UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50001
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS MUNOZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-93-CR-242)

(September 23, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellant Jesus Munoz appeals his convictions for conspiring to obstruct interstate commerce by means of robbery, 18 U.S.C. §§ 1951, 371; obstructing interstate commerce by means of robbery, 18 U.S.C. § 1951; and carrying a firearm during commission of a crime of violence, 18 U.S.C. § 924. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

While robbing a 7-Eleven store in El Paso, Texas of less than $50 cash, a few 12-packs of beer, and a few cigarette lighters, Jesus Munoz shot and killed the store clerk. A Texas state jury convicted Munoz of capital murder and sentenced him to death. On appeal, the Texas Court of Criminal Appeals reversed his conviction, applying a Texas rule requiring the state in a case such as this -- in which the state relies on testimony of accomplice witnesses -- to present corroborating evidence connecting the defendant to the crime. Upon instruction of the Court of Criminal Appeals, Munoz was acquitted of the offense. See Munoz v. State, 853 S.W.2d 558, 559-64 (Tex. Crim. App. 1993).

After reading a newspaper account of the reversal and acquittal, the chief of the El Paso Division of the United States Attorney's office telephoned the District Attorney of El Paso County inquiring about the record in Munoz's case so that the United States Attorney's office could consider federal prosecution. The District Attorney put the Assistant United States Attorney ("AUSA") in contact with the state district court clerk from whom the AUSA obtained the state record. Up to that point, there had been no federal investigation of Munoz, and, afterwards, there was no substantial contact between the AUSA and the district attorney's office.

At the AUSA's request, the Federal Bureau of Investigation looked into potential charges against Munoz. Much of the federal investigation was based on the state trial transcript

and records of the El Paso Police Department. As a result of the investigation, the United States charged Munoz with violating the Hobbs Act, 18 U.S.C. § 1951,[1] alleging that: (1) he conspired with others to rob a 7-Eleven convenience store in obstruction of interstate commerce, (2) he robbed the 7-Eleven in obstruction of interstate commerce, and (3) he used and carried a firearm during the commission of the robbery, a crime of violence. A jury found Munoz guilty as to all three counts. The district court sentenced him to two concurrent 210-month prison terms for the first two offenses and a term of 60 months to be served consecutively for the third. The court also ordered him to pay restitution to the family of the deceased cashier and the corporate owners of the 7-Eleven.

Munoz now appeals claiming that he was improperly convicted under the Hobbs Act and that his conviction violates principles of double jeopardy.

DISCUSSION

Convictions Under the Hobbs Act

Munoz argues that he was improperly convicted under the Hobbs Act for several reasons: (1) the Hobbs Act only targets racketeering offenses, (2) his robbery of a 7-Eleven is merely a state -- not a federal -- offense, and (3) the Hobbs Act is unconstitutionally vague thereby warranting the reversal of his

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[1] The Hobbs Act provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951.

conviction under the doctrine of lenity. This court has previously rejected similar claims.

The United States Supreme Court has recognized the applicability of the Hobbs Act outside of the racketeering realm as an exercise of Congress's authority to use its constitutional power to punish interference with interstate commerce by extortion, robbery, or physical violence. See United States v. Wright, 797 F.2d 245, 248 (5th Cir. 1986) (quoting Stirone v. U.S., 361 U.S. 212, 215 (1960)), cert. denied, 481 U.S. 1013 (1987). The Supreme Court has rejected claims that Congress has exceeded its authority in defining as federal offenses conduct that Congress already knows to be proscribed under state law. See id. (citing United States v. Culbert, 435 U.S. 371, 379 (1978)). Finally, this court has held that the Hobbs Act is not unconstitutionally vague. See United States v. Williams, 621 F.2d 123, 125 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981). We accordingly find Munoz's first claim to be without merit.

Double Jeopardy

Munoz next argues that his prosecution under Texas law and federal law for the same conduct violates the double jeopardy clause of the Constitution. He relies on dictum from the Supreme Court's opinion in Bartkus v. Illinois, 359 U.S. 121 (1959), contending that it is unconstitutional for two sovereigns to collude to prosecute an individual for criminal conduct. We find this argument to be without merit.

We review a district court's denial of a motion to dismiss based upon grounds of double jeopardy de novo and the factual findings underlying the district court's decision for clear error. See United States v. Deshaw, 974 F.2d 667, 669 (5th Cir. 1992).

Munoz contends that the United States had no interest in prosecuting him apart from the state's interest and that the United States was motivated solely by the reversal in the Court of Criminal Appeals. First of all, with few exceptions, the dual sovereignty doctrine permits prosecution under both state and federal law; this does not constitute double jeopardy. See United States v. Devine, 934 F.2d 1325, 1343 (5th Cir. 1991) (citing United States v. Lanza, 260 U.S. 377, 382 (1922)), cert. denied, 112 S. Ct. 911 (1992). One possible exception to the dual sovereignty doctrine was suggested in dictum in Bartkus v. Illinois, 359 U.S. 121 (1959). The Court in Bartkus suggested if the two sovereigns collude with one another to the extent that they act as one, then traditional double jeopardy analysis -- not the dual sovereignty doctrine -- might apply. See United States v. Cooper, 949 F.2d 737, 750-51 (5th Cir. 1991), cert. denied, 112 S. Ct. 2945 (1992). In order for such an exception to apply, Munoz must show "that one prosecution was a mere tool of the other sovereign's authorities." United States v. Harrison, 918 F.2d 469, 475 (5th Cir. 1990) (citing United States v. Stricklin, 591 F.2d 1112 (5th Cir. 1979).

The record indicates that on Munoz's motion, the district court held a hearing in which the AUSA explained the circumstances in which the federal prosecution commenced. R. 5, 2-8. The AUSA testified that the federal investigation began a few days after he read the newspaper account of the reversal of the murder conviction, and he made one telephone call to the El Paso district attorney. R. 5, 4-6. The state did not approach federal authorities about the case, but merely cooperated with federal authorities when asked to do so. R. 5, 8. No other witnesses testified on this issue, and this testimony was not refuted by Munoz.

The district court stated that the "undisputed evidence shows that there was no collusion between state and federal authorities." The court concluded "[i]f, therefore, an exception does exist for 'sham' prosecutions, the evidence fails to reflect that the instant case belongs in that category." We agree. Munoz did not bear his burden of showing collusion between the two sovereigns. The district court's findings are not clearly erroneous.

For these foregoing reasons, we AFFIRM the judgment of the district court.