United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 30, 2022
Lyle W. Cayce
Clerk

No. 21-60425
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CHARLES BOLTON; LINDA BOLTON,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:16-CR-7-1
USDC No. 2:16-CR-7-2

Before WIENER, DENNIS, and HAYNES, *Circuit Judges*.

PER CURIAM:*

A grand jury indicted Defendants-Appellants Charles Bolton and his wife, Linda Bolton, on five counts of attempted tax evasion and five counts of filing false tax returns. The Government presented evidence at trial that

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

the Boltons treated money received by their businesses, Sports 22 Restaurant and Hall Avenue Package Store, as "loans" rather than "income" when reporting their business income on their personal income tax returns, thus falsely reducing their tax liability. The deposits in question included checks from various entities and individuals, including attorney John Lee.

The jury ultimately convicted Charles on four of the attempted tax evasion counts and all five of the false tax return counts. The jury acquitted both Boltons of one of the attempted tax evasion counts, failed to reach a verdict as to Linda on the remaining attempted tax evasion counts, and convicted Linda on all five counts of filing false tax returns.

The district court sentenced Charles to 45 months of imprisonment. The court also imposed three years of supervised release with a special condition requiring payment of $145,849.78 in restitution. Linda was sentenced to 30 months of imprisonment followed by a one-year term of supervised release. She was also ordered to pay restitution of $145,849.78, owed jointly and severally with Charles.

This court affirmed the Boltons' convictions and sentences on direct appeal except that it modified their judgments to reflect that the restitution owed by the Boltons would not be due until their terms of supervised release commenced. *United States v. Bolton*, 908 F.3d 75, 102 (5th Cir. 2018).

Linda later moved for a new trial under Federal Rule of Criminal Procedure 33 based on alleged newly discovered evidence. In the alternative, she sought a reduction of the restitution amount based on the same evidence offered in support of her motion for a new trial. Charles sought to join his wife's motion.

The district court concluded that the Boltons' claim of newly discovered evidence was not well taken and denied the motion for a new trial. The Boltons appealed.

"We review a district court's denial of a motion for new trial based on newly discovered evidence for abuse of discretion." *United States v. Erwin*, 277 F.3d 727, 731 (5th Cir. 2001). A defendant must meet "five prerequisites (typically referred to as the *Berry* rule)" to justify a new trial based on newly discovered evidence. *Untied States v. Wall*, 389 F.3d 457, 467 (5th Cir. 2004). "The defendant must prove that (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal." *Id.*

The Boltons rely on portions of Lee's testimony at a post-conviction civil deposition that they claim "entirely refutes [IRS] Agent [Bradley] Luker's [trial] testimony[,]" in addition to certain responses when Lee invoked his privilege against self-incrimination. Even though Lee's testimony was "newly available," it was not "newly discovered" evidence as contemplated by the *Berry* rule. *United States v. Freeman*, 77 F.3d 812, 817 (5th Cir. 1996). *See also United States v. Chapman*, 851 F.3d 363, 381 (5th Cir. 2017); *United States v. Wall*, 389 F.3d 457, 467-71 (5th Cir. 2004). As the district court stated, "the Boltons had personal knowledge of their own tax returns and could have presented any evidence that Lee could have about payments to them."

The Boltons insist that Lee's deposition testimony—that the checks he wrote to the Boltons were business loans— refutes Agent Luker's trial testimony that the checks were written for food and liquor. The Boltons fail to explain, however, how Lee's deposition testimony and his invocation of his Fifth Amendment privilege serve any other purpose than impeachment. "[M]ere impeachment evidence" that "only casts doubt on the veracity of a witness's testimony," is insufficient to warrant a new trial. *United States v.*

Eghobor, 812 F.3d 352, 363-64 (5th Cir. 2015) (internal quotation marks and citation omitted).

With respect to the final two *Berry* factors, the Boltons have failed to show how their impeachment evidence is material to their guilt or innocence or that, if it had been introduced at trial, it would probably have resulted in their acquittal. *See Chapman*, 851 F.3d at 381-83. As the district court found, even if the Boltons were successful in showing that the checks written by Lee were not income, "there was still sufficient evidence of unreported income to support their convictions." *See United States v. Blackthorne*, 378 F.3d 449, 453-55 (5th Cir. 2004). Because the Boltons have failed to satisfy a single *Berry* factor with respect to Lee's deposition testimony, the district court did not err in denying their motion for a new trial based on such evidence. *See Chapman*, 851 F.3d at 381.

The Boltons also seek a new trial because, after they were found guilty of tax fraud, Lee and their accountant, Carl Nicholson, were also convicted of tax fraud. The Boltons contend that evidence of these other convictions would probably result in their acquittal if introduced at a new trial because a "reasonable jury" would understand that a lay person provides their accountant with their financial records and "relies entirely" on their accountant's expertise. As the Government notes, however, "[w]hether and how much the Boltons relied on their accountant is something uniquely within the Boltons' personal knowledge." In other words, it is not new evidence.[1] *See Chapman*, 851 F.3d at 381.

[1] Moreover, assuming the Boltons are suggesting that the convictions of Lee and Nicholson support a defense of good-faith reliance on their tax accountant, as the district court observed, the Boltons both chose not to pursue a good faith defense at trial.

Finally, the Boltons contend that the alleged newly discovered evidence offered in support of their request for a new trial also "necessitates the reduction of [their] restitution." "We review the restitution amount imposed by the district court for abuse of discretion." *Bolton*, 908 F.3d at 97. Because the Boltons rely on the same "newly discovered" evidence, their request fails for the same reasons discussed above. The district court did not abuse its discretion in refusing the Boltons' alternative request to reduce that court's restitution order.

AFFIRMED.