IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10979
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY WAYNE ANDERSON,

Defendant-Appellant.

Appeal from United States District Court
for the Northern District of Texas
(3:89-CR-072-G)

(May 11, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Billy W. Anderson appeals the judgment of the district court denying his motion for a new trial based on newly discovered evidence. For the following reasons, the judgment of the district court is affirmed.

BACKGROUND

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Following a jury trial, Anderson was convicted along with three other defendants of conspiracy to damage and destroy by fire a building and personal property used in interstate commerce in violation of 18 U.S.C. § 371. Anderson was also convicted of maliciously damaging and destroying by fire a building and personal property used in interstate commerce in violation of 18 U.S.C. §§ 8444(i) and 2. Additionally, the jury returned convictions for mail fraud in violation of 18 U.S.C. §§ 1341 and 2. Anderson received a fifteen year prison term followed by a five year probated sentence. The Fifth Circuit affirmed Anderson's conviction following two appeals. United States v. Anderson, 933 F.2d 1261 (5th Cir. 1991), appeal after remand, 976 F.2d 927 (5th Cir. 1992).

On direct appeal, we determined the following facts from the evidence adduced at the trial:

> Michael and Dennis Thomas, brothers who operated discount furniture stores in Texas, planned with Billy Anderson, a furniture manufacturer in Mississippi, to rent a big warehouse, fill it with furniture, have it burned, and collect on an insurance policy. . . .
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> Eugene Lindsey, also involved in the discount furniture business, was a key witness. His was the most controversial testimony for the prosecution, and he was the only witness to implicate Anderson directly.
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> In December 1983, Dennis and Michael Thomas told Lindsey that they were planning with Anderson to have a "professional torch" set fire to their furniture warehouse/store, filled with Anderson's furniture. The two brothers wanted Lindsey's help. To avoid suspicion, the brothers needed furniture from manufacturers other than Anderson. They asked Lindsey to approach other manufacturers on their behalf. . . .
> In January 1984, the Thomas brothers introduced Lindsey to Anderson at a furniture market. Anderson's company, Style-Line Furniture, had rented space at the market.

> Lindsey testified that Anderson "told me that he had fires in the past and there was nothing to worry about, only way to get caught is if they caught [sic] you with matches in your hand." Anderson then allegedly pointed to a picture of the Style-Line factory hanging on a wall or curtain, indicating that insurance proceeds financed the factory. Lindsey told Michael and Dennis Thomas the next day that he did not want to be a part of the scheme. The day before the fire, Dennis Thomas told Lindsey that the warehouse would be closed the next day. Lindsey testified that this indicated to him that the arson would occur then because the warehouse was usually open every day. Lindsey admitted on direct examination that he had been convicted of selling heroin and possessing marijuana in 1973. . . .
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> The trial court also admitted evidence showing that Anderson's factory had four fires between 1979 and 1982 and that Dennis Thomas, Michael Thomas, and their furniture businesses had a history of financial troubles.

United States v. Anderson, 933 F.2d 1261, 1265-67 (5th Cir. 1991).

On June 7, 1994, Anderson filed a second motion[1] for new trial and evidentiary hearing. Anderson alleged that newly-discovered evidence demonstrated that Lindsey's testimony at trial (that he attended the furniture market in January 1994 as a representative of Beshel Industries, or any other furniture manufacturer) was perjured. According to Don Beshel, the manager of Beshel Industries, the company's records showed that Lindsey did not work for them after June 1983. Debbie Anderson, the marketing research database manager for the Dallas Market Center (the sponsor of the furniture show), gave a statement that "Lindsey's name was not located in this database as working for himself, for Beshel Industries, or as a representative for any other manufacturer at the January 1984 market." Anderson further alleged that Beshel

[1] The first motion was filed in March 1990, immediately following the jury trial.

informed them that Lindsey suggested he and Beshel commit arson together. Anderson contended that the Government knew, or should have known, about the evidence and deliberately suppressed the exculpatory arson evidence notwithstanding Anderson's Brady request.[2]

In its opposition to the motion, the Government countered Anderson's "newly-discovered evidence" with (1) accounting records from Beshel Industries showing that "E. Lindsey" received a sales commission from Beshel Industries by check dated January 19, 1984; and (2) Debbie Anderson's statement demonstrating that the show was held from January 15-20, 1984; that exhibitors and association representatives could enter the furniture show with an appropriate badge, and that if Lindsey was a member of a permanent association, such as "Southwest Roadrunners," he would have had access to the show without being listed in the database as a buyer or an exhibitor. The Government also submitted the statement of Pat McKay, the Executive Director of Southwest Roadrunners, stating that Southwest Roadrunners is a trade organization of wholesale furniture salesmen, that Lindsey was a member of the organization in January 1984, and that the members were issued distinctive plastic badges used for entering furniture shows without further identification or registration.

The district court denied the motion because Anderson "has failed to satisfy at least one element of the four part test used

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[2] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

in this circuit for determining a motion for new trial on the basis of newly discovered evidence." The district court further determined that Anderson failed to explain why he did not challenge Lindsey's testimony at trial, which lasted approximately five weeks and included several day-long breaks, or why he "waited four and one-half years before making a motion for consideration of the new evidence"; nor did he provide any information "indicating that the records on which he is relying were not in existence at the time of trial in 1990." This appeal ensued.

DISCUSSION

Timeliness of motion for new trial

"The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." Fed. R. Crim. P. 33. "A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment." Id. Anderson filed the instant motion for a new trial within two years after this court affirmed the district court's evidentiary determinations following remand. Accordingly, his motion was timely under Rule 33.

Denial of motion for new trial

Anderson argues that the district court's denial of his motion for new trial was a "clear abuse of discretion" because the district court considered only the second factor of the four-part test, whether the failure to discover the new evidence was the result of a lack of due diligence," and decided it incorrectly. According to Anderson, he satisfied all of the requisites for a new

trial, including a showing that (1) Anderson learned for the first time at the trial that Lindsey was working for Beshel; (2) he exercised due diligence because he filed the motion as soon as he confirmed Lindsey's testimony was false and within the two-year limit of Rule 33; (3) evidence was not merely cumulative or impeaching because if Lindsey was not at the 1984 show, the incriminating conversation could not have taken place; and (4) it is likely that the evidence would have produced an acquittal.

Motions for a new trial based on newly discovered evidence are generally disfavored by the courts and are viewed with caution. United States v. Pena, 949 F.2d 751, 758 (5th Cir. 1991). This court will reverse a denial of a motion for a new trial only when there is an abuse of discretion. United States v. Sanchez-Sotelo, 8 F.3d 202, 212 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1410, 128 L.Ed. 82 (1994). To prevail on a motion for a new trial based on newly discovered evidence, a defendant must show that (1) the evidence is in fact newly discovered and was unknown to the defendant at the time of trial, (2) the failure to discover the evidence was not due to the defendant's lack of diligence, (3) the evidence is material and not merely cumulative or impeaching, and (4) the evidence introduced at a new trial would probably produce an acquittal. United States v. Jaramillo, 42 F.3d 920, 924 (5th Cir. 1995).

Although Anderson asserts that the district court abused its discretion by grounding its denial on Anderson's failure to satisfy the due-diligence requirement, "[f]ailure to satisfy one part of

the test requires the denial of the motion for new trial." Id. at 924-25. Anderson's suggestion that he demonstrated due diligence because he filed the motion as soon as he confirmed Lindsey's testimony was false and within the two-year limit of Rule 33, does not provide an explanation why the evidence could not have been discovered during the five-week trial or the four-and-one-half year appellate process. United States v. Time, 21 F.3d 635, 642 (5th Cir. 1994) (holding that there was no due diligence when defendant is aware of witness and could have pursued "new evidence" through cross-examination or further investigation).

Moreover, Anderson's "new evidence" fails to satisfy the requirements (1) that the evidence must not be merely cumulative or impeaching, and (2) that a new trial would probably produce an acquittal. In the motion, Anderson submitted Don Beshel's statement that Lindsey did not work for Beshel Industries after June 1983, and Debbie Anderson's statement that her database for the January 1984 show did not contain an entry for the name "Eugene Lindsey." Anderson also suggested that Beshel informed him that Lindsey proposed that he and Beshel commit arson together. In its opposition to the motion, the Government countered Anderson's "newly-discovered evidence" with (1) accounting records from Beshel Industries showing that "E. Lindsey" received a sales commission from Beshel by check dated January 19, 1984; and (2) Debbie Anderson's statement demonstrating that the show was held from January 15-20, 1984; that exhibitors and association representatives could enter the furniture show with an appropriate

badge; and that if Lindsey was a member of a permanent association, such as "Southwest Roadrunners," he would have had access to the show without being listed in the database as a buyer or an exhibitor. The Government also submitted the statement of Pat McKay, the Executive Director of Southwest Roadrunners, stating that Southwest Roadrunners is a trade organization of wholesale furniture salesmen, that Lindsey was a member of the organization in January 1984, and that the members were issued distinctive plastic badges used for entering furniture shows without further identification or registration.

Taken as a whole, the new evidence creates, at best, a credibility issue whether Lindsey attended the furniture show; it is not likely to produce an acquittal, especially in light of the properly-admitted evidence before the jury that "Anderson's arson caused the previous [four] fires." see Time, 21 F.3d at 642-43 (denial of motion for new trial is not an abuse of discretion if new evidence is not material and new trial would probably not produce an acquittal). Accordingly, the district court's decision to deny Anderson's second motion for new trial was not an abuse of discretion.

CONCLUSION

Fore the foregoing reasons, the judgment of the district court denying Anderson's motion for a new trial based on newly discovered evidence is AFFIRMED.