

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10008

Summary Calendar

UNITED STATES of AMERICA,

Plaintiff-Appellee,

versus

HARRISON EARL SMITH and CAROLE RUTH SMITH,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:92 CR 500 D)

(November 11, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Appellants Harrison Earl Smith and Carole Ruth Smith were convicted of conspiracy to defraud the government by making false statements, wire fraud, fraudulently obtaining government property, and money laundering. They both appeal.

One of the government's main witnesses at trial was George Michael Dyess, who at the time of the crimes was a rehabilitation

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

specialist at the Grand Prairie agency that administered the rental rehabilitation program of the Department of Housing and Urban Development. He testified that he and the Smiths conspired to get HUD reimbursement funds by deceiving HUD into thinking that the Smiths had made repairs to their properties.

Dyess testified on Monday and Tuesday, September 20 and 21, 1993. That Friday evening, September 24, the government disclosed three FBI 302 memoranda commemorating interviews with Dyess and two housing inspectors who had inspected some of the Smiths' properties. Appellants argue that the memoranda contradict Dyess's testimony and support their defense theory, which was that Dyess represented that he could authorize the Smiths' use of the HUD funds for expenses other than repairs.

On Monday, September 27, appellants moved for a mistrial. The court denied the motion, but permitted appellants to recall Dyess for cross-examination. Appellants recalled him for cross-examination that day. Nevertheless, they argue on appeal that under Brady v. Maryland, 373 U.S. 83 (1963), the prosecution should have disclosed the memoranda earlier.

If the memoranda are indeed Brady material, they are late. The government's two excuses for its tardy production of this materials are unpersuasive. First, it claims that the memoranda were Jencks material. 18 U.S.C. § 3500(a). Because the government witness who had authored one of the memoranda, Special Agent Dale Webb, had not yet testified, the government argues that it had no duty to disclose the memoranda any earlier. However, the other two

memoranda cannot be Jencks material, since they were drafted by colleagues of Webb's who were not testifying for the government. Thus the government's Jencks rationale cannot excuse its tardy disclosure, if the memoranda contained Brady material. The government's second excuse is that it did not know that the memoranda were exculpatory until defendants unveiled their defense theory in the middle of the trial. Yet the Smiths established their theory of defense in their opening statements (1 T. 147, 162). The government could not have been surprised, and it has no excuse for disclosing the memoranda late.

Although the disclosure was late, we find no Brady violation because the disclosure was not too late. See, e.g., United States v. Jackson, 978 F.2d 903, 912 (5th Cir. 1992) (finding no prejudice in tardy disclosure of Brady material received in time to use effectively at trial), cert. denied, 113 S. Ct. 2429 (1993); United States v. McKinney, 758 F.2d 1036, 1048-52 (5th Cir. 1985) (same). The district court permitted appellants to recall Dyess for a second cross-examination after the government rested. Appellants received the memoranda on Sept. 24, 1993, a Friday evening, and had until Monday to prepare for Dyess's second cross-examination. Appellants protest that by the time they could confront Dyess with the memoranda, Dyess's original testimony had stood uncontroverted for a week. The district court acknowledged that the jurors might have already made up their minds by that time, but believed there was an equally good chance that the late-breaking second cross-examination would explode Dyess's earlier testimony more

effectively than timely cross-examination would have. Because the tardy disclosure did not prejudice appellants' defense, there is no Brady violation. See United States v. Neal, 27 F.3d 1035, 1050 (5th Cir. 1994) (rejecting Brady claim where government disclosed memorandum late but still in time for effective use in cross-examination).

Appellants' second argument is also unsuccessful. Citing Napue v. Illinois, 360 U.S. 264 (1959), appellants argue that the government used Dyess's testimony to convict them even though it knew from the memoranda that Dyess testified falsely. Assuming this characterization of Dyess's testimony is fair, the government fulfilled its constitutional disclosure duty by revealing the memoranda in time for appellants to recall Dyess for cross-examination. See United States v. Decker, 543 F.2d 1102, 1105 (5th Cir. 1976) (rejecting Napue argument where government discloses impeaching evidence after witness leaves stand but while still subject to recall), cert. denied, 431 U.S. 906 (1977).

AFFIRMED.