one of Ortloff's attorneys had a conflict because the attorney represented a potential witness, Bob Bryson, who could have been called to impeach the government's witness on the obstruction of justice charge.

To show ineffective assistance of counsel Ortloff must demonstrate that counsel's actions were "deficient, falling below

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[6] 18 U.S.C. § 3161(c)(2).

[7] **United States v. Shaid**, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, ___ U.S. ___, 112 S.Ct. 978 (1992).

an objective standard of reasonableness, and that [he] was prejudiced as a result."[8] Prejudice is not presumed in a conflict of interest case. Although Ortloff is "entitled to an attorney who can make a decision to use or not use testimony or evidence unfettered by the effect of that decision on his other client's case,"[9] he must demonstrate "that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance."[10]

The record reflects no actual conflict between Bryson and Ortloff as they were involved in entirely separate criminal cases. Nor does it reflect any adverse effect on the performance of counsel; Bryson was only briefly mentioned in the trial and we find no showing of any material testimony he could have added to Ortloff's defense. The record does contain, however, detailed testimony from another witness counsel offered in an effort to impeach the prosecution's witness on the obstruction count. Counsel is not constitutionally required to interview and call every claimed witness.[11]

Ortloff next contends that his second trial was constitutionally infirm because the court used 19 persons who had been on the venire of the first jury, four of whom served as

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[8] **United States v. McCaskey**, 9 F.3d 368, 381 (5th Cir.1993), cert. denied, ___U.S.___, 114 S.Ct. 1565 (1994). See also **Strickland v. Washington**, 466 U.S. 668 (1984).

[9] **United States v. Abner**, 825 F.2d 835, 843 (5th Cir.1987).

[10] **McCaskey**, 9 F.3d at 381.

[11] See **Bryant v. Scott**, 28 F.3d 1411 (5th Cir. 1994).

jurors. He maintains that they could not be impartial because of knowledge gained during the first voir dire experience. Although these potential jurors might have been aware of the allegations against Ortloff from the first case, such awareness alone would not disqualify these jurors if they could "lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court."[12] The district court questioned these jurors at length, doing so separately from the other members of the venire, and allowed defense counsel an opportunity to examine them before finding that they were impartial. Ortloff demonstrates no clear error in this finding; we find none.[13]

Ortloff advances a **Brady**[14] claim, contending that the government suppressed exculpatory evidence. The suppressed evidence was in two parts. The first was the identity of a postal clerk who handled the package but could not positively identify the sender. This claim has no merit whatsoever.[15] The second part is the claim that the brown wrapping paper containing Ortloff's fingerprints was taken from another package sent to the victim, not from the bomb. This contention may not result in a reversal short of the showing of "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would

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[12] **Irvin v. Dowd**, 366 U.S. 717, 723 (1961).

[13] See **United States v. Dozier**, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982).

[14] 373 U.S. 83 (1963).

[15] See **United States v. Rhodes**, 569 F.2d 384 (5th Cir.), cert. denied, 439 U.S. 844 (1978).

have been different."[16] This non-disclosure was harmless,[17] the Jencks Act materials provided Ortloff with sufficient cross-examination fodder.[18]

Finding no validity to any of the enumerated complaints, the cumulative effect of same is likewise unavailing to Ortloff.

Finally, Ortloff challenges the section 2255 proceeding itself, contending first that the trial judge should have recused himself. Such recusal motions are "committed to the sound discretion of the judge and [his] decision will only be reversed if there has been an abuse of that discretion."[19] In this case, there has been no showing of such an abuse, as adverse rulings or, as in this case, adverse pre-trial statements do not, in and of themselves, render the judge biased.[20] Ortloff's claim that the district court erred in failing to conduct an evidentiary hearing on his motion likewise has no merit. A section 2255 motion may be

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[16] **United States v. Bagley**, 473 U.S. 667, 682 (1985).

[17] **United States v. Garcia**, 917 F.2d 1370 (5th Cir. 1990); **United States v. Cochran**, 697 F.2d 600 (5th Cir. 1983).

[18] In the Jencks Act disclosure Ortloff was provided with a statement from SSG Martha Jones who first received the packages in question. In her statement, Jones noted that (despite overwhelming evidence adduced at trial to the contrary) the bomb was in an unwrapped package.

[19] **Matter of Hipp, Inc.**, 5 F.3d 109, 116 (5th Cir.1993).

[20] See **United States v. MMR Corp.**, 954 F.2d 1040 (5th Cir.1992); **United States v. Reeves**, 782 F.2d 1323 (5th Cir.), cert. denied, 479 U.S. 837 (1986). Even if there were error in the district judge's refusal to recuse himself, the error would be harmless, as the district court correctly ruled on the effectiveness of Ortloff's counsel. See **In re Continental Airlines Corp.**, 901 F.2d 1259 (5th Cir.1990).

denied without a hearing when the record conclusively shows that the prisoner is entitled to no relief.[21] Ortloff's claim that the district court's refusal to have the arraignment hearing transcribed for inclusion in the appellate record constituted an abuse of discretion also lacks merit, as he has failed to show both a particularized need for the transcript and the lack of alternatives to the furnishing of a transcript at public expense.[22]

Finally, Ortloff moves this court to allow Robert Burkholder to represent him if this matter is docketed for oral argument. As this matter is being resolved on the non-argument calendar the motion is **DENIED** as moot, and the judgment of the district court is **AFFIRMED** in all respects.

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[21] **United States v. Bartholomew**, 974 F.2d 39 (5th Cir. 1992).

[22] See **Jackson v. Estelle**, 672 F.2d 505 (5th Cir.1982).