U.S.C.A. No. 12-30005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff/Appellee,	)
	)
vs.	)
	)
EDGAR J. STEELE	)
	)
Defendant/Appellant.	)
	)

GOVERNMENT'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR SUMMMARY REVERSAL

On Appeal from the United States District Court
for the District of Idaho
District Court 10-CR-00148-N-BLW

Honorable B. Lynn Winmill, Chief District Court Judge

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Defendant was tried, convicted and sentenced for crimes related to murder for hire. Through one of his prior counsel, defendant filed a notice of appeal. Rather than pursue his appeal, defendant's new attorneys seek summary reversal of his conviction and remand directing the district court to hold an evidentiary hearing on defendant's claim of ineffective assistance of counsel.

The United States opposes defendant-appellant Edgar Steele's motion for summary reversal and remand for evidentiary hearing. (ECF No. 6-1.) *See* FED. R. APP. P. 27.

This case is not appropriate for summary reversal because defendant's allegations are not so clear as to justify expedited action and the district court did not abuse its discretion in declining *sua sponte* to hold a hearing on general claims of ineffective counsel.

PROCEDURAL HISTORY

Charging

The defendant was charged with four felony counts: *Count I*, Use of Interstate Commerce Facilities in the Commission of Murder for Hire, 18 U.S.C. § 1958; *Count II*, Use of Explosive Materials to Commit Federal Felony, 18 U.S.C. § 844(h); *Count III*, Possession of a Destructive Device in Relation to a Crime of Violence, 18 U.S.C. § 924(c)(1)(B)(ii); and *Count IV*, Tampering with a Victim, 18 U.S.C. § 1512(b)(3).

First change of attorneys and trial setting

At his initial appearance, defendant applied for and was granted representation by Roger Peven and the Federal Defender's Office of Eastern Washington and Northern Idaho. (ECF No. 15.) A jury trial was set for August 16, 2010. (ECF No. 9.) The defendant twice moved for a continuance leading to a trial setting of March 7, 2011. (ECF Nos. 31, 53.)

Approximately one month before trial was scheduled to begin, defendant moved for substitution of counsel. The court granted the motion and Robert T. McAllister and Gary Amendola were retained. (ECF Nos. 74, 75, 89.) Mr. McAllister is the counsel whom the defendant now alleges was ineffective.

Mr. McAllister and Mr. Amendola filed numerous motions, including: motion for release on bond (ECF No. 82.); motion to sever counts (ECF No. 94.); motion for change of venue (ECF No. 111.); motion to continue trial (ECF Nos. 128, 148.); and motion to exclude audio recordings (ECF No. 147.) The district court held hearings and required briefing on the various pre-trial motions. A *Daubert* hearing on defendant's challenge to the audio recordings was held on April 20 and 21, 2011. (ECF Nos. 202, 203.)

The defendant's trial began on April 26, 2011. (ECF No. 212.) On May 5, 2011, the defendant was found guilty on all charges. Sentencing was set for August 22, 2011. (ECF No. 225.)

A timely Rule 33 Motion for New Trial was filed by Mr. McAllister and Mr. Amendola on May 12, 2011. (ECF No. 234.) The district court then set a briefing schedule for the motion. (ECF No. 238.)

Second change of attorneys and trial

On June 13, 2011, Wesley Hoyt—attorney for one of the alleged victims, Cyndi Steele—substituted in as defendant's attorney replacing Mr. McAllister and Mr. Amendola. (ECF No. 243.) He completed briefing on the new trial motion. The district court issued an eighteen-page Memorandum Decision and Order denying the Motion for New Trial. (ECF No. 312.) The defendant was sentenced on November 14, 2011. He filed a timely Notice of Appeal on November 16, 2011. (ECF Nos. 316, 317.)

Defendant's motion for new trial

Defendant's Motion for New Trial, as finally submitted, alleged: 1) errors regarding the court's jurisdiction; 2) errors in the court's jury charges; 3) prosecutorial misconduct; 4) FBI misconduct; 5) ineffective counsel; 6) court bias; and 7) denial of a public trial. (ECF Nos. 234, 291, 312.) Intertwined with each of these challenges were allegations of ineffective assistance of counsel and allegations of newly-discovered evidence. The defendant alleged that his initial counsel, Roger Peven of the Federal Defenders of Eastern Washington and North Idaho, was ineffective. He also claimed his retained counsel, Robert McAllister

and Gary Amendola, were ineffective. The defendant included affidavit's disclosing Mr. McAllister's bankruptcy and bar disciplinary proceedings. (Exhibits 11, 12, 13 of defendant's motion for summary reversal). The defendant did not request an evidentiary hearing. (ECF Nos. 234, 290.)

The district court considered all briefing and exhibits and denied the motion for new trial in an eighteen-page Order on November 8, 2011. (ECF No. 312.) Relevant to this appeal, in his Order, the court examined the substantive examples of ineffective assistance alleged by defendant. The court analyzed each of the substantive issues and explained why the defendant was not prejudiced by his counsel's asserted failure to litigate those issues. For instance, the defendant alleged his counsel was ineffective because he didn't explore government misconduct. (pp. 15, ECF Nos. 290, 294.) The district court addressed and rejected allegations of government misconduct. (pp. 9-16, ECF No. 312.) There were eight total allegations of government misconduct. (ECF No. 234, 291.) The court explained that the United States had not engaged in misconduct in reviewing non legal mail or by failing to disclose a draft of a fictional book (which the United States had never possessed) written by a witness. The court found there was no evidence the prosecutor ever listened to the defendant's conversation with his attorney while in an attorney-client booth. (pp. 10, 12 ECF No. 312.) Where there were general allegations of ineffective assistance of counsel the court explained

that: "The proper procedure [for] challenging the effective assistance of counsel is by a collateral attack on the conviction under 28 U.S.C. § 2255, after a full record can be developed. Therefore, the Court will not consider this argument." (ECF No. 312) (*citing United States v. Ross*, 2011 WL 2678832 (9th Cir. 2011) (unpublished) (affirming denial of motion for new trial based on ineffective assistance)).

Third change of attorneys and appeal

This Court issued a briefing schedule for defendant's appeal in early January, 2012. Defendant's opening brief was due April 4, 2012. (Dkt Entry 1-2.) New counsel substituted in on April 4, 2012, and filed the instant Motion for Summary Reversal on April 5, 2012.

SUMMARY OF ARGUMENT

Defendant's Motion for Summary Reversal and Remand based on ineffective assistance of counsel should be denied. Summary disposition is only appropriate where a party has sustained its heavy burden of showing that questions are so insubstantial and the merits of a claim so clear that expedited action is justified. That is not the situation here. The district court considered and ruled upon the defendant's motion for a new trial, which included ineffective assistance of counsel claims against all three of defendant's prior attorneys. The district court did not err much less abuse its discretion when it denied the defendant's motion.

Neither did it err when it did not *sua sponte* hold an evidentiary hearing. This Court should deny the motion and proceed to briefing on the appeal.

ARGUMENT

I. Appeal, not summary reversal, is appropriate in this case.

The defendant cannot meet the "heavy burden" of establishing that the unusual remedy of summary reversal is warranted in this case. *See United States v. Glover*, 731 F.2d 41, 44 (D.C. Cir. 1984) (internal quotation marks omitted). He simply cannot "demonstrate that the merits of his claim are so clear as to justify expedited action." *Id*. (quoting *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980)).

As the cases cited by the defendant illustrate, summary reversal is reserved for cases in which a district court has failed to follow a mandatory rule, (*United States v. Duarte-Higareda*, 68 F.3d 369 (9th Cir. 1995)), or statute, (*United States v. Nevarez-Castro*, 120 F.3d 190 (9th Cir. 1997)), or clear and binding precedent, (*Glover*, 731 F.2d 41). *See also In re Thomas*, 508 F.3d 1225, 1226 (9th Cir. 2007); *United States v. Hooten*, 693 F.2d 857 (9th Cir. 1982) (describing standard). The defendant fails to cite (nor can the Government find) any case in which the unusual remedy of summary reversal was applied to a district court's exercise of its discretion. This case involves no violation of a mandatory rule, of a statute, or of precedent. It involves a district court's thoughtful exercise of discretion. There are

numerous issues that are ripe for appeal. There are no issues that justify bypassing the appellate process and granting summary reversal.

As discussed below, the district court carefully considered the defendant's assertions of ineffective assistance of counsel on the part of McAllister, as it did his assertions against his other two trial counsel, Amendola and Peven. Defendant described the proceedings against McAllister, and the district court was well aware of them. But it had viewed McAllister's representation first-hand over the course of briefing, argument, and then trial. It addressed and rejected the specific allegations of ineffective assistance the defendant raised. As to the more general allegations, it explained they could be handled in the usual way – after appeal in collateral proceedings. This, too, was not an abuse of discretion.

The defendant did not request an evidentiary hearing regarding McAllister's performance and the district court did not *sua sponte* grant one. This, too, was far from an abuse of discretion.

In short, the district court acted reasonably, carefully considering the issues before it, and ruled on them. It properly exercised its discretion. It broke no mandatory rules and violated no statutes or precedent. Its decisions are ripe for appellate review. They are not, however, appropriate for summary reversal.

II. The district court did not abuse its discretion when it declined to develop the record regarding defendant's vague ineffective assistance claims.

A. Standard of Review

The denial of a defendant's motion for a new trial is reviewed for an abuse of discretion. *See United States v. Moses*, 496 F.3d 984, 992-93 (9th Cir. 2007); *United States v. Mack*, 362 F.3d 597, 600 (9th Cir. 2004); *United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995). Defendant argues the trial court "clearly erred" by not understanding the court could hear, or by refusing to hear, the claim of ineffective assistance of counsel raised in his motions for new trials. (Appellant's Motion for Summary Reversal, pp. 18, 19). Defendant urges the wrong standard of review. The clearly erroneous standard applies to factual findings. *See, e.g., United States v. Stoterau*, 524 F.3d 988, 997 (9th Cir. 2008) (sentencing); *United States v. Rowland*, 464 F.3d 899, 903 (9th Cir. 2006) (motion to suppress); *United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998) (bench trial). The abuse of discretion standard applies to decisions regarding whether to hold evidentiary hearings and grant motion for new trial. *See Moses*, 496 F.3d at 992-93 (new trial); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008) (habeas); *United States v. Bussell*, 414 F.3d 1048, 1054 (9th Cir. 2005) (juror misconduct). Using the abuse of discretion standard, a reviewing court cannot reverse the decision of the district court absent "a definite and firm conviction that the district

court committed a clear error of judgment in the conclusion it reached upon [a] weighing of [] relevant factors." *See SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001); *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (noting reversal under abuse of discretion standard is possible only "when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances").

B. Discussion

The district court did not abuse its discretion when it denied the defendant's motion for a new trial based on ineffective assistance of counsel. Defendant appears to argue that the disbarment and investigation of Mr. McAllister established the ineffectiveness of Mr. McAllister and Mr. Amendola. The district court disagreed. Just because it declined to hold a hearing does not mean it did not understand it could hold a hearing. In fact, the district court has recognized its authority to hold such a hearing when the circumstances warrant it. *See United States v. Moses*, 2006 WL 1459836 (D. Idaho 2006) (citing *United States v. Logan*, 861 F.2d 859 (5th Cir. 1988)).

The district court was in an ideal position to review counsel's actions during pretrial and trial proceedings. The district court had reviewed defense counsel's extensive briefing in pretrial motions and presided over a *Daubert* hearing and a trial. The court had before it the affidavits of Mr. McAllister and Mr. Amendola

which were filed months before the court issued it's order denying the motion for new trial. This was not the unusual case where the court itself raised concerns regarding the effectiveness of counsel, nor was it one in which the court so plainly erred that summary reversal is appropriate. *See United States v. Jensen*, 2010 WL 3809988 (E.D. Wash. 2010); *Duarte-Higareda*, 68 F.3d 369 (9th Cir. 1995). The court did not err, much less abuse its discretion. *See United States v. Moses*, 496 F.3d 984, 992-93 (9th Cir. 2007).

Additionally, the district court thoroughly addressed the defendant's allegations regarding ineffective assistance as they related to the specific issues of jury instructions, government misconduct, jurisdiction, and newly-discovered evidence. (ECF No. 312.)

The defendant cites a string of cases, mainly from other jurisdictions, for his position that the district court should have considered the claim of ineffective assistance of counsel prior to the appeal. At most, these cases establish that district courts have the authority to consider ineffective assistance claims at the trial level and that they should, in extreme circumstances. For example, *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996), involved a district court's refusal to appoint new counsel for the defendant during a hearing alleging ineffective assistance of counsel. Thus, trial counsel had to prove his own ineffectiveness.

In *United States v. Jensen*, 2010 WL 3809988 (E.D. Wash. 2010), the district court, *sua sponte*, appointed independent counsel to review the record and determine whether to file a motion for new trial based on ineffective assistance of trial counsel. *Id.* at *1, *2.

The extreme circumstances of *Jensen* and *Del Muro* do not exist here. The district court observed counsel throughout the proceedings. It rejected specific allegations of error which defendant interwove with his ineffective assistance claims. The fact that the court did not *sua sponte* order a hearing was not an abuse of discretion. The defendant never requested a hearing on his motion, which raised numerous claims. The court did not have the concerns of the *Jensen* court. In *Jensen* the court noted, "the government does not contest the conclusions of this court and those of Mr. Weatherhead that ineffective assistance of counsel to Mr. Jensen took place. Rather the Government contends the Motion for New Trial based upon the unchallenged findings is procedurally barred" *Id.* at *3. That is not the case here. The United States disagrees with the defendant's assertion that all three trial attorneys, appointed and retained, were ineffective.

The defendant spends a great deal of time detailing Mr. McAllister's criminal charges and subsequent disbarment. He speculates there might have been collusion by the United States Attorney's Office in the District of Idaho and the United States Attorney's Office in the District of Colorado as to how or when

McAllister was arrested. The government looks forward to the time when speculation and innuendo are set aside and the court may rely on the facts.

Defendant has not shown the district court abused its discretion by failing to grant his motion for new trial or sua sponte order a hearing on his ineffective assistance of counsel claims. The defendant has not demonstrated that the district court abused its discretion by not taking the extraordinary step of holding a hearing on his ineffective assistance of counsel claim. Simply, the defendant has not met his burden.

CONCLUSION

The United States respectfully requests that defendant's motion for summary reversal be denied.

Respectfully submitted this 30th day of April, 2012.

WENDY J. OLSON
United States Attorney
District of Idaho
By

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/s/D. MARC HAWS
/s/ TRACI J. WHELAN
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 30, 2012, the foregoing **Government's Response to Appellant's Motion for Summary Reversal** were electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons:

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