

B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40052



UNITED STATES OF AMERICA,

Plaintiff - Appellee

A True Copy

Certified order issued Feb 21, 2018

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

v.

ANDRE DAVID LEFFEBRE, also known as Charlie Kerr,

Defendant - Appellant

Appeals from the United States District Court for the
Southern District of Texas

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeals are dismissed as of February 21, 2018, for want of prosecution. The appellant failed to timely pay the docketing fee.

LYLE W. CAYCE

Clerk of the United States Court
of Appeals for the Fifth Circuit

Angelique B. Tardie

By: _____
Angelique B. Tardie, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C
United States Courts
Southern District of Texas
FILED

MAY 12 2005

Michael N. Milby, Clerk of Court

UNITED STATES OF AMERICA

v.

ANDRE DAVID LEFFEBRE,
a/k/a/ Charlie Kerr,

Defendant

§
§
§
§
§
§
§

CRIMINAL NUMBER: G-05-

09

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE
(Felon in Possession of a Weapon)

On or about September 24, 2004, in the Galveston Division of the Southern District of Texas, the defendant,

ANDRE DAVID LEFFEBRE,
a/k/a Charlie Kerr,

having been convicted in a court of three violent felonies, all of which are crimes punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce a firearm, namely a Springfield Armory, model XD-40, .40 caliber pistol, which had been shipped and transported in interstate and foreign commerce.

In violation of Title 18, United States Code, Section 922(g)(1) and Section 924(e)(1).

C

Notice of Criminal Forfeiture

Pursuant to Title 18, United States Code, Section 924(d)(1), and Title 28, United States Code, Section 2461(c), the United States of America hereby gives notice that all firearms and ammunition involved in, or used in the commission of the offense in violation of Title 18, United States Code, Section 922(g)(1) charged in Count One, are subject to forfeiture, including, but not limited to, the following:

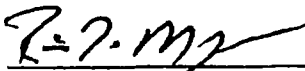
Springfield Armory, model XD-40, .40 caliber pistol, serial number US468362.

A TRUE BILL:


FOREMAN OF THE GRAND JURY

MICHAEL T. SHELBY
United States Attorney

BY:


Richard J. Magness
Assistant United States Attorney
(713) 567-9582

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ANDRE DAVID LEFFEBRE
AKA CHARLES KERR,
(Defendant)

V.

INDICTMENT
CRIMINAL NO.
G-05-09

UNITED STATES OF
AMERICA
(Plaintiff)

MOTION/PETITION FOR THE
REVIEW OF GRAND JURY
MINUTES/EVIDENCE

ON THE 12TH DAY OF MAY, 2005
The Defendant, WAS indicted
under The Fed-R. Crim. P. Rule
6, IN Title 18 USC 922(g)(1)
Sect. 924(e)(1).

The Defendant, has maintained
his innocents, but has also
sought to challenge said

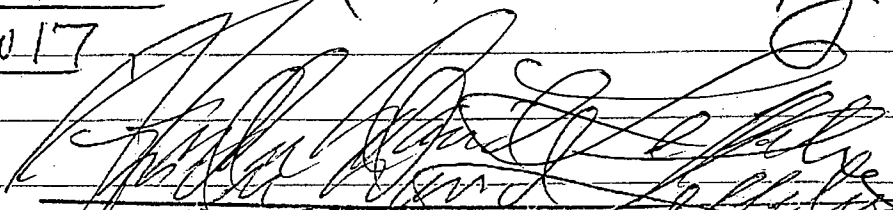
D

Indictment under Fed. R. Crim. P. But also seeks the minutes and evidence presented since there is no Rule 6(e)(2) indicated in the indictment, that was not sealed. To deny the defendant the opportunity to review the minutes and evidence that was presented to the Grand Jury of a firearm, retrieved in the grass, and a indictment that has no grand jury foreman's signature in essence is a "faulty indictment" since there is a big black marker for the Grand Jury foreman's signature and a indictment that has no "secrecy declaration" or is sealed, (Per Fed. R. Crim. P.) The fact that "fraud and deception" may have been carried out at said Grand Jury, is all the more reason for the defendant be afforded

2 of 4

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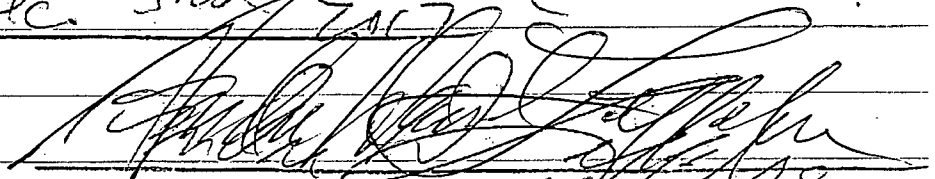
Chance To Review in The up-
coming challenge, which may
carry "FRAUD and deception"
charges against The Depart-
ment of public safety (DPS)
and all involved who did
knowingly and intentionally
commit said acts
For stated reason(s). The
defendant seeks said "order"
of Review, To be Granted,
To Resolve any possibility of
"FRAUD" committed before and
to the Grand Jury.
Document declared under
The penalty of perjury, and
executed in true correct
and complete form and copy
Dec. 3rd 2017


ANDRE DAVIS
Petitioner / PRO Se
90754708 (USP Atlanta)
PO Box 150160
Atlanta, GA.

Certificate of Service

D

on The 5th day of Dec. 2017
The Defendant ANDRE D. LEBRE
did place in the U.S. mail a
motion/ Petition for the review of
GRAND Jury minutes/ evidence
2 copies, one (1) original address
ed to The United States District
Court Southern District of TEXAS
P.O. BOX 61010, HOUSTON TEXAS 77208
via SMH-SOP Team (Mrs Lewis/
Mrs Campbell), Declared under
the penalty of perjury, is in
also True, correct and complete
form, and nature, of signature,
executed Dec. 3rd, 2017



ANDRE D. LEBRE
% 02897078 (WP Atlanta)
P.O. Box 150160
Atlanta, GA.
30315

ENTERED

December 15, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF AMERICA

v.

ANDRE DAVID LEFFEBRE.

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CRIMINAL ACTION No. G-05-009

D

ORDER

Defendant's *pro se* motion to review the 2005 grand jury minutes in this closed criminal case (Docket Entry No. 179) is **DENIED**.

Signed at Houston, Texas, on this the 14th day of December, 2017.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

E

HEARING AND COURT'S RULING ON
ADMISSIBILITY OF 404(b) EVIDENCE

(Outside the presence of the jury.)

THE COURT: On the record, for plenary hearing in the case now on trial from the Government?

MR. MAGNESS: Your Honor, the Government would like to introduce into evidence, I believe, Government's Exhibit 15, which is a judgment of a prior conviction of the defendant under 404(b). The prior conviction is for being a convicted felon in possession of a firearm. It is a conviction out of Beaumont, B-90-31-CR, in the United States District Court, Eastern District of Texas.

The defense in opening and through cross-examination has basically been making the claims that it's not a knowing possession, that it's an accident or a mistake. And I believe even implicitly in opening -- I don't know if he actually said it -- but implicitly I believe he's going to make the argument that he knew he was a convicted felon, we stipulated to that so he knew he shouldn't have a gun while he had a gun.

We would offer that conviction into evidence, not to prove the defendant's bad character, but to prove that it wasn't a mistake, that it wasn't an accident and that it was knowing. And we also believe that it's more probative than prejudicial because of the claims that have been made throughout the trial.

THE COURT: Okay. Response.

MR. BERG: Response, well -- no. My argument is that

1 the Government has to prove knowing possession beyond a
2 reasonable doubt based on the stipulations that we've done as
3 to the fact that my client is a felon and the stipulation that
4 the weapon is a firearm that traveled through interstate
5 commerce. The only element that is left for the jury to
6 determine is knowing possession. And our claim is that the
7 Government does not have sufficient evidence to prove it. It
8 is simply they've alleged it. They've got to prove it. I'm
9 not saying mistake, accident, any of those things. We do not
10 intend to put on any evidence through or suggest mistake and
11 inadvertent possession. We claim it's not his and he never
12 knew it was there.

13 They want to introduce a conviction that is 16 years
14 old. They've got no facts underlying that conviction to show
15 any similarity with the circumstances in this case. If you
16 look at the *Beechum* case, which is a Fifth Circuit guidance on
17 how to do the running on the record, among the factors that
18 you have to look for are proximity in time because the further
19 away in time, the less probative it is in comparison to its
20 prejudicial weight, similarity and, of course, they proffered
21 no evidence as to the underlying facts, only the fact of
22 conviction. And it's their burden to establish that.

23 So I don't think that they get over the requirement
24 in 404(B) that its probative nature is -- outweighs inherently
25 its prejudicial effect that you know it's got to have in front

1 of this jury in this case.

2 MR. MAGNESS: May I respond?

3 THE COURT: Sure.

4 MR. MAGNESS: As far as the staleness of the
5 conviction, the only reason the conviction is 15 years old is
6 because he got 15 years in the federal penitentiary and a
7 month after he gets out he possesses another gun. So the next
8 opportunity he had to do it, he did it. And as far as the
9 facts, the underlying facts, it's my understanding when you
10 have a conviction we're not allowed to go into the underlying
11 facts. I mean, the similarity is it's a felon in possession
12 of a firearm. And this is also a felon in possession of a
13 firearm. The similarity goes towards inclusion in 404(b) and
14 not exclusion. If it were a murder conviction, I certainly
15 wouldn't be able to get it in.

16 MR. BERG: In response, 404(b) prohibits under facts
17 under conduct convictions to the extent that they demonstrate
18 other acts or conduct. But certainly it is the underlying
19 conduct. It's like the M.O. evidence. It's the similarity of
20 conduct which makes it more likely that a person acted this
21 way, the same way he acted the last time. It's not merely the
22 fact of conviction. It is the similarity of the conduct.

23 And they've proffered no evidence to show that the
24 circumstances 16 years ago are the same -- actually the
25 offense occurred in 1989 -- to show that that offense is in

1 any way like this one whether a handgun or long gun or what.

2 THE COURT: The defense in this case, being up to
3 your usual standards of superbness has been the suggestion
4 that in the vast expanse of I-45, which I had an opportunity
5 to view up close for 19 hours during the Rita diaspora, he
6 coincidentally picked the one spot to run across the highway
7 to fall into a -- which is about as cool of a defense as I
8 ever heard in my life and you've done about as good a job in
9 presenting it as anyone I've ever met. You can make more out
10 of no ear than anybody I've ever seen in my life. It's really
11 fun to have you down here.

12 Look, that notwithstanding, and my unabashed
13 admiration of you to the side, I'm going to allow it with a
14 cautionary instruction.

15 Anything else?

16 MR. MAGNESS: No, just the mechanics of introducing
17 it. They've stipulated in writing that it is his conviction.
18 I mean, they still want their objection, but it's not --

19 THE COURT: Oh, I understand. And objections are all
20 timely noted for appellate scrutiny purposes in all respects,
21 but I'm going to allow it with an appropriate cautionary
22 instruction.

23 MR. BERG: Okay. I do request under *Beechum* that you
24 state your weighing of probative versus prejudicial.

25 THE COURT: Well, I think that I am persuaded by the

1 fact that the guy gets out of prison and a month later he is
2 alleged to have a gun. I think that it's so implausible to
3 suggest otherwise that this has at least the probative value
4 of demonstrating an avoidance of mistake inadvertence, that
5 sort of thing. And I'm not suggesting that somebody slipped a
6 throw down giant pistol in his pants while he was at the
7 U-Tote-Em or something. But I think the jury is entitled to
8 understand that if he had it, it was by intention and design
9 as opposed to mistake or inadvertence and I'm going to allow
10 it.

11 MR. MAGNESS: Thank you, Your Honor.

12 THE COURT: All right. Thank you all very much.

13 We'll get started in a minute.

14 You have one witness?

15 MR. MAGNESS: One witness and just these
16 stipulations.

17 THE COURT: All right. Off the record.

18 (Discussion was held off the record.)

19 (Outside the presence of the jury.)

20 THE COURT: Back on the record in plenary session
21 Part Duh. What is your concern now?

22 MR. MAGNESS: The judgment, Government's Exhibit 15
23 we were discussing on what we believe should absolutely be
24 admissible and what may be extraneous. The first two pages
25 are an issue. It's a seven-page document. The last, like,

**Additional material
from this filing is
available in the
Clerk's Office.**