UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10096

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

KENT ALLEN McFADDEN,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(5:93 CR 051 C)

June 23, 1995

Before DAVIS and JONES, Circuit Judges, and MAHON[*], District Judge.

PER CURIAM:[**]

This is an appeal from the district court's ruling granting defendant Kent Allen McFadden's motion for dismissal of his indictment for attempted bank robbery, in violation of Title 18, United States Code § 2113(a). Although the court's dismissal seems a rational and just (in a broad sense) response to an exasperating series of failed prosecutorial attempts, we are

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[*] District Judge of the Northern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

uncertain that it comports with established law and therefore must vacate and remand for findings.

On October 6, 1993, McFadden's first trial was declared a mistrial after the jury declared it was hopelessly deadlocked. McFadden's second trial began on November 2, 1993. Upon discovery of juror misconduct,[1] the district court declared a second mistrial the next day. The third trial began on December 6, 1993. On December 8, 1993, with the jury hopelessly deadlocked, the district court declared yet another mistrial, this time over McFadden's objection. Moments after the third mistrial was declared, McFadden moved to have his indictment dismissed either on double jeopardy grounds or because of insufficient evidence. The district court dismissed the indictment, stating "[t]he court is going to grant the defendant's motion. I am going to dismiss the case in the interest of justice. I am going to free the defendant from any federal custody as of today." In a written order, the court entered a Judgment of Dismissal repeating that the Defendant's motion should be granted "in the interests of justice" and ordering that the "case is dismissed and the Defendant is discharged from custody of the United States Marshal." District Court's Order of December 9, 1993.

On December 30, 1993, the district court denied the government's motion for reconsideration without comment. On January 27, 1994, the government filed its notice of appeal from

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[1] The district court was advised that two jurors went to the scene of the alleged crime to make an independent investigation, and at least one of the two shared information with other jurors. R. IV-11.

the Judgment of Dismissal and the denial of the motion to reconsider.[2] In this court, the government defends its right to ignore the signal sent by two hung juries.

This court reviews the district court's legal rulings de novo. It is unclear from the record whether the district court dismissed the indictment based on McFadden's double jeopardy argument, for insufficiency of the evidence, or under its supervisory powers because of prosecutorial misconduct.[3] The district court's stated "interest of justice" rationale may be read as a reference to any or all of these grounds. However, the district court failed to make findings which would support any of these grounds. We are unable to review this dismissal without knowing the factual basis for the court's order.

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[2] This court asked the parties to brief the issue of the timeliness of the government's notice of appeal. On consideration of their submissions, it appears that the notice of appeal was brought timely within 30 days of the denial of the motion to reconsider. "The effect of a timely filed motion to reconsider is to extend the time in which to appeal so that it begins to run when the motion is denied." United States v. Lewis, 921 F.2d 563, 564-65 (5th Cir. 1991) (citing United States v. Healy, 376 U.S. 75, 78, 84 S.Ct. 553, 555 (1964)). The motion to reconsider is timely if filed within the period prescribed for filing the notice of appeal. United States v. Cook, 670 F.2d 46, 48 (5th Cir.), cert. denied, 456 U.S. 982, 102 S.Ct. 2255 (1982).

The court considered the question of whether the 1993 amendments to Fed. R. App. P. 4(b) overruled or significantly altered the ruling in Cook. First, the changes in Rule 4(b) are merely grammatical, and "[n]o substantive change is intended." Fed. R. App. P. 4(b) advisory committee's note. The Eighth Circuit has specifically addressed the same question and come to the same result, without specifically discussing the 1993 amendments. United States v. Ridl, 26 F.3d 73, 74 (8th Cir. 1994) (finding that the "government's motion for reconsideration postponed the commencement of the thirty day period for appealing [the judgment] until the motion for reconsideration had been ruled upon."). Further, given that the motion for reconsideration is a judicial creation, derived from judicial interpretation not statute or rule, this court finds that a change in Rule 4 that does not specifically alter the results of those cases should not be read to reverse them implicitly. McFadden agreed with this point in his briefing and at oral argument.

[3] The record contains no evidence to suggest that prosecutorial misconduct was argued to the trial court, however, McFadden suggests this as a possible justification of the ruling.

The defendant's double jeopardy argument runs afoul of rulings of the Supreme Court and this Circuit. Richardson v. United States, 468 U.S. 317, 323-26, 104 S.Ct. 3081, 3085-86 (1984) (holding that retrial following a hung jury does not violate the Double Jeopardy Clause because failure of a jury to reach a verdict is not an event which terminates original jeopardy); United States v. Miller, 952 F.2d 866, 874 (5th Cir.), cert. denied sub nom Huls v. United States, ___ U.S. ___, 112 S.Ct. 3029 (1992). Accordingly, if the district court granted the motion out of concern for McFadden's right to be free of being put repeatedly in jeopardy for the same crime, that ruling would be in error because the "original jeopardy" has not yet been terminated.

Further, the district court had consistently denied McFadden's motions for acquittal based on insufficiency of the evidence. In the absence of specific findings, we are unwilling to assume that the district court found the evidence to be insufficient after the mistrial.

Finally, the district court made no findings of prosecutorial misconduct leading to any of the mistrials or prosecutorial "overreaching" in the continued prosecution of the case after any of the mistrials.[4] The record reflects no hearing

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[4] In United States v. Fulmer, 722 F.2d 1192, 1195 (5th Cir. 1983), we explained that the use of a court's supervisory powers to dismiss an indictment should be confined to extraordinary situations:

> The supervisory powers of the district court allow it to impose the extreme sanction of dismissal with prejudice only in extraordinary situations. For this reason, we have held that a district court may dismiss an indictment with prejudice only where it has been shown that governmental misconduct or gross negligence in prosecuting the case has actually prejudiced the defendant.

(citations omitted).

was held where evidence of such misconduct or overreaching was presented. On remand, the district court should make more explicit findings relating to its rationale for dismissing the case "in the interest of justice." See Bank of Nova Scotia v. United States, 487 U.S. 250, 254-57 (1988); United States v. Fulmer, 722 F.2d 1192 (5th Cir. 1983); United States v. Campagnuolo, 592 F.2d 852, 865 (5th Cir. 1979).

Accordingly, we **VACATE** the district court's rulings dismissing the case and **REMAND** this matter to the district court for further findings consistent with this opinion.