

At all times relevant Stout was the owner of Flying Tigers which serviced, repaired and provided annual inspections of small privately owned aircraft at the Donegal Springs Airport in Lancaster County. Stout himself was an expert airplane mechanic and pilot who at one time had held airframe and power plant certifications ("A & P") as well as a certification to perform annual inspections of aircraft ("IA") from the Federal Aviation Administration ("FAA"). These certifications, however, had been suspended in 2003 and permanently revoked on November 18, 2004.

The essence of the charges against Stout was that he continued to service and repair aircraft and perform annual inspections when no certified mechanic was in the employ of Flying Tigers. Stout would fraudulently add entries into aircraft logs, alter logs and sign them with his name even though he did not have the required certifications and was not authorized to sign as he did. Sometimes he would forge the name of a certified mechanic or have a certified mechanic sign who was not a Flying Tigers employee and who had not performed the work. Flying Tigers, at the direction of Stout, charged customers for these fraudulent services.

Among the witnesses for the prosecution was Stout's son Joel Stout who also worked as a non-certified mechanic at Flying Tigers and Brian Cavada, a certified mechanic, who had

worked there for a period of time. An FAA inspector and a computer expert also testified. Numerous log books showing fraudulent entries and signatures were introduced and summary charts were presented. The jury also heard from four defrauded customers who owned aircraft taken to Flying Tigers and Stout for servicing and annual inspections.

One of the customers who took the stand for the government was Charles Marshall. He testified that after the conclusion of each annual inspection or repair of his aircraft he would always meet with Stout and together they would review the entries made in the airplane's log. Marshall was assured that all work done was necessary and completed. Stout would then sign the log. Stout now contends that he has newly discovered impeachment evidence that Marshal "perjured himself" insofar as he testified that he always met with Stout on those occasions. As a result, Stout maintains he is entitled to a new trial.

The relevant trial testimony of Marshall which Stout cites is as follows:

Q. And tell us what your practice was in terms of who it was that you dealt with and what your practice was in terms of bringing this plane to Flying Tigers for service.

A. Well, we'd bring it to - we'd bring it up there, either fly it or - I would fly it and my wife would follow me. Sometimes Jay would come - you know, I'd fly it up there; Jay would fly me back.

Q. And where was "back"? I'm sorry.

A. Oh, I'm sorry; to Tipton.

Q. What state is that?

A. Fort Mead [sic], Maryland.

Q. Thank you, sir. All right. Go ahead.

A. And I'd - I'd leave it there and he would do the annual. Then, when I came back up, I would go into the airplane, get the logbooks, and we would sit down and go over what was done, sign the logbooks, and I'd go on my way.

Q. When you said - when you - when you would return, you said you would go to the plane and get your logbooks?

A. Uh-huh.

Q. Is that a "yes"?

A. Yes.

. . .

Q. When you would obtain your logbooks you said you would then - "we would sit down"?

A. Yes.

Q. Who is "we"?

A. Jay and I.

Q. And you would review your logbooks?

A. Yes, and I would - as I expected any good person to do, he went over the work that was done, what had to be done maybe next time that didn't have to be done this time, and then had the logbooks completed, and then I left.

Q. And was that the practice that you would adhere to each and every time you took your plane to Flying Tigers for an annual inspection?

A. Yes.

Q. And each and every time you obtained your completed logbooks from Flying Tigers after an annual inspection, it was after you reviewed those logbooks with Jay Stout.

A. Yes, I would always go into the plane, get the logbooks, we'd go in and sit down at the table, and go over what was done.

. . .

Q. . . . And is this an - the first annual inspection that you had performed at Flying Tigers of this plane after you purchased it?

A. Yes.

Q. And on the following page does it bear the 2/19/04 date and signature of the individual who performed the annual inspection?

A. Yes.

Q. And as I understand it, as was your practice, after this annual inspection was completed, did you review this entry with Jay Stout?

A. Yes, along with the invoice.

Q. Okay. Two thousand and five, again, the same document; was the plane inspected again at Flying Tigers?

A. Yes.

Q. And it was signed on 2/19/05; is that right?

A. Yes.

Q. And did you review this entry and the invoice with Jay Stout?

A. Yes.

. . .

Q. When you brought your plane in to Flying Tigers for replacement of a boost pump on August 12th, 2015 [sic], did you then pick up your logbook after it was completed?

A. It was in the airplane.

Q. All right. Was it your practice after repairs like this to also review that with Jay Stout?

A. Yes.

Q. And did you review this entry with Jay Stout?

A. Yes.

Q. Did you discuss who did the work?

A. No.

Q. Did you question whose name or signature was on there?

A. No.

. . .

Trial Tr., Apr. 1, 2014, pp. 185-89. The Assistant United States Attorney made limited reference to this testimony in her closing argument to the jury.

Stout, in support of his motion for a new trial, presents three affidavits to impeach Marshall's testimony that he always met with Stout after annual inspections or repairs.

The first is from Beverly Hendry, Stout's live-in girlfriend. She states that on one occasion "The Marshalls [Charles Marshall and his wife] went directly to Flying Tigers, Inc. and secured the Marshall's plane without meeting with Jay Stout." She identifies the timeframe only as "late summer or fall of 2009."

The second affidavit is that of James H. McCutcheon, a commercial pilot and close friend of Stout who testified at the trial on his behalf. He declares that Marshall's testimony was "inherently improbable and does not conform with his experience of procedures in airplane maintenance." According to the affidavit, McCutcheon twice delivered Marshall's plane to the Fort Meade Airport and Stout did not meet with Marshall on those occasions. Finally, he states that he saw Marshall pick up his plane several times and "at least one time he is certain that Jay Stout was out flying and not present." He does not say when these events took place.

The final affiant, Leroy Redcay, states that he is a pilot who was a frequent visitor and customer of Flying Tigers. On one occasion, he accompanied Stout on a delivery of a plane to an airport in Fort Meade, Maryland. While he has no recollection when the delivery was made, he is "certain it was before 2008." He somehow remembers the number of the plane as "N94MR" and its type and color. This appears to be a

description of Marshall's plane. Redcay did not know the name of the owner but noted that no owner met with Stout at that time.

In order to obtain a new trial based on newly discovered evidence, a defendant has the burden of showing that he meets each of the following requirements:

- (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial;
- (b) facts must be alleged from which the court may infer diligence on the part of the [defendant];
- (c) the evidence relied on, must not be merely cumulative or impeaching;
- (d) it must be material to the issues involved; and
- (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Kelly, 539 F.3d 172, 181-82 (3d Cir. 2008).

Our Court of Appeals in United States v. Quiles has explained that while newly discovered impeachment evidence is generally an insufficient basis for a new trial, it can under "certain unusual circumstances" satisfy prong (c) of the rule. 618 F.3d 383, 391-95 (3d Cir. 2010). Defendant's burden to establish

that he meets all of the above criteria is a heavy one. United States v. Saada, 212 F.3d 210, 216 (3d Cir. 2010).

We turn first to the question whether the court can infer diligence on the part of Stout in discovering that Marshall did not always meet with Stout to review log entries after an annual inspection or other times when repairs were made. Marshall's testimony in this regard could not have come as a surprise to Stout. Prior to trial, the Government had supplied to Stout in discovery a January 8, 2009 memorandum from Marshall to FAA inspector Robert Brantigan as well as a memorandum of a March 15, 2013 telephone interview of Marshall by Assistant United States Attorney Arlene Fisk and Special Agent Brian C. Gallagher. These documents are totally consistent with what Marshall said at the trial, and it even appears that defendant concedes the point at page 9 of his reply brief.

Moreover, prior to trial, Stout had ready access to at least two of the persons whose affidavits are being put forward in support of his motion for his new trial. One is his live-in girlfriend Brenda Hendry and the other is his friend James McCutcheon, who, as noted above, actually testified at the trial. These friendly witnesses were certainly available to challenge Marshall's testimony at the trial had Stout or his counsel taken reasonable steps to obtain in a timely fashion the

information belatedly presented in the Hendry and McCutcheon affidavits. Nor has Stout argued that the third affiant, Leroy Redcay, who apparently did not know Marshall, was unavailable to him until after the trial.¹ It is clear that even assuming that the impeachment evidence could otherwise support a motion for new trial here, Stout has not met his heavy burden to show diligence on his part in attempting to discover earlier the evidence he now puts forward. See Gov't of Virgin Islands v. Lima, 774 F.2d 1245 (3d Cir. 1985).

Stout's motion for a new trial fails for another reason. Under Kelly, in order for Stout to obtain a new trial, he must also establish that "the newly discovered evidence would probably produce an acquittal." 539 F.3d at 182. The evidence against Stout was substantial. It included the testimony of his son and of Brian Cavada, as well as of a number of customers who were airplane owners. In addition, there were a plethora of airplane logs with fraudulent entries and signatures. Assuming the admissibility of the impeachment evidence related to Charles Marshall, one of four of Stout's customers who testified, it is unlikely to have altered the outcome. Whether Marshall always

¹ Stout himself testified at the trial. On direct, he stated that he and Marshall "usually went over the invoice either - sometimes in person and sometimes by phone" (Trial Tr., Apr. 7, 2014, p. 20). On cross-examination, he denied that Marshall sat down with him to review the logbook entries for the 2004, 2005, 2006, and 2007 airplane inspections and the invoices. Id. pp. 56-57.

met with Stout after the inspection or repair of his airplane is hardly central to this case. Even if the jury believed Hendry, McCutcheon and Redcay, all of whom were friendly to Stout, their testimony would be limited to only a very few occasions when they say Marshall did not meet with Stout at the time of the delivery of his airplane. The dates of these few occasions are never identified except vaguely as the late summer or fall of 2009 or before 2008. Most significantly, the affidavits do not contradict Marshall's testimony that he met with Stout on the specific instances in 2004, 2005, 2006 and 2007 about which he was questioned. Stout has failed to establish that an acquittal would have been probable had the proffered evidence been introduced and believed at trial.

Stout argues that the proper standard in deciding whether a new trial should be granted is the more lenient whether-he-might-have-been-acquitted rather than probably-would-have-been-acquitted. He relies on United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973). He maintains that in that decades-old case the Court of Appeals applied the might-have-been-acquitted test, known as the Larrison Rule, when the motion for new trial was based on evidence that a witness had given false testimony at trial. See Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928).

The problem with Stout's argument is that our Court of Appeals has stated in later decisions that it has not adopted the Larrison Rule. Lima, 774 F.2d at 1251 n.4; United States v. DeSivo, 288 F. App'x 815, 819 n.1 (3d Cir. 2008). Instead, the Court of Appeals has frequently relied on the probably-would-have-been-acquitted test. The Court in Quiles, for example, specified the application of the same probably-would-have-been-acquitted test used in Kelly for a new trial based on newly discovered evidence. Significantly, Quiles involved impeachment evidence but did not cite Larrison or Meyers. Finally, we note that the Court of Appeals for the Seventh Circuit has overruled Larrison in United States v. Mitrione, 357 F.3d 712, 718 (7th Cir. 2004), vacated on other grounds, 543 U.S. 1097 (2005). In sum, the Larrison Rule is simply not the law.

Defendant has not established facts from which the court can infer diligence on his part in obtaining newly discovered evidence. Nor has he established that any newly discovered evidence would probably result in an acquittal. Accordingly, the motion of defendant Jay Stout for a new trial will be denied.²

² Defense counsel, in defendant's reply brief, makes allegations that the Assistant United States Attorney has committed prosecutorial misconduct in withholding exculpatory investigatory notes during the discovery phase of the case. Counsel makes these serious allegations without any basis whatsoever. The prosecutor has assured the court that she

supplied more discovery than required and that she did not suppress any information properly discoverable. The court deplores defense counsel's conduct in this regard.

