

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50016
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEESA DAWN BRYANT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CV-173) (W-88-CR-47-1)

(October 19, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Leesa D. Bryant was convicted of murder on United States territory in violation of 18 U.S.C. §§ 1111 and 2. Bryant filed a motion to vacate, set aside, or correct her sentence pursuant to 18 U.S.C. § 2255. This motion was denied by the district court. Bryant appeals asserting seven grounds of error. For the following reasons, the judgment of the district court is affirmed.

BACKGROUND

Leesa Dawn Bryant and Gary Vaughn were indicted for the first degree murder of Bryant's husband in violation of 18 U.S.C. §§ 1111

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and 2. At trial, the government presented evidence that Bryant, with the aid of Vaughn, hired a man to kill her husband and helped lure her husband to the murder site. Following a jury trial in 1988, both Bryant and Vaughn were convicted and sentenced to life imprisonment. Following her conviction, Bryant filed a direct appeal of her conviction, which was subsequently affirmed by this Court.

Subsequent to her direct appeal, Bryant filed a motion to vacate, set aside, or correct sentence. In her § 2255 motion, Bryant raised seven grounds which she claimed entitled her to relief: (1) the court violated Bryant's due process rights by refusing to allow her to examine grand jury testimony of Cliff Boutin, a crucial government witness; (2) the government withheld exculpatory evidence in violation of Brady v. Maryland, the Jencks Act, and Fed. R. Crim. P. 26.2; (3) the government violated Bryant's due process rights by refusing to provide her with grand jury testimony of Ray McAllister, another critical government witness; (4) Bryant's conviction rested on insufficient evidence to prove her guilt beyond a reasonable doubt; (5) the government failed to prove the elements necessary to show that she was an accessory before the fact; (6) the government presented false and contradictory evidence through one of its witnesses; and (7) Bryant was denied effective assistance of counsel. The district court denied Bryant's § 2255 motion and dismissed the action. Bryant appeals the judgment of the district court.

LEGAL PRECEPTS

Grounds for relief under § 2255 are narrower than those for relief on direct appeal. U.S. v. Smith, 844 F.2d 203, 205 (5th Cir. 1988). Section 2255 "is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." U.S. v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981). A matter need not be reconsidered in a § 2255 motion if it has already been determined on direct appeal. Buckelew v. United States, 575 F.2d 515, 517-18 (5th Cir. 1978).

DISCUSSION

Although Bryant lists only seven grounds of error, most of them raise multiple issues. We shall initially discuss Bryant's fourth ground, insufficient evidence for a conviction, and then address the issues in the order that she raises them.

Issue No. 4

Bryant contends that there was insufficient evidence to convict her of murder. The standard for determining the sufficiency of the evidence in a post-conviction proceeding is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). A determination on sufficiency of the evidence must be made drawing all reasonable inferences and credibility choices in

favor of the verdict. Glasser v. U.S., 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942).

A person commits first-degree murder under § 1111 if she accomplishes the "unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111. "Every murder perpetrated by [inter alia] . . . lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing" is murder in the first degree. 18 U.S.C. § 1111. A person who associates in a criminal venture, participates in the venture, and engages in conduct designed to make the venture succeed is guilty of aiding and abetting under 18 U.S.C. § 2, U.S. v. Murray, 988 F.2d 518, 522 (5th Cir. 1993), and is guilty of the principal offense. U.S. v. Laury, 985 F.2d 1293, 1300 n.2 (5th Cir. 1993).

Juries are permitted to make reasonable inferences and to use their common sense in weighing evidence. U.S. v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989). The jury is the final authority on the credibility of witnesses. U.S. v. Lerma, 657 F.2d 786, 789 (5th Cir. 1981), cert. denied, 455 U.S. 921, 102 S.Ct. 1279, 71 L.Ed.2d 463 (1982). The court should intervene and declare evidence incredible as a matter of law only when it is "so unbelievable on its face that it defies physical laws." Id.

At trial, Ray McAllister testified that he was the lone trigger-man and that he shot Bryant's husband twice in the head at short range with a shotgun. According to McAllister, Vaughn recruited him on behalf of Bryant to kill Bryant's husband, for a specific fee. McAllister testified that he believed that Bryant

brought her husband to a pre-arranged location by promising to have sex with him there. He testified that he and Vaughn were waiting at the spot with a shotgun. After Bryant got out of the car, McAllister approached the vehicle where Bryant's husband was sitting and shot him twice in the head. McAllister then joined Vaughn, who drove them to McAllister's apartment.

Clifford Boutin testified that Bryant asked him to ask Vaughn whether he knew anyone who would kill her husband. According to Boutin, Bryant told him that she would lure her husband to a park by promising to have sex with him there, and that he would be killed in the park. The plan was delayed several times. Bryant told him that she would pay the killers \$500 after her husband was dead.

Vaughn denied that Bryant asked him to arrange the killing of her husband. Bryant denied that she asked Gary Vaughn to murder her husband.

We find that there was ample evidence for a reasonable jury to find beyond a reasonable doubt all the elements necessary to secure a conviction for violation of §§ 1111 and 2. Both the testimony of Boutin and McAllister provide a reasonable basis for the jury to conclude that Bryant helped to murder her husband in violation of 18 U.S.C. §§ 1111 and 2.

According to Bryant, there was insufficient evidence because Boutin and McAllister provided "conflicting, hearsay testimony." However, she does not identify any specific examples of conflicting testimony or inadmissible hearsay although she was in possession of

the trial transcript. We therefore find this contention to be without merit.

Issue No. 1

Bryant contends that the district court erred in not permitting the discovery of the grand jury testimony of Boutin. Bryant argues that her attorney moved for the discovery of grand jury testimony and that the motion was denied. She also states that the denial of that motion denied her the opportunity to effectively cross-examine several witnesses.

A criminal defendant is entitled to grand jury transcripts as a matter of right only at the close of direct examination of grand jury witnesses at trial. Jencks Act, 18 U.S.C. § 3500(b). Our examination of the trial transcripts reveals that the government turned over the grand jury testimony of all trial witnesses before the start of trial, despite the district court's earlier denial of Bryant's discovery motion. The government thus turned over all the grand jury testimony before it was required to do so by law. We therefore find this contention to be without merit.

Issue No. 2

Bryant contends that the district court violated her due process rights by denying her access to a signed statement that Boutin states he gave to the FBI in 1982 and which he reportedly adopted later in preparation for his Grand Jury testimony and Bryant's trial. On direct appeal, this Court found that such a statement did not exist and that Boutin erred in testifying that

such a statement did exist. We thus need not address this issue again. See Buckelew, 575 F.2d at 517-18.

Bryant contends that the government failed to disclose that it had made an agreement with Boutin in exchange for his testimony. There is nothing in the record to indicate that any deal was made with Boutin. There is also nothing in the record to indicate that Bryant has recently obtained knowledge of some special arrangement between Boutin and the prosecution. We therefore find this contention to be without merit.

Bryant contends that she was denied access to grand jury testimony of Ray McAllister. Our examination of the record reveals that the Assistant United States Attorney ("AUSA") turned over the grand jury testimony of all the trial witnesses. We therefore find this contention to be without merit.

Bryant also argues that she was denied access to Brady and Jencks Act material concerning McAllister. Bryant, however, points to no evidence indicating that she was denied a report or statement made by McAllister. Instead, she supports her position with a statement made by the AUSA and taken out of context, indicating that he did not think it appropriate to turn over all the documents in his possession because of their volume. The AUSA plainly stated that he had turned over all the documents to which the defendants were entitled to see. We therefore find this contention to be without merit.

Bryant contends that the district court erred in "suppress[ing]" Boutin's criminal records at trial. Although this

argument is raised as an issue in her brief, Bryant devotes a single line to it and presents no arguments. Issues which are not briefed are considered abandoned. Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988). We therefore do not address this argument.

Bryant contends that the government violated her rights by not disclosing the agreement it made with McAllister in return for his testimony. A defendant's due process rights are violated if she is denied an opportunity to bring before the jury in a criminal case evidence which affects the credibility of a witness, such as promises, agreements, or understandings provided a government witness in exchange for her testimony. See Joyner v. King, 786 F.2d 1317, 1319 (5th Cir.), cert. denied, 479 U.S. 1010, 107 S.Ct. 653, 93 L.Ed.2d 708 (1986).

McAllister, unlike Boutin, had made a plea bargain with the government. McAllister was allowed to plead guilty to conspiracy and the government made a recommendation for a 15-year sentence. McAllister's plea agreement was entered into evidence and provided to defense counsel prior to McAllister's cross-examination. On cross-examination, McAllister testified that he entered into a plea agreement with the government and that in return for his truthful testimony the government agreed to reduce his sentence to conspiracy to commit murder and to recommend that he serve no more than 15 years. Thus, contrary to Bryant's assertion, the plea agreement was revealed. We therefore find this contention to be without merit.

Issue No. 5

Bryant contends that she was not convicted of the offense for which she was indicted. She argues that in our opinion on her direct appeal, this Court stated that she was convicted as an accomplice and thus was not tried and convicted on the elements set forth in the indictment under 18 U.S.C. § 1111. She also argues that she was convicted of conspiracy and that the statute of limitations for conspiracy had expired.

We find no merit in these arguments. The jury instructions given to the jury corresponded to the elements of 18 U.S.C. §§ 1111 and 2. No jury instructions on any other crimes were given to the jury. The jury returned a verdict sheet stating that they had found that Bryant had violated 18 U.S.C. §§ 1111 and 2. Thus, contrary to the Bryant's assertions, she was convicted of murder pursuant to 18 U.S.C. §§ 1111 and 2.

Issue No. 6

Bryant contends that the autopsy report submitted by the government at trial was both false evidence during the trial and evidence which contradicted the testimony of McAllister. Bryant implicitly argues that the autopsy report offered at trial described someone other than her husband. According to Bryant, the report contained numerous inconsistencies. She asserts that her husband was two inches shorter and 20 pounds lighter than the individual in the report and her husband had "brownish blonde hair" and no tattoo while the subject of the autopsy had black hair and a tattoo. Bryant faulted the report for failing to note that

Bryant had a crown on one of his teeth; that he had a heart murmur; and that he had asthma. Further, Bryant attacked the report because the death certificate indicated that Bryant's body was found in the car while the report stated that her husband had grass, dirt, and debris covering parts of his body. Bryant also argued that because she was not allowed to view her husband's body following the shooting, that there was no body, and that without a body she could not be convicted.

Bryant's first claim is comparable to an argument that the government offered perjured testimony. To prove a due process violation from the use of perjured testimony, Bryant has the burden of establishing that "(1) [the witness] gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." May v. Collins, 955 F.2d 299, 315 (5th Cir.) cert. denied, ___ U.S. ___, 112 S.Ct. 1925, 118 L.Ed.2d 553 (1992).

Bryant does not assert that the government knowingly utilized a false autopsy report. Her arguments are not supported by record evidence and do not raise the type of issues that are cognizable under § 2255. See U.S v. Drobny, 955 F.2d 990, 994-95 (5th Cir. 1992).

As to Bryant's claim concerning the testimony of McAllister, as discussed above, the jury is the final authority on the credibility of witnesses. Lerma, 657 F.2d at 789. The evidence supplied by McAllister and Boutin was not unbelievable as a matter of law. Id. We reject Bryant's assertions as meritless.

Issue No. 7

Finally, Bryant argues that she received ineffective assistance of counsel. Counsel's assistance is ineffective if the defendant can show that her performance was deficient and that this substandard representation prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 80 L.Ed.2d 674 (1984). To show deficient performance the defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id.; 104 S.Ct. at 2064. This means that Bryant must show that her counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. Yohey v. Collins, 985 F.2d 222, 228 (5th Cir. 1993).

A court that reviews an attorney's performance in hindsight must accord the attorney a strong presumption that his representation was reasonable at the time. Strickland, 466 U.S. at 689; 104 S.Ct. at 2065. "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.; 104 S.Ct. at 2065 (internal quotation and citation omitted). To demonstrate that counsel's deficient performance prejudiced the defense, Bryant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687; 104 S.Ct. at 2064. If the defendant fails to demonstrate either prejudice or deficient performance, the

court need not consider the other prong. Id. at 697; 104 S.Ct. at 2069.

Bryant provides numerous examples of the alleged ineffectiveness of her counsel based on legal issues discussed above. Bryant asserts that her counsel was ineffective, inter alia, because: (1) she permitted the government to utilize an autopsy report for an individual other than Bryant's husband; (2) she failed to move for a mistrial or have Boutin's and McAllister's testimony stricken after the court denied her Jencks Act material relating to the two witnesses; (3) she did not seek to dismiss the indictment after the government failed to provide the defense with transcripts of Boutin's and McAllister's Grand Jury testimony; (4) she did not move for a mistrial when Bryant was convicted of conspiracy rather than murder; and (5) she did not move to dismiss the indictment for failing to specify conspiracy to murder as the offense. These errors were discussed above and found to be meritless.

Additionally, Bryant argues that her counsel was ineffective because she did not subpoena a Cindy Eubanks to testify at trial and because she did not move for a mistrial after the government refused to comply with the court's order to produce Eubanks. Ineffective assistance claims based on counsel's failure to call a witness "are not favored in federal habeas review." Murray v. Maggio, 736 F.2d 279, 282 (5th Cir. 1984). Complaints that defense counsel failed to call a witness are disfavored "because the presentation of testimonial evidence is a matter of trial strategy,

and because allegations of what a witness would have testified are largely speculative." U.S. v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983) (internal quotation and citation omitted), cert. denied, 467 U.S. 1251, 104 S.Ct. 3534, 82 L.Ed.2d 839 (1984). An appellant must demonstrate that he was prejudiced by his defense counsel's failure to call a witness before such a claim will provide the basis for habeas corpus relief. Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985). Aside from the fact that Bryant's arguments on this matter are contradictory, Bryant does not explain who Eubanks is or why she was prejudiced by her absence. We thus cannot find any error in Bryant's failure to call Eubanks.

Bryant contends that her counsel was ineffective because she did not impeach Boutin and McAllister based on their conflicting and perjured testimony. Although Vaughn's counsel was more active, the record is replete with instances where the two witnesses were indeed impeached. Bryant does not provide any specific examples of her counsel's failure to impeach Boutin's and McAllister's testimony. She also fails to demonstrate prejudice or deficient performance on this issue.

Bryant also argues that her counsel was ineffective because she failed to move for a dismissal based on false testimony. Because Bryant does not identify what false evidence she means, or the effect it had on her trial, this issue should not be considered. See Price, 846 F.2d at 1028.

Lastly, Bryant asserts that her counsel was ineffective because she did not raise the issues detailed in her § 2255 brief

on direct appeal. However, these errors, if raised on direct appeal would have undoubtedly have been deemed harmless. Because the analysis of Bryant's § 2255 motion is virtually identical to what would have been the analysis of her issues on direct appeal, Bryant has not demonstrated prejudice or deficient performance on the part of her appellate counsel for failing to raise them. Also, Bryant does not explain how her counsel's failure to raise either of these issues on direct appeal resulted in prejudice or manifested deficient performance. Finally, Bryant's appellate counsel did raise the Brady and Jencks Act issues concerning Boutin on direct appeal.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.