IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20576
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SPENCER D. JORDAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 93 0232-1)

(May 25, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Spencer Jordan appeals his conviction of bank fraud in violation of 18 U.S.C. §§ 371, 1014, and 1344. Finding no error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On September 10, 1993, Jordan was charged in a six-count indictment with conspiring with Travis Hardy to commit bank fraud, conspiring to make false statements to a federally insured institution, and devising a scheme to defraud Bayshore Savings Association ("Bayshore"). The indictment charged the following: Beginning in January 1986 through June 1987, Jordan and his coconspirators used a venture known as Cambridge Capital Corporation ("Cambridge") fraudulently to originate and compile loan packages for presentation to federally insured lending institutions, including Bayshore. Jordan and others procured false verifications of deposit, verifications of employment, and verifications of rental payments and bribed employees of various financial institutions to verify falsely that prospective borrowers had checking and savings accounts with funds on deposit.

Specifically, Jordan and others created and operated an enterprise known as Pradera Joint Venture, Inc., to purchase Pradera Townhomes. Jordan used the services of Steven Thomae to inflate appraisals of Pradera Townhomes to be submitted to lending institutions. Jordan solicited "buyers" for the Pradera Townhomes who made no down payment and even received a fee for making the purchase. Travis Hardy prepared false credit histories for the "buyers," and Jordan provided other false documents for them. Jordan then submitted false loan applications to Bayshore for funding.

II.

Jordan initially pleaded not guilty. On November 17, 1993, he filed a motion to dismiss the indictment for preindictment delay. The district court conducted an evidentiary hearing, then made findings of fact and conclusions of law denying Jordan's motion. The court concluded that Jordan had not met his burden of proving that the government had intentionally delayed indicting him to gain a tactical advantage at trial. The court deferred making a finding whether Jordan had met his burden of proving that he suffered actual prejudice as a result of the delay until the government presented its evidence. Jordan pleaded guilty to all counts on April 8, 1994, with his plea conditioned on his appeal of the denial of his motion to dismiss.

III.

Jordan argues that his Fifth Amendment right to due process was violated by the five-year delay between the time he entered into an agreement with the government to cooperate and the indictment. The testimony at the evidentiary hearing on Jordan's motion to dismiss showed the following sequence of events:

In March or April 1987, Christopher Stout, a special agent with the Federal Bureau of Investigation ("FBI"), received a complaint from Pat St. Cricq, a security officer with Savings of America, that Savings of America had received false Verification of Deposit ("VOD") forms. In response, Stout interviewed Rosalind Owens and Barbara Augustine on April 3 and May 13, 1987, respec-

tively. After the interviews, Stout confirmed that Jordan was involved with the false VOD forms. Specifically, Stout learned that Jordan had solicited Owens and Augustine to sign forms that contained false information regarding funds that purportedly were on deposit at Savings of America. In exchange, Owens and Augustine were to receive money for preparing the false forms. Stout also learned the names of other individuals on the false forms, known as the "buyers." These included Gladys Dostal, Earnest Jackson, Michael White, and Myrtle Parrimore, also known as Mae Ella Gipson.

Between June 23 and August 26, 1987, Stout interviewed all of the buyers except Michael White. After talking to Parrimore and Dostal, it was evident to Stout that Jordan was their point of contact. On July 14, 1987, Stout interviewed Jordan. Stout believed that Jordan was not completely forthright regarding his participation in the operation, because the verifiers indicated that Jordan had contacted them, whereas Jordan asserted that the verifiers were coming to him, begging for work and money.

Nonetheless, Jordan told Stout that there was a person employed at Cambridge who was capable of changing one's credit. Jordan also admitted to Stout that he had contacted Augustine, Owens, and Deborah Willis regarding the VOD forms and indicated that they had been paid money by the principals of Cambridge.

Prior to talking to Jordan, Stout advised him that he was subject to criminal investigation. When Stout interviewed Jordan, he, along with Larry Ramming, John Draughon, and Thomas Cloud, was the target of such an investigation.

On August 17, 1987, Assistant U.S. Attorney ("AUSA") William Herman, III, called Augustine and Owens to testify at a grand jury investigation of Jordan. Stout did not interview Jordan again until February 1988, after Jordan had retained Bill Hester as his counsel. At that time, Herman and Jordan entered into a "proffer agreement" whereby Jordan agreed to cooperate with the government. The letter of agreement explicitly stated that the government made no promise that Jordan would not be prosecuted or that he would receive any form of immunity. The agreement did provide, however, that the government would not use any statements Jordan made in his interview against him in any subsequent criminal prosecution for his conduct in processing home mortgages before the date of his interview.

Herman testified that he had no independent recollection of the "proffer" letter. He stated that policy at that time was such that the letter would not have been given to someone whom the government eventually intended to indict. Herman did not recall that the government thought that Jordan had lied. According to Herman, had Jordan lied, the government would have sent him a letter stating that the deal was off. Henry Oncken, who was the U.S. Attorney from 1985 until June 1990, testified that office policy was not to make the type agreement that was made with Jordan with anyone who was the target of an investigation.

Bill Hester, who was Jordan's attorney at the time Jordan received the government's letter, testified that the letter led him to believe that Jordan was a witness and not the target. Hester

recalled that he had four meetings with Stout between February 4 and April 26, 1988. No one ever indicated to Hester that they believed Jordan to be lying, and, in fact, Herman thanked Jordan for his cooperation. Hester testified that he did not hear from Jordan again until October or November 1993.

According to Stout, however, Hester met with Herman on January 7 and January 27, 1988. Stout testified that at the first meeting, Herman told Hester that Jordan could be indicted for several felony counts. At the second meeting, Herman told Hester that Jordan could be of benefit to the government if he chose to cooperate, but that he would have to plead guilty to some felony count.

Because neither Herman nor Hester recalled such a meeting, the court ordered that the government produce its 1988 files relating to Jordan. The court conducted an in camera review and concluded that the files did not show that Jordan was not prosecuted because of the proffer letter. The court noted that, if anything, the files showed that on September 17, 1991, the government still had an active interest in Jordan because at that time his case was transferred to the Richard Plato case.

Jordan testified that after the April 26, 1988, meeting he did not hear from the government until April 12, 1993, almost five years after the day of his last interview. On April 13, 1993, Jordan met with Fred Dailey and George Kelt, the present prosecutors, and with Stout. At the meeting, he received a subpoena to appear before a grand jury on April 21, 1993. Jordan was asked to

visit the AUSA office on April 14, 1993. He went to pick up the letter, which turned out to be a "target" letter. Jordan next heard from the government on September 11, 1993, when he received a call from Stout advising him that he had been indicted on September 9, 1993.

The district court made the following findings regarding the reasons for the preindictment delay:

> . . . I find that the Defendant has failed to prove that the government intentionally delayed to gain an improper tactical advantage.
>
> I base this general finding on the following subsidiary findings: First, the FBI was still investigating the complete role of Mr. Jordan in the Bayshore false statement and fraud case. Until the time of the Defendant's indictment, the FBI was also still investigating the role of other potential Defendants in that case.
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> Although the FBI was aware of the Defendant's involvement in the false deposit verifications involving Gladys Dostal and Mae Gipson, also known as Parrimore, in 1987 and 1988, the government in the form of the FBI was not aware of all of the facts of the Defendant's involvement regarding the false deposit verifications until 1992 and 1993 when Ernest Jackson and Michael White testified before the grand jury, thereby strengthening the government's case against the Defendant.
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> Further investigation and use of grand jury testimony by White and Jackson and others also revealed other evidence to the government regarding not only the Defendant but other potential Defendants.
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> In United States v. Lovasco, [431 U.S. 783 (1977),] . . . the Court stated and rejected the argument that the government must file charges against a defendant once it has evidence to prove his guilt beyond a reasonable doubt where the government's investigation of the entire criminal transaction is not complete. That is the situation I find we have in this case.
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> Secondly, I find that the Defendant has not proved that the government intentionally delayed indicting Mr. Jordan to obtain a tactical advantage over him or

that the government intentionally delayed indicting him to prejudice him in his defense.

The only evidence offered by the Defendant is that the government reactivated its focus on the Defendant in 1992. This does not mean that the government intentionally delayed the investigation before then.

I find credible Agent Stout's testimony that he was working on other matters and, in particular, other bank fraud matters; and I conclude that although))that the government had a right to prioritize the allocation of its investigatory resources.

Third, the Defendant has not provided that there was anything improper about the government's renewed interest in Bayshore Savings in 1992 and 1993 or the indictment of the Defendant then.

The Defendant has failed to persuade me that the government promised the Defendant immunity or promised the Defendant that he would not be indicted. The February 1, 1988, letter, which is Defendant's Exhibit Number 3, expressly says that the government has not promised the Defendant that he will not be prosecuted.

Agent Stout testified that if the Defendant was going to cooperate, he was told he would have to plead guilty and that [AUSA] Herman told this to the Defendant's then counsel Mr. Hester in January of 1988.

The government files, which I have reviewed in camera, in fact, confirm that there was a meeting in January of 1988 which Mr. Hester did not recall in which Mr. Herman notes that there was a plea discussion.

Moreover, Agent Stout testified that the Defendant had not fully cooperated with the government; and having observed the Defendant's responses to some of the questions on the witness stand and his evasiveness, I credit Agent Stout's testimony and can certainly believe that he was not fully cooperating . . . .

To prove that preindictment delay violated his due process rights, "a defendant must demonstrate that the prosecutor intentionally delayed the indictment to gain a tactical advantage and that the defendant incurred actual prejudice as a result of the delay." United States v. Byrd, 31 F.3d 1329, 1339 (5th Cir. 1994)

(emphasis in the original), cert. denied, 115 S. Ct. 1432 (1995). The defendant bears the burden of proof, as the applicable statutes of limitations provide the primary guarantee against overly stale criminal charges.

The United States indicted Jordan within the ten-year statute of limitations,[1] so Jordan has the burden of proving both intentional tactical delay by prosecutors and actual prejudice. See Byrd, 31 F.3d at 1340. The district court's fact findings when ruling on a motion to dismiss the indictment based upon preindictment delay are reviewed for clear error; its conclusions of law are reviewed de novo. United States v. Bezborn, 21 F.3d 62, 66 (5th Cir.), cert. denied, 115 S. Ct. 330 (1994). A finding of prejudice involves a mixed question of law and fact.

Bezborn, 21 F.3d at 67 n.1, states that a defendant urging preindictment delay has the threshold burden of proving actual prejudice. As noted above, the district court deferred ruling on the question of prejudice until it heard the evidence supporting the government's charges. Prior to entering his guilty plea, Jordan asked the court to make written findings on his motion to dismiss the indictment for preindictment delay, but the court referred Jordan to the findings made at the conclusion of the hearing on his motion. Jordan subsequently entered his guilty plea.

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[1] Jordan conceded that under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 83 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.), the applicable statute of limitations is ten years. See 18 U.S.C. § 3293 (1994).

Regardless of whether Jordan makes a showing of actual prejudice from the preindictment delay, he fails to show that the district court erred when it determined that the government did not intentionally delay indicting him. According to Jordan, the government had all the facts necessary to indict him in 1988 and did not gain additional information thereafter. He asserts that the only witnesses not interviewed before 1988 were (1) Steve Thomae, who did not know Jordan, and (2) Travis Hardy, the "credit doctor" who assisted prospective buyers in altering their credit histories. Jordan argues that the government intentionally waited five years to indict him as a tactic to investigate others. He also asserts that he was not the target of a criminal investigation until 1993, as is evidenced by the fact that, pursuant to the government's policy, he never received a letter indicating that the "proffer" agreement was terminated.

In United States v. Lovasco, 431 U.S. 783, 795-96 (1977), the Court established that prosecutors may delay indicting a defendant for investigatory purposes to obtain additional indictments without offending the Due Process Clause, even if the delay somewhat prejudices the defense. The Lovasco Court recognized that prosecutors must have discretion in determining when to seek an indictment and that the government may delay indicting a defendant in order to investigate a case further, even when sufficient evidence exists to prove guilt beyond a reasonable doubt. Id. at 791-96.

The district court noted that the government was not aware of

all the facts regarding Jordan's complicity until 1992 and 1993, when Jackson's and White's grand jury testimony brought forth facts to strengthen its case. This finding is supported by Stout's testimony that about twenty additional witnesses testified before the grand jury in 1992. Additionally, the court noted that the government's files show that the government had an active interest in Jordan on September 17, 1991, when Jordan's case was transferred to the Plato case. Moreover, the government's file materials, which the district court reviewed in camera, support the finding that there was a meeting in January 1988 between Herman and Hester when a plea was discussed.

Thus, contrary to Jordan's assertion, to the extent that in 1988 the government discussed a plea with his attorney, he was the target of an ongoing criminal investigation at that time. Accordingly, the finding that the government's preindictment delay for investigatory purposes did not violate Jordan's Due Process rights was not clearly erroneous.

AFFIRMED.