

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
THOMAS P. JASIN	:	NO. 91-602-08

ORDER & MEMORANDUM

ORDER

AND NOW, to wit, this 21st day of November 2000, upon consideration of defendant's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 Based Upon Newly Discovered Evidence (Document No. 202, filed September 28, 1999), and the related submissions of the parties—Government's Response (included in Government's Answer to Stay Execution of Sentence) (Document No. 205, filed October 8, 1999), Defendant's Pro Se Response (Document No. 209, filed November 30, 1999), Government's Reply to Defendant's Motion for New Trial Based on Newly Discovered Evidence (Document No. 214, filed January 5, 2000), Defendant's Answer to Government's Reply (Document No. 215, filed January 12, 2000), Defendant's Third Pro Se Answer to Government's Third Reply (Document No. 217, filed January 20, 2000), and related letters, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that defendant's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 Based Upon Newly Discovered Evidence is **DENIED**.

MEMORANDUM

I. BACKGROUND

On October 31, 1991, a Grand Jury in the Eastern District of Pennsylvania returned a sixty-seven (67) count Indictment against nineteen (19) co-defendants including defendant Jasin. Defendant was charged in three (3) counts of the Indictment. Count I charged a conspiracy to violate the Arms Export Control Act, 22 U.S.C. §§ 2778(b)(2) and 2778(c) and its implementing regulations, 22 C.F.R. § 121, et seq.; the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001, et seq.; and sections of a money laundering statute, 18 U.S.C. § 1956. Counts XXIII and XXIV charged violations of the Arms Export Control Act.

On December 10, 1992, after a five (5) week trial, the jury returned a verdict of guilty on Count I of the Indictment and not guilty on Count XXIV of the Indictment. Count XXIII of the Indictment was voluntarily dismissed by the Government before trial.¹

Defendant was sentenced on July 16, 1998. The Court departed downward from a guideline sentence of sixty (60) months and sentenced defendant to twenty-four (24) months incarceration. Defendant thereafter appealed. The Court of Appeals, by Judgment and Unreported—Not Precedential Memorandum Opinion dated August 12, 1999, affirmed the judgment of this Court. United States v. Jasin, No. 98-1641 (3d Cir. Aug. 12, 1999) (unreported). Defendants' petition for en banc review was denied.

Defendant filed a petition for a writ of certiorari to the United States Supreme Court. It was denied on January 24, 2000. United States v. Jasin, 120 S. Ct. 986, 145 L. Ed. 2d 935

¹ The facts are set forth in detail in this Court's Memorandum dated July 7, 1993. There is no need to repeat those facts in this Memorandum.

(2000).

II. DISCUSSION

A. Applicable Law

Defendant seeks a new trial based on after-discovered evidence—testimony from Eloy Torrez, Giovanni Paladini, Wayne Radcliffe, William Gallagher, certain letters defendant wrote to John Lombard, Central Intelligence Agency (“CIA”) documents requested under the Freedom of Information Act over one year ago but not received, and certain other exhibits.

Under United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976), five requirements must be met before a trial court may order a new trial based on newly discovered evidence: (a) the evidence must be, in fact, newly discovered—i.e., since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence must not be merely cumulative or impeaching; (d) the evidence must be material to the issues involved; and (e) the evidence must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. See also Government of Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985); United States v. Adams, 759 F.2d 1099, 1108 (3d Cir. 1985).

Defendant previously filed a motion for new trial pursuant to Federal Rule of Criminal Procedure 33 based upon newly discovered evidence—the claimed failure of the government to advise defendant that a co-conspirator who testified against defendant—Gerald Schuler—had a prior federal conviction for tax evasion and that he was involved in obstruction of justice in a

related matter. The motion was denied by order dated July 10, 1998.²

The pending motion was filed under Federal Rule of Criminal Procedure 33. Prior to December 1, 1998 a motion for new trial based on newly discovered evidence could be filed within two (2) years of the final judgment. The courts in interpreting that language uniformly concluded that it referred to the action of the Court of Appeals. The Court notes that defendant filed the pending motion for new trial less than two (2) months after the Court of Appeals affirmed the judgment of conviction.

Effective December 1, 1998, Federal Rule of Criminal Procedure 33 was amended to require that motions for new trial based on newly discovered evidence be filed within three (3) years “. . . after the verdict or finding of guilty.” Under that rule, defendant’s motion would be time barred because the jury verdict of guilty was returned on December 10, 1992, almost seven (7) years before the motion was filed.

It would be entirely anomalous to apply the current time limit to defendant’s motion. Doing so would mean that the motion was barred before amended Rule 33 came into effect. Under the circumstances, the Court will apply to this case the rule relating to new trials based on newly discovered evidence as it existed when defendant was convicted, not as amended while his conviction was on appeal. See United States v. West, 103 F. Supp. 2d 1301 (N.D. Ala. 2000); United States v. Soler, 2000 WL 385514 (S.D.N.Y. Apr. 17, 2000). Applying the version of Federal Rule of Criminal Procedure 33 in effect at the time of defendant’s conviction, the Court

² The Court notes that, standing alone, the fact the pending motion is a second motion for new trial based on newly discovered evidence does not warrant dismissal unless it raises issues previously raised, which it does not. See United States v. Brown, 417 F. Supp. 340 (E.D. Pa. 1976).

concludes the pending motion for new trial based on newly discovered evidence was timely filed.

B. The Evidence Offered by Defendant

The Court concludes that the evidence described in defendant's motion is not newly discovered evidence sufficient to warrant the granting of a new trial. That determination is based on the following analysis of the offered evidence.

(1) The Torrez Evidence—Defendant asserts for the first time seven (7) years after his conviction that he sought but was unsuccessful in locating a potential witness, former International Signal and Control (“ISC”) employee Eloy Torrez for trial testimony. The motion goes on to state that defendant discovered Torrez's address shortly after his December 1992 conviction.

The motion makes it clear that defendant was aware of Torrez's proposed testimony prior to trial. He claims that the evidence was “newly discovered evidence” but he really means that the evidence is “newly available testimony.” Without deciding whether “newly available testimony” can ever be considered “newly discovered evidence,” the Court rules that the Torrez evidence is not newly discovered evidence in this case. First, defendant never alerted the Court at the time of trial with respect to his difficulty in locating this witness. Such action would have enabled the Court to assist the defense in securing his appearance. Such inaction on the part of the defendant leads the Court to conclude that the defendant failed to show due diligence in locating Torrez before trial, a requirement under Rule 33. See United States v. Hall, 854 F.2d 1269 (11th Cir. 1988); United States v. DeLuca, 945 F. Supp. 409 (D. R.I. 1996), aff'd, 137 F.3d 24 (1st Cir. 1998).

The Court also concludes that Torrez's proposed testimony is to a large extent cumulative

of evidence presented at trial by defendant that ISC had the capability to remedy any flight irregularities of the Striker. Such evidence is only marginally relevant to the case and on a new trial it would probably not result in an acquittal.

(2) The Paladini Evidence—Giovanni Paladini was Chairman of Elmer Industrie per lo Spazio e le Comunicazioni S.p.A. (“Elmer”) during the time Jasin and Elmer worked together on the Striker system project. In the motion defendant states that he wanted Paladini to testify at his trial that the value added to the Striker in Italy was substantial but that Paladini refused to testify in 1992 because he was a subject of criminal investigation in Italy that was related to the instant case. According to defendant, Paladini is now available because the investigation has been concluded.

It appears from the motion that defendant was aware before and during his trial of the information that Paladini possessed. As with Torrez, defendant failed at trial to advise the Court of his desire to call Paladini as a witness or to seek the Court’s assistance in obtaining a foreign deposition of the witness. For this reason, the Court concludes that defendant has failed to show due diligence in obtaining the Paladini evidence before trial, a requirement under a Rule 33 analysis.

Of equal significance, although Paladini’s testimony may have been newly available, the Court concludes it was not in fact “newly discovered evidence” within the meaning of Rule 33. See, e.g., United States v. Lockett, 919 F.2d 585, 591 (9th Cir. 1990) (“[W]hen a defendant who has chosen not to testify comes forward to offer testimony exculpating a co-defendant, the evidence is not ‘newly discovered.’”) (internal quotation omitted); United States v. DiBernardo, 880 F.2d 1216, 1224–25 (11th Cir. 1989) (concluding that the newly available testimony of a co-

conspirator after he no longer claimed privilege against self-incrimination was not “newly discovered evidence”).

Moreover, the Court concludes that on a new trial the proposed Paladini evidence would probably not result in an acquittal. As this Court held during the trial, the United States customs law applicable to defendant’s asserted defense was whether a “substantial transformation” of a product took place, not whether value was added. The Third Circuit affirmed this Court’s ruling, stating:

[t]he District Court held that the test Jasin proffered based on customs laws looks to the nature of the transformation—was it a substantial transformation?—not to the value added. The District Court further concluded as a matter of law that the evidence did not establish that there was a substantial transformation of the missiles that were routed through Italy from South Africa. The District Court reasoned that the article shipped from South Africa to Italy was a dummy missile or slug, and the article shipped from Italy to the United States was a dummy missile. Further, the court noted that of the first shipment of ten missiles from Italy, nine were dummies from South Africa that were unchanged in Italy and the tenth had some telemetry and additional items added in Italy. Thus, even accepting the evidence in the light most favorable to the defendant, the court concluded that, as a matter of law, no new and different article arrived from Italy.

...
[W]e have no basis to overturn the District Court’s conclusion

United States v. Jasin, No. 98-1641, at 16–17 (3d Cir. Aug. 12, 1999) (unreported). In light of the foregoing, Paladini’s proposed testimony was not material to the issue of substantial transformation of the dummy missiles and involved only one (1) of nine (9) missiles at issue.

(3) The Radcliffe Evidence—Defendant contends that the proposed testimony of co-defendant Wayne Radcliffe will impeach government witness Gerald Schuler and is newly discovered evidence that entitles defendant to a new trial. The Court rejects that conclusion.

As previously stated, a newly available co-defendant as a witness is not newly discovered

evidence. Succinctly stated, “[w]hen a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a co-defendant, the evidence is not ‘newly discovered.’” United States v. Diggs, 649 F.2d 731, 740 (9th Cir. 1981). See also Lockett, 919 F.2d at 591; DiBernardo, 880 F.2d at 1224–25.

More significantly, newly discovered evidence within the meaning of Rule 33 must not be merely cumulative or impeaching. Thus, defendant’s claim that Radcliffe would impeach Schuler is insufficient to warrant the granting of the motion. “[T]he discovery of new evidence which merely discredits a government witness and does not directly contradict the government’s case ordinarily does not justify the grant of a new trial.” United States v. Sposato, 446 F.2d 779, 781 (2d Cir. 1971) (quoting United States v. Aguillar, 387 F.2d 625, 626 (2d Cir. 1967)).

(4) The Gallagher Evidence—Defendant contends that after trial he discovered that an employee of Sikorsky Aircraft Company, William Gallagher, had relevant testimony. Defendant does not explain why he failed to interview Gallagher or other Sikorsky employees in preparation for trial, and there is no claim that Gallagher was unavailable. A defendant is not entitled to a new trial where the witness was available but not sought or secured by a defendant. United States v. Beasley, 582 F.2d 337, 339 (5th Cir. 1978).

(5) Letters from Defendant to John Lombard—These letters were allegedly written on October 17, 1986 and January 22, 1987. Defendant claims that he came into possession of these letters in 1993, six (6) months after the trial. At sentencing in 1998 the government took the position that these letters were fabricated. Without going into a lengthy discussion of the way in which the letters were obtained, the substance of the letters, or John Lombard’s response to the letters, some of which is set forth in the Government’s Reply to the Motion in footnote 2, the

Court concludes that defendant did not exercise due diligence in obtaining copies of the letters before the trial and on a new trial the letters would probably not result in an acquittal.

(6) CIA Data—Defendant sought additional CIA documentation under the Freedom of Information Act a number of years ago. To date, no documents have been produced.

Before and after the trial, the Court reviewed all of the CIA documents relating to this case under the procedures set forth in the Classified Information Procedures Act, 18 U.S.C. App. IV (1982). It concluded then, and it concludes at this time, that all discoverable CIA documents were produced to the defendant in advance of trial.

(7) The Remaining Exhibits—Defendant argues that exhibits O and P, which relate to the value-added issue, constitute after-discovered evidence and warrant the granting of a new trial. The Court disagrees for the reasons set forth in paragraph 6(b) relating to the Paladini evidence.

III. CONCLUSION

For the foregoing reasons, defendant's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 Based Upon Newly Discovered Evidence is denied.

BY THE COURT:

JAN E. DUBOIS, J.