UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10059
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JASON JAMES MERRITT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-92-A)

(September 8, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[1]

Jason Merritt challenges his conviction following his guilty plea on two grounds: the judge impermissibly participated in the plea negotiations, and the judge erred in refusing to recuse himself. We affirm.

I.

On June 1, 1992, pursuant to a plea bargain, Merritt pleaded guilty to one count of mail fraud in Cause No. 4:-92-CR-088-A. On

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

June 30, 1992, a related eighty-seven-count indictment was filed against thirty-two additional defendants. Both cases were transferred to District Judge McBryde's docket and sentencing was scheduled for April 30, 1993. Prior to sentencing, Judge McBryde expressed concern that the plea agreements entered into by Merritt and certain others might not adequately reflect the seriousness of their actual offense behavior. Following a hearing in April 1993, the judge rejected Merritt's plea agreement, and Merritt withdrew his guilty plea. The district court then ordered that Merritt's waiver of indictment be withdrawn; and the court then dismissed Cause No. 4:-92-CR-088-A without prejudice.

In July 1993, Merritt was charged in a three-count indictment with conspiring to commit mail fraud, wire fraud, bank fraud and money laundering, in violation of 18 U.S.C. §§ 371, 1341, 1343, 1344, 1956 (count one); aiding and abetting in the commission of bank fraud, in violation of 18 U.S.C. §§ 2, 1344 (count two); and aiding and abetting in the commission of mail fraud, in violation of 18 U.S.C. §§ 2, 1341 (count three). Judge Mahon, to whom the case was originally assigned, transferred the case to Judge McBryde's docket because Judge McBryde was "familiar with the facts and issues relevant to this action and, thus, could more efficiently adjudicate this matter."

In October 1993, Merritt moved to disqualify Judge McBryde pursuant to 28 U.S.C. § 455(a). The judge denied the disqualification motion, and Merritt later pleaded guilty to counts one and three pursuant to a plea agreement. In January 1994, the judge

granted the government's motion for downward departure and sentenced Merritt to a total of thirty-six months imprisonment, three years supervised release, a $10,000 fine.

II.

Merritt contends for the first time on appeal that Judge McBryde violated Rule 11(e)(1) by participating in his plea negotiations with the government.

Parties ordinarily must challenge errors in the district court. When an error is not timely raised in the district court, this court may remedy the error under Fed. R. Crim. P. 52(b), but "`in only the most exceptional cases.'" **United States v. Rodriguez**, 15 F.3d 408, 414 (5th Cir. 1994) (quoting **United States v. Bullard**, 13 F.3d 154, 156 (5th Cir. 1994)). An appellant who raises an issue for the first time on appeal has the burden to show that there is an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. **United States v. Olano**, 113 S. Ct. 1770, 1777-78; **see also 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.

In **United States v. Adams**, 634 F.2d 830, 836 (5th Cir. 1981), however, this court concluded that judicial participation in plea negotiations constituted plain error sufficient for the court to raise the issue **sua sponte** under Rule 52(b). Although it is unclear whether **Adams** survived **Olano**, we need not decide this question because the district judge's actions in this case in

relation to Merritt's plea agreement did not constitute error, plain or otherwise.

Merritt points to various statements made by the district judge which allegedly demonstrate judicial participation in plea negotiations. In his order signed on April 16, 1993, Judge McBryde stated that approval of Merritt's "plea agreement would reduce the guideline range of imprisonment to 46-57 months from a range of 168-210 months, that would exist if he were to be convicted on all counts of the indictment by which he was charged." Merritt correctly notes that the statement is inaccurate, in that he waived indictment and consented to prosecution by information on a charge of mail fraud. Nevertheless, contrary to Merritt's argument, the statement in no way suggests what plea agreement would be acceptable to the court. The court was merely stating its concerns about accepting the proposed plea based on its review of the PSR.

Nor do the other passages[2] cited by Merritt from the April 30,

[2] Merritt cites to three passages from the April 30 hearing:

> This is a defendant who was not indicted, who apparently could have been charged with money laundering -- at least that appears from the presentence investigation report to be a possibility.
>
> If he had been indicted and convicted on the offenses to which it appears he had exposure, his guideline range would have been 168 to 210 months. He pled guilty to a charge of mail fraud and aiding and abetting. The plea of guilty, if approved, would reduce the guideline range [to] 46 to 57 months.
>
> . . . .
>
> And there's no contention, no indication whatsoever, that there would be any problem of the Government making its case in the sense of at least getting it to the point where the jury would be the deciding factor in the case ultimately as far as the counts of the indictment, as far as the offenses that apparently he has committed are concerned, or at least there's some evidence he has committed.
>
> . . . .
>
> The Government apparently does not contend that it has any proof problems may be the best way to say it, but according to the Information I have, this defendant is one of the most involved actors in the criminal activities that give rise to this case. He apparently was the incorporator, or one of the incorporators.
>
> He was listed as one of the initial directors of Multi Corp when it was formed in February of 1989, who at some point in time became the executive vice president, and I've taken that to mean that he was somewhat second in command below Defendant Fregien in the operation of Multi Corp. Apparently he actively participated in setting up factoring

1993, hearing constitute impermissible judicial participation in the plea negotiation process. None of the judge's remarks encourage or suggest a particular plea bargain. Rather, they are explanations of the court's reasons for rejecting the first plea agreement. "A district court is free, of course, to reject a plea agreement, and may express its reasons for doing so." **United States v. Miles**, 10 F.3d 1135, 1139 (5th Cir. 1993) (citing Fed. R. Crim. P. 11(e)(4)). The failure of a plea bargain to provide for the imposition of an appropriately severe sentence under the circumstances is a sound reason for a court to reject it. **United States v. Bean**, 564 F.2d 700, 704 (5th Cir. 1977). Thus, notwithstanding Merritt's contrary assertions, none of the above comments demonstrate judicial participation in the plea bargaining process.

Merritt also bases his judicial participation claim on the Judge McBryde's statements and behavior following his rejection of the plea agreement. After allowing Merritt to withdraw his plea, the judge commented:

> The Information is still pending and my plan -- or I'll have to think about it. I suppose there is a possibility of -- well, I think

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> arrangements, made trips with Mr. Fregien to set up those arrangements, if my memory serves me.
>
> So it would appear that wherever Mr. Fregien stands on money laundering, this Defendant stands about the same place. And wherever the factor stands on money laundering, this Defendant appears to stand pretty much the same places.

> I'll wait and see what the Government's next move is and then decide what to do with this case.

The judge later made inquiries, through his law clerk, of the government as to whether it intended to file additional charges against Merritt.

In denying Merritt's motion to disqualify, Judge McBryde stated his reasons for these inquiries:

> As defendant and his counsel were and are aware, the trial judge has always intended to try together the defendants engaged in the telemarketing scheme. As defendant suggests, the court made inquiries "about what the Government was going to do with the Defendant," . . . so that the court could set its trial schedule. At no time has the court suggested how the United States should proceed. Rather, as defendant notes, the court "set a deadline for the Government to make a decision." . . . The United States made her decision by seeking and obtaining the pending indictment against defendant. Everyone involved in this action and the related actions has known from the outset that the undersigned judge intended to further the efficient administration of criminal justice by avoidance of needless multiple trials. It would be apparent to any reasonable person that the inquiries made by the law clerk of the prosecutors were strictly related to those salutary goals.

The record amply supports the judge's explanation that his inquiry was for the purpose of arranging a single trial for all defendants. None of the judge's inquiries referred to a plea agreement.

Merritt also contends that Judge McBryde participated in plea negotiations by having Merritt's case transferred from another district judge's docket. Under Fed. R. Crim. P. 18, the district court has broad discretion in deciding whether a case should be transferred within a district. **See United States v. Kaufman**, 858

F.2d 994, 1006 (5th Cir. 1988). In the instant case, a valid reason existed for a transfer. As Judge McBryde stated:

> As the judges of this Division of the Northern District of Texas are wont to do, the judge before whom the indictment was pending transferred the case to the undersigned because of the undersigned's familiarity with the facts and circumstances giving rise to the charges against defendant. By the time of the transfer, the undersigned had tried the No. 4:92-CR-106-A case and had sentenced nineteen of the telemarketers.

Thus, the reasons given for the transfer -- judicial economy and efficiency -- fully support the transfer of the case from Judge Mahon to Judge McBryde.

III.

Merritt argues next that Judge McBryde committed reversible error in failing to grant Merritt's recusal motion brought pursuant to 28 U.S.C. § 455(a).

Section 455(a) requires a federal judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." In **Liteky v. United States**, 114 S. Ct. 1147, 1157 (1994), the Supreme Court determined that judicial rulings may support a motion for recusal "only in the rarest circumstances." Beliefs by a judge formed on the basis of current or prior proceedings also may serve as the basis of a § 455(a) motion, but only when "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." **Id**. Furthermore, "[a] judge's ordinary efforts at courtroom administration . . . remain immune." **Id**.

Merritt bases his contention that Judge McBryde should have recused himself on the same grounds raised in his first assignment of error: the judge's comments in rejecting the first plea agreement, the judge's statements and behavior following his rejection of the plea agreement, and the judge's actions surrounding the transfer of the case. The district court did not err in denying the disqualification motion. As discussed above, the record fully supports the judge's assigned reasons for rejecting the plea agreement as well as his later actions. Accordingly, Merritt has failed to show that the judge exhibited deep-seated antagonism that would render fair judgment impossible.

AFFIRMED.