IN THE UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 94-10019
No. 94-10331
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HILLARD E. AUSTIN,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(1:93-CR-013-01)

(December 7, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Hillard E. Austin appeals his conviction and sentence for four counts of bribery of a public official in violation of 18 U.S.C. § 201(b)(1)(A). He also appeals the district court's dismissal without prejudice of his motion to vacate his sentence pursuant to 28 U.S.C. § 2255 and a motion for release pending a hearing on the § 2255 motion. For the following reasons, his conviction and sentence are affirmed. The appeal of the judgment denying his § 2255 motion and his motion for release is dismissed as moot.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Hillard E. Austin was indicted on four counts of bribing IRS agent Linda Dickerson, who was acting group manager at the Abilene IRS office while the group manager was away from the office. At trial, the Government presented evidence that Austin tried to bribe Dickerson, in order to "get rid" of his tax liability of almost $300,000. After a jury trial, Austin was found guilty on all four counts and was sentenced to serve three concurrent 33-month prison terms and two years on supervised release and to pay a $200 special assessment. Austin filed this appeal of his conviction and sentence.

Austin also filed a motion to correct, set aside or vacate sentence pursuant to 28 U.S.C. § 2255, along with a motion for release pending a hearing on the § 2255 motion. He claimed ineffective assistance of counsel. In one order and one judgment, the district court dismissed the § 2255 motion without prejudice and denied the motion for release pending disposition of the § 2255 motion. The district court found that the § 2255 motion was premature because Austin's direct appeal was still pending. The court denied the motion for release because there was no clear showing that he would succeed on the merits of his § 2255 motion. He appeals the dismissal of the § 2255 motion and his motion for release pending a hearing on the § 2255 motion.

Issues 1 through 7 of this opinion address the argument that Austin raises in his direct criminal appeal. Issue 8 of this

opinion analyzes the appeal of the dismissal of his § 2255 motion and the related motion for release.

DISCUSSION

Issue 1 - Attorney-Client Privilege

Austin contends that the trial court erred in allowing two attorneys to testify about his character and refusing to allow a voir dire of the attorneys. Austin argues that the testimonies of two attorneys as to his reputation for veracity violated the attorney-client privilege. The attorney-client privilege:

> [P]rotects communications from the client to the attorney made in confidence for the purpose of obtaining legal advice. It shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney.

United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994).

When the attorney-client privilege is asserted, the district court should decide whether an attorney-client relationship existed or whether an exception or waiver applies. A defendant asserting the privilege has the burden of proving the existence of an attorney-client relationship. To do that, he must show that he made the communication at issue to his lawyer for the purpose of securing a legal opinion or legal services. Neal, 27 F.3d at 1048 n.24. This Court reviews factual findings made in the application of the attorney-client privilege for clear error and reviews the controlling law de novo. Id. at 1048.

After Austin testified, the court held a bench conference at which defense counsel objected to the Government's calling two attorneys, William Hoffman and William Wright, to testify about

Austin's reputation for truthfulness. Defense counsel asked to examine them on voir dire, asserting that Hoffman and Wright had previously represented Austin. The court denied the defense request and allowed the Government to call the attorneys.

On direct examination, Hoffman testified that Austin's reputation for truth and honesty is "very bad." On cross-examination, Hoffman testified that he represented Austin two or three times in the 1980s. Hoffman stated that Austin owes him money. After receiving a demand letter from another attorney representing Austin, Hoffman obtained a declaratory judgment against Austin to the effect that Hoffman had no liability to him.

On direct examination, Wright testified that he had dealt with Austin in the past but never served as his attorney. Austin's reputation for truth and honesty, Wright stated, was "bad." On cross-examination, Wright stated that he was not a party to the lawsuit between Hoffman and Austin and was not associated with Hoffman.

We find no error in the district court's decision to allow the attorneys to testify without voir dire. Hoffman and Wright did not testify about any communications made in confidence for the purpose of obtaining legal counsel, nor did the Government ask them to so testify. The testimonies revealed no information protected by the attorney-client privilege.

Austin also argues that the lawyers' testimonies violated the "work product" doctrine. That doctrine protects against the disclosure of materials that an attorney prepared on behalf of his

client in anticipation of litigation. United States v. Davis, 636 F.2d 1028, 1040 (5th Cir.), cert. denied, 454 U.S. 862, 102 S.Ct. 320, 70 l.Ed.2d 162 (1981). Hoffman and Wright did not disclose such materials, and the Government did not ask them to do so.

Austin also argues that the testimonies violated the "last link" doctrine. That doctrine provides that the attorney-client privilege protects the client against his lawyer's disclosure to the Government of the last link in a chain of probative, inculpatory evidence. In re Grand Jury Subpoena (Reyes-Requena), 926 F.2d 1423, 1426 (5th Cir. 1991). For example, when the Government already possesses the substance of communications between a lawyer and his client, the lawyer may not identify the client to the Government, which would be the "last link" in the chain of evidence showing confidential communication. Id. at 1431-32. Hoffman and Wright gave no such information.

The district court is charged with exercising reasonable control over the mode of interrogating witnesses to avoid needless use of time. Fed. R. Evid. 611. Austin has shown no error in the district court's refusal to allow voir dire examination of the attorneys. Considering that they divulged no privileged information, we find this contention to be without merit.

Issue 2 - Jury Instruction

Austin contends that the district court's jury instruction defining "corruptly" was incorrect in that it should have been coordinated with the definition of "knowing," in order to address

Austin's defense that he did the acts in good faith. He admits that he did not object to the jury instructions.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional cases. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S.Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). This Court lacks the authority to relieve an appellant of this burden. Olano, 113 S.Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affects substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S.Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano,

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously

> affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S.Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this Court's discretion to correct an error pursuant to Rule 52(b) is narrow.

The statute that Austin was convicted of violating provides criminal penalties for

> [w]hoever . . . directly or indirectly, corruptly gives, offers, or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official, to give anything of value to any other person or entity with intent . . . to influence any official act . . . .

18 U.S.C. § 201(b)(1)(A) (emphasis provided).

The court instructed the jury that a finding of guilt requires proof:

> First: That the defendant directly or indirectly gave or offered something of value to Linda Dickerson, a public official; and
>
> Second: That the defendant did so corruptly with intent to persuade the public official to do an act in violation of her lawful duty.
>
> An act is "corruptly" done if it is done intentionally with an unlawful purpose.

Several paragraphs later, the court instructed, "The word `knowingly,' as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident." The term "knowingly," however, had not been mentioned previously in the instructions and is not an element of the offense of bribery of a public official.

Austin argues that the instructions confused the jury because even if it found that an act was not done "knowingly," it would not correspond to the good faith defense that he was putting forth at trial. We find Austin's contention to be without merit. If he wanted a different instruction to coincide with his good faith defense, he should have made such a request to the district court. He cannot now argue that this jury instruction was plain error.

Issue 3 - Discovery of IRS Agent's Rough Notes

Austin contends that he should have been allowed discovery of Dickerson's rough notes of a conversation that she had with him on January 13, 1993, the day before the taping began. Dickerson described the conversation in an affidavit that she made shortly after the conversation but destroyed her rough notes. Dickerson testified that, in that conversation, Austin made a bribe overture. Austin testified that she lied. Austin argues that the rough notes might have revealed whether he actually made a bribe overture.

The Government responds that Dickerson destroyed her rough notes, making the issue moot. Austin responds that the destruction of notes is an obstruction of justice and should be condemned in all cases.

The Federal Rules of Criminal Procedure require the Government to disclose, upon the defendant's request, the substance of any oral statement that he made to a Government investigator, before or after arrest. Fed. R. Crim. P. 16(a)(1)(A). Austin moved for discovery of the rough notes. The district court denied the motion. This Court reviews alleged discovery errors for abuse of

discretion, and the defendant must show prejudice to his substantial rights. United States v. Ellender, 947 F.2d 748, 756 (5th Cir. 1991).

Austin offers only speculation about the evidentiary worth of Dickerson's rough notes. Because they had been destroyed prior to the discovery request Austin fails to show that the district court's ruling was in error. Moreover, he has made no showing that the notes were destroyed in order to obstruct justice. Finding no prejudice to his substantial rights, we reject this contention.

Issue 4 - Discovery of Tax Audit File

Austin contends that the district court erred by not granting a continuance in order that he could get the IRS tax audit file. He contends that the court's action violated Fed. R. Crim. P. 16 and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In addition to discovery of the defendant's statements, Rule 16 provides for discovery of documents and tangible objects in the possession of the Government. Fed. R. Crim. P. 16(a)(1)(B). To show a Rule 16 violation, Austin must show abuse of discretion and prejudice to his substantial rights. Ellender, 947 F.2d at 756. To show a Brady violation, Austin must show that the Government suppressed evidence, that the evidence was favorable to him, and that it was material either to guilt or punishment. Moore v. Illinois, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972).

The district court denied the request for a continuance because it felt that the evidence contained in the file was not

relevant to Austin's guilt. Defense counsel stated that he wanted the file in order to prove that Dickerson had made "an offer for a hardship case" to Austin. However, our review of the record reveals that Dickerson freely admitted that she was going to make such an offer to Austin. Thus, the evidence in the file would have been cumulative.

Austin now argues that the files related to Dickerson's credibility and to his motive for trying to bribe her. He also argues that the file would be relevant to sentencing. Our review of the testimony reveals that Austin never brought this argument to the attention of the trial court. See United States v. Hosford, 782 F.2d 936 (11th Cir.)(holding that objections must be presented to the district court in order to preserve them on appeal), cert denied, 476 U.S. 1118, 106 S.Ct. 1977, 70 L.Ed.2d 660 (1986). We therefore cannot say that the court acted unreasonably in refusing to grant the continuance, when it heard no compelling reasons for a continuance. We find this contention to be without merit.

Issue 5 - Cross-examination Regarding Tax Refund

Austin contends that the district court erred in sustaining the Government's objection to his cross-examination of Dickerson. The trial court has wide latitude to reasonably limit cross-examination. A court may impose limits to prevent harassment, prejudice, confusion, repetition, danger to a witness, and testimony that is only marginally relevant. The limitations are reviewed for clear abuse of discretion. United States v.

Barksdale-Contreras, 972 F.2d 111, 115 (5th Cir. 1992), cert. denied, 113 S.Ct. 1060, 1614 (1993).

Austin testified that the IRS had sent him a letter stating that he was due a $226,000 refund. The jury also heard a taped meeting between Dickerson and Austin in which Austin mentioned the possibility of the IRS returning [between $220,000 and $230,000/$220,00 or 230,000] to him. Dickerson responded, "I already explained that to you. That was an error." Austin replied, "I know that, I know that." Austin's counsel attempted to question Dickerson about whether she had spoken to Austin and Bill Gilkey, Austin's accountant, about the letter that stated that Austin was due a refund.

Defense counsel asked Dickerson, "Did [Austin and Gilkey] make numerous requests for records to see where [the IRS] came up with the figures and why there was one person saying one thing and somebody else saying something else?" The Government objected on the grounds of relevancy and hearsay. The court sustained the objection.

Austin argues that, because the Government put on evidence of Austin's tax debt of $330,000, he should have been permitted to put on evidence of a prospective tax refund of approximately $220,000. Counsel's question on cross-examination, though, goes to what Dickerson, Austin, and his accountant might have said and done about the alleged prospective refund. It does not address whether Austin was actually due a refund. Furthermore, Austin stated in a

taped conversation that he knew that the refund letter was a mistake. Austin has shown no abuse of discretion.

Issue 6 - Eight-level Increase

Austin contends that the district court erroneously increased his Sentencing Guidelines offense level by eight points pursuant to U.S.S.G. § 2C1.1(b). Under U.S.S.G. § 2C1.1(b), the base offense level is increased by eight levels "[i]f the value of the payment, the benefit received or to be received in return for the payment or the loss to the government from the offense, whichever is greatest, exceeded $2000, increase by the corresponding number of levels from the table in § 2F1.1" or "[i]f the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position." Section 2F1.1 provides for an increase of eight levels when the amount involved is between $200,000 and $350,000. U.S.S.G. § 2F1.1(b)(1)(I). Thus, the eight-level increase is not erroneous if it was applied pursuant to either condition.

This Court reviews the sentence to determine whether the district court correctly applied the Sentencing Guidelines to factual findings that are not clearly erroneous. United States v. Montoya-Ortiz, 7 F.3d 1171, 1179 (5th Cir. 1993). A factual finding is clearly erroneous if it is not plausible in light of the record taken as a whole. Anderson v. City of Bessemer City, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Legal conclusions regarding the Sentencing Guidelines are reviewed de novo. Montoya-Ortiz, 7 F.3d at 1179.

Austin's tax preparer testified that Austin did not owe any taxes and that in fact Austin was owed a refund. At the sentencing hearing, an IRS agent testified that at the time of the bribery, Austin owed $292,344.71 to the IRS. He also testified that the letters sent to Austin stating that he was owed a refund were errors resulting from information incorrectly entered into a computer at the main IRS office in Dallas, Texas. At several places in the trial record Austin appears to have admitted that he owed the money to the government; although he now disclaims ever admitting owing the government anything. We find no clear error in the court's finding that an eight level increase was warranted under U.S.S.G. § 2F1.1(b)(1)(I). The testimony of the IRS agent provided a reasonable basis for the district court to believe that Austin owed the government between $200,000 and $300,00 in taxes. Having determined that an eight level increase was warranted by the approximately $300,000 in benefits that Austin would have inured, we need not address his arguments concerning whether he attempted to bribe an official in a high-level decision making or sensitive position. See U.S.S.G. § 2C1.1(b)(2).

Austin also argues that the Government's evidence at sentencing was legally incomplete because no documentary evidence was presented showing his tax liability. Austin cites no authority for the proposition that the loss must be proved by documentary evidence rather than by testimony and we have found none. We find this contention to be without merit.

Issue 7 - Poor Health

Austin argues that the district court erroneously refused to grant a downward departure that he had sought on the ground of poor health. He argues, first, that the district court failed to make findings with respect to his health and, second, that accurate findings should result in the downward departure.

A sentencing court is required to consider "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). "[T]here may be extraordinary circumstances where age and health may be relevant to the sentencing decision." United States v. Guajardo, 950 F.2d 203, 208 (5th Cir. 1991) (citing U.S.S.G. §§ 5H1.1, 5H1.4), cert. denied, ___ U.S. ___, 112 S.Ct. 1773 118 L.Ed.2d 432 (1992). A refusal to depart is unreviewable unless the refusal was in violation of the law. United States v. Mitchell, 964 F.2d 454, 462 (5th Cir. 1992).

When a defendant objects to facts in the PSR, the district court must make either a finding regarding the objection or a determination that no finding is necessary because the controverted matter will not be taken into account at sentencing. Fed. R. Crim. P. 32(c)(3)(D); United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). Nevertheless, "Rule 32 does not require a catechismic regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the court has adopted by reference." Sherbak, 950 F.2d at 1099.

The PSR described Austin's history of heart disease, including a heart attack on August 9, 1993, for which Austin was hospitalized for ten days. As of September 28, 1993, Austin was bedridden, using oxygen and awaiting the implantation of a pacemaker. Austin asserted that the condition merited a downward departure.

Austin submitted an October 22, 1993 affidavit of a physician that described Austin as having a "serious heart condition" and that Austin was taking the large doses of medication for the problem. Austin experiences "congestive heart failure, a currently uncontrolled heart rate problem, and adult diabetes." Austin was awaiting the surgical implantation of a pacing device. The doctor stated that imprisonment would be detrimental to Austin's health and that immediate access to high-quality medical care would be required.

At sentencing, the district court expressly stated that he was considering whether Austin's health condition necessitated a downward departure. The court then found that no mitigating circumstances warranted a downward departure. A refusal to depart is unreviewable unless the refusal was in violation of the law. United States v. Mitchell, 964 F.2d 454, 462 (5th Cir. 1992). Because the district court followed the correct procedure and did not violate the law in sentencing Austin, we reject this contention as meritless.

Issue 8 - § 2255 Motion

Austin argues that his § 2255 motion was not premature even though his direct appeal was still pending. We however find that

the appeal of the district court's dismissal of the § 2255 motion is now moot. An action is moot if the court cannot affect the rights of the litigants in the case before it. Defunis v. Odegaard, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705, 40 L.Ed.2d 164 (1974). Because we have already disposed of Austin's direct appeal, he can now pursue a § 2255 motion unfettered by procedural requirements. Fassler v. Untied States, 858 F.2d 1016, 1019 (5th Cir. 1988), cert. denied, 490 U.S. 1099 109 S.Ct. 2450, 104 L.Ed.2d 1004 (1989)(holding that "a criminal defendant may not collaterally attack his conviction until it has been affirmed on direct appeal"). Thus, our resolution of this case would have no effect on the litigants as to the § 2255 motion and the question presented is moot.

Because of the inter-relationship of the § 2255 motion and the motion for release pending appeal, the appeal of the denial of the motion to release is also dismissed.

CONCLUSION

For the foregoing reasons, Austin's conviction and sentence are AFFIRMED and the appeal of the district court's dismissal of his § 2255 motion and his motion for release pending a hearing on the § 2255 motion is DISMISSED as moot.