United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 6, 2020

Before:

William J. Bauer, *Circuit Judge*
Michael B. Brennan, *Circuit Judge*
Michael Y. Scudder, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	] Appeal from the United] States District Court for] the Northern District of
No. 20-1346 v.	] Illinois, Eastern Division.]
MELVIN T. BELL, Defendant-Appellant.	] No. 1:13-cr-00949]] Virginia M. Kendall,] Judge.

ORDER

On consideration of the papers filed in this appeal and review of the short record,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

Ordinarily, a defendant in a criminal case may not take an appeal until a judgment of conviction and sentence has been entered. *Flanagan v. United States*, 465 U.S. 259, 263 (1984); *United States v. Kaufmann*, 951 F.2d 793 (7th Cir. 1992).

Defendant Melvin Bell has been convicted of federal crimes[3] (AFTER HAVING BEEN ACQUITTED FIRST, MIDTRIAL, FOR THAT SAME CHARGE.) But he has not been sentenced. Sentencing is currently set for May 20, 2020. As such, defendant's case is not at an end, and there is no final judgment.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. Melvin Bell, *Defendant.*	No. 13 CR 949-1 Judge Virginia M. Kendall

ORDER

A federal grand jury charged Defendant Melvin Bell with four counts of mail fraud. Count One charged him with a mail fraud scheme and Counts Two, Three and Four charged him with substantive counts of mail fraud alleging three different mailings, each in violation of 18 U.S.C. § 1341. Specifically, Bell was charged with setting forth a scheme to defraud (Count One) and three separate counts of substantive mail fraud (Counts 2, 3, 4). Bell proceeded to trial on January 23, 2017. Due to a witness's equivocal testimony, the government voluntarily moved to dismiss Count Three of the Indictment prior to the case going to the jury, but presented evidence on Counts One, Two, and Four. (Dkt. 350). Bell's attorney did not object to the dismissal of the count. The jury returned guilty charges on Counts One, Two and Four and was not given an opportunity to return a verdict on Count Three. (Dkt. 351). Defendant Bell now moves to reconsider this Court's denial of his motion to dismiss based on double jeopardy. (Dkts. 575, 576). For the following reasons, the motions to dismiss based on double jeopardy are denied.

Double jeopardy is intended to protect a defendant against (1) a second prosecution for the same offense following an acquittal; (2) a second prosecution for the same offense following a conviction; and (3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Double jeopardy only applies, however, if there has been a resolution of the case, such as an acquittal or verdict. *U.S. v. Morgan*, 929 F.3d 411, 421 (7th Cir. 2019). To decipher what a jury has necessarily decided, courts should examine the record of the prior proceeding, "taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager*

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v. U.S., 557 U.S. 110, 120 (2009) (quoting *Ashe v. Swenson,* 397 U.S. 436, 444 (1970)).

To be successful in his motion, Bell must show that there was a resolution of his case and that he is facing a second prosecution for the same offence. *Brown*, 432 U.S. at 165. He has failed to do so. Bell's motion repeatedly misstates the record. Bell's motion is premised on the idea that he was acquitted on Count Three. For example, he writes "[a]fter the dismissal of the third count, the Government issued a second indictment [and] moved forward in bringing the case to the jury and relitigating the same theory and issue for counts one, two, and four, on which Bell has already been acquitted." (Dkt. 575 at 7).

As an initial matter, the government was well within the bounds of Federal Rule of Criminal Procedure 48(a) when it voluntarily dismissed Count Three with the Court's leave and its dismissal does not constitute an acquittal of the remaining charges. "The leave of court requirement allows the courts to exercise discretion over the propriety of a prosecutorial motion to dismiss.... [T]he primary purpose of the rule is protection of a defendant's rights ... to prevent harassment of a defendant by charging, dismissing and recharging without placing a defendant in jeopardy." *United States v. Novak*, 2014 WL 3882963, *3 (N.D. Ill Aug. 7, 2014) (citing *United States v. Olson,* 846 F.2d 1103, 1113 (7th Cir. 1988)). "The key factor in a determination of prosecutorial harassment is the property ... of the Government's efforts to terminate the prosecution–the good faith ... of the Government in moving to dismiss.' " *Olson,* 846 F.2d at 1114 (quoting *United States v. Salinas,* 693 F.2d 348, 351 (5th Cir. 1982)). The transcript shows that the government presented a written motion to dismiss Count Three before the jury deliberated on it, the Court exercised its discretion to grant it, and Bell did not object to this motion. (Dkt. 409 at 1504). The government's motion here was due to the equivocal testimony of a witness and they have not brought new charges against Bell for this Count. This indicates that it was a good-faith motion and was not intended to harass Bell in any way. In fact, it was the ethical option to take in light of the change in testimony as to that count.

Additionally, contrary to what Bell writes, there was no second indictment and he was never acquitted on Counts One, Two, and Four. In actuality, Bell was found guilty of all three. (Dkt. 351). Even if the government dismissed Count Three, it was still proper to continue prosecuting the remaining three counts as "[i]t is well settled that 'each mailing in furtherance of a scheme to defraud is a separate offense under 18 U.S.C. § 1341 even if there is but one scheme involved." *United States v. Ledesma*, 631 F.2d 670, 679 (7th Cir. 1980) (citations omitted). This is so because "[u]nder 18 U.S.C. § 1341, it is not the plan or scheme that is punished, but rather each individual use of the mails in furtherance of the alleged fraud..." *United States v. Gardner*, 65 F.3d 82, 85-86 (8th Cir. 1995).

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Here, while Count Three was dismissed by the government, Bell was found guilty by a jury on Counts One, Two and Four. Each of these specific charges involved distinct facts that were different from those contained in the other counts. Individual mail fraud counts do not constitute double jeopardy. *See U.S. v. Peugh*, 675 F.3d 736, 740 (7th Cir 2012) (discussing how an indictment is multiplicitous, and a violation of the double jeopardy clause, if it charges a single offense in more than one count), *rev'd on other grounds,* 569 U.S. 530 (2013). None of those counts were prosecuted before; and none of these counts had received a not-guilty determination from any jury. This does not meet the standard for double jeopardy where "two offenses are 'the same' for double jeopardy purposes unless each requires proof of an additional fact that the other does not." *Jeffers v. United States*, 432 U.S. 137, 151 (1977).

For the foregoing reasons, Melvin Bell has failed to show that he has been subjected to double jeopardy. His motions to reconsider based on double jeopardy is therefore denied. No further briefing on this issue is permitted.

Virginia M. Kendall
United States District Judge

Date: February 20, 2020

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	USCA No. 20-1346
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Northern District of Illinois,
v.	)	Eastern Division
	)	
MELVIN BELL,	)	USDC No. 13-cr-949
	)	
Defendant-Appellant.	)	Judge Virginia Kendall

RESPONSE TO DEFENDANT-APPELLANT'S JURISDICTIONAL MEMORANDUM

The UNITED STATES OF AMERICA, by its attorney, JOHN R. LAUSCH, JR., United States Attorney for the Northern District of Illinois, respectfully submits this Response to Defendant-Appellant's Jurisdictional Memorandum, pursuant to this Court's order of March 16, 2020, as follows.

1. On December 11, 2013, a federal grand jury returned an indictment charging defendant with four counts of mail fraud, in violation of Title 18, United States Code, Section 1341. R. 1.[1] The indictment alleged that defendant engaged in a scheme to defraud, and each of the four counts were executions of the charged scheme.

[1] Citations to the Court of Appeals docket are to "Dkt.," and citations to the district court docket are to "R."

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2. On January 23, 2017, the parties proceeded to trial. R. 339. At trial, the government voluntarily moved to dismiss Count Three of the indictment; on February 1, 2017, the jury returned a verdict convicting defendant of the remaining three counts. R. 350.

3. After the trial—on November 21, 2019—defendant orally moved for acquittal based on Double Jeopardy. R. 566. Defendant argued that the government's voluntary dismissal of Count Three somehow barred it, under the Double Jeopardy Clause, from proceeding to verdict on the other three counts of the indictment. *Id.* The district court denied the motion. *Id.* Defendant sought reconsideration (R. 575), which the district court denied on February 20, 2020 (R. 582).

4. Defendant's case remains pending before the district court. A sentencing hearing is scheduled for April 7, 2020. R. 597.

5. On February 26, 2020, defendant filed a notice of interlocutory appeal. R. 586.

6. On February 28, 2020, this Court issued an Order directing defendant to file a brief memorandum, on or before March 11, 2020, stating why the appeal should not be dismissed for lack of jurisdiction. Dkt. 3. Defendant filed a jurisdictional memorandum addressing why his appeal

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should not be dismissed for lack of jurisdiction (Dkt. 4); the memo was dated March 10, 2020, and it was received and filed on March 13, 2020. This Court directed the government to respond by March 23, 2020, addressing the jurisdictional issued raised in the Court's Order of February 28, 2020. Dkt. 7.

7. Title 28, United States Code, Section 1291 grants this Court jurisdiction to review all "final decisions" of district courts. *See* 28 U.S.C. 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]"). A final decision "is normally deemed not to have occurred until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (internal quotation marks and citations omitted). "In criminal cases, this prohibits appellate review until after conviction and imposition of sentence." *Id.* In this case, defendant has not yet been sentenced. Pursuant to the generally applicable jurisdictional rules (subject to a few narrow exceptions), defendant's appeal—which is being brought prior to the imposition of a sentence—is not based on a "final decision."

8. There are a few narrow circumstances in which appellate review is permitted prior to a final decision. *See Cohen v. Beneficial Industrial Loan*

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Corp., 337 US 541 (1949); *see also Midland Asphalt Corp.* at 799-800. One such exception permits the immediate appeal of a pretrial denial of a motion to dismiss based on Double Jeopardy grounds. *Abney v. United States*, 431 U.S. 651 (1977). *Abney* reasoned that "pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291," because the constitutional protection against Double Jeopardy not only protects against being twice convicted for the same offense, but also against being twice put in jeopardy for the same offense. *Id.* at 662; *see also United States v. Kashamu*, 656 F.3d 679, 681 (7th Cir. 2011) ("Normally . . . the denial of a motion to dismiss an indictment cannot be appealed immediately . . . [b]ut there is an exception when the ground is double jeopardy . . . because the double jeopardy clause protects a defendant against being retried, and not just against being convicted").

9. The collateral order exception for Double Jeopardy, however, applies only to *pretrial* motions that claim a constitutional bar to being tried twice for the same crime; this is because the motion involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated *before trial.*" *Midland Asphalt Corp.* at 799 (emphasis added). The same logic does not extend to a post-trial motion that seeks acquittal on Double

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Jeopardy grounds, as defendant did here. At the time he raised a Double Jeopardy concern, he had gone to trial and been convicted, and therefore an immediate appeal is not needed to protect defendant against improper retrial.

10. Because there is no final judgment, and because *Abney's* collateral order exception for pretrial motions to dismiss based upon double jeopardy does not apply to defendant's post-trial motion for acquittal, this Court lacks jurisdiction to consider defendant's appeal, and his appeal should be dismissed.

Respectfully Submitted,

JOHN R. LAUSCH, JR.
United States Attorney

By: /s Ankur Srivastava
ANKUR SRIVASTAVA
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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2020, I electronically filed the foregoing RESPONSE TO DEFENDANT-APPELLANT'S JURISDICTIONAL MEMORANDUM with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have caused the foregoing document to be delivered by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days to the following non-CM/ECF participants:

Melvin Bell, Inmate # 22485-075
Metropolitan Correctional Center
71 West Van Buren Street
Chicago, Illinois 60621

/s/ Ankur Srivastava
ANKUR SRIVASTAVA
Assistant United States Attorney
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(312) 353-3148

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

/s/ Virginia M. Kendall
Hon. Virginia M. Kendall
United States District Judge
Date: January 30, 2019

Footnotes

UNITED STATES V. BELL, No. 13-CR-949, 2019 U.S. DIST LEXIS 14583, (7th DIST. 2019)

1

Turner dealt with both the mail fraud and wire fraud statutes. These statutes-18 U.S.C. § 1341 and § 1341, respectively-are worded almost identically. Therefore, "[c]ases construing the mail-fraud statute are equally applicable to cases involving violations of the wire-fraud statute," and vice versa. *Turner*, 551 F.3d at 666, n.4 (citing *United States v. Leahy*, 464 F.3d 773, 786 (7th Cir. 2006)); *see also* United States v. Dooley, 578 F.3d 582, 587, n.2 (7th Cir. 2009).

2

Hernandez claims the Government cannot rely on these non-charged mailings to prove the knowledge element, noting the Government dismissed the fourth charge against Defendants because it could not prove Tapia ever received the membership packet in the mail and, therefore, "could not prove that the specific mailing furthered any scheme if Tapia never received it in the mail." (Dkt. 359 at 3). The difference here, of course, is that the Government relied on the non-charged mailings as proof of the knowledge element-*i.e.*, that Hernandez knew WNT used the mail in the ordinary course of business-and not to show that any specific mailing underlying the three charges against Hernandez was made. In fact, the Government sufficiently established that Ramirez, Lopez and Gonzalez received a membership packet in the mail through each victim's own testimony. There was nothing improper in the Government relying on the non-charged mailings as circumstantial evidence that Hernandez foresaw those mailings being made.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CASE: UNITED STATES V. BELL, ET AL
DOCKET/CASE NO. 13-CR 00949
VOLUME 8-A - TRANSCRIPT OF PROCEEDINGS - JURY TRIAL
VENUE: CHICAGO, ILLINOIS
DATE: FEBRUARY 1, 2017
TIME: 9:06 A.M.

DOCKET # 409 AT 1509: 7-9

[THE COURT:]
7: "SO THE GOVERNMENT'S NEW PROPOSAL ASSUMES THAT WE'VE
8: RENUMBERED THE INDICTMENT, AND IT TALKS ABOUT COUNTS ONE
9: THROUGH THREE."

I AFFIRM UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THIS IS A TRUE AND ACCURATE COPY OF COURT TRANSCRIPT DESCRIBED ABOVE. THIS IS THE EXACT POINT IN TIME WHERE RESPONDENT RETRIED PETITIONER A SECOND TIME FOR THE SAME OFFENSE AFTER THE ORIGINAL JEOPARDY HAD TERMINATED.

EXECUTED ON: MAY 3, 2020

/S/

APPENDIX E

1) RULE 48(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE:
THE ATTORNEY GENERAL OR THE UNITED STATES ATTORNEY MAY BY LEAVE OF COURT FILE A DISMISSAL OF AN INDICTMENT, INFORMATION OR COMPLAINT AND THE PROSECUTION SHALL THEREUPON TERMINATE. SUCH A DISMISSAL MAY NOT BE FILED DURING THE TRIAL WITHOUT THE CONSENT OF THE DEFENDANT.

2) 18 U.S.C. §1341
FOR THE PURPOSE OF EXECUTING THE SCHEME TO DEFRAUD, KNOWINGLY CAUSED TO BE DELIVERED BY U.S. MAIL, ACCORDING TO THE DIRECTION THEREON, AN EVELOPE CONTAINING SIGNED COPIES OF MEMBERSHIP DOCUMENTS FROM WASHINGTON NATIONAL TRUST, THAT ENVELOPE BEING ADDRESSED TO INDIVIDUAL A, B, C, D IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1341.

3) 28 U.S.C §1291
"THE COURT OF APPEALS . . . SHALL HAVE JURISDICTION TO REVIEW APPEALS FROM ALL FINAL DECISIONS OF THE DISTRICT COURTS OF THE UNITED STATES . . ."

4) DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT:
"NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB . . ."

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5) ABNEY RULE: 431 US AT 663

"A DEFENDANT MAY SEEK IMMEDIATE APPELLATE REVIEW OF A DISTRICT COURT'S REJECTION OF HIS DOUBLE JEOPARDY CLAIM IS BASED ON SPECIAL CONSIDERATIONS PERMEATING CLAIMS OF THAT NATURE WHICH JUSTIFY A DEPARTURE FROM THE NORMAL RULE OF FINALITY."

6) KEPNER PRINCIPLE: U.S. V. WILSON, 420 U.S. 332, FOOTNOTE 16

"ALTHOUGH KEPNER TECHNICALLY INVOLVED ONLY ONE PROCEEDING, THE SUPREME COURT REGARDED THE SECOND FACTFINDING AS THE EQUIVALENT OF A SECOND TRIAL, AND HAS, IN SUBSEQUENT CASES, TREATED THE KEPNER PRINCIPLE AS BEING ADDRESSED TO THE EVIL OF SUCCESSIVE TRIALS."

7) DUE PROCESS = RULE OF FINALITY: 434 U.S. AT 503-505

"BECAUSE JEOPARDY ATTACHES BEFORE THE JUDGMENT BECOMES FINAL, THE CONSTITUTIONAL PROTECTION ALSO EMBRACES THE DEFENDANT'S VALUED RIGHT TO HAVE HIS TRIAL COMPLETED BY A PARTICULAR TRIBUNAL." CONSEQUENTLY, AS A GENERAL RULE, THE PROSECUTION IS ENTITLED TO ONE, AND ONLY ONE, OPPORTUNITY TO REQUIRE AN ACCUSED TO STAND TRIAL.

8) EVANS V. MICHIGAN, 568 U.S. 313, 318-19 (2013)

"OUR CASES HAVE DEFINED AN ACQUITTAL TO ENCOMPASS ANY RULING THAT THE PROSECUTION'S PROOF IS INSUFFICIENT TO ESTABLISH CRIMINAL LIABILITY FOR AN OFFENSE."

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9) STROUD v. U.S., 251 U.S. 15 (1919):

"THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY IN CORPORATED IN THE PHRASE OF THE 5th AMENDMENT, "NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE BE TWICE PUT IN JEOPARDY OF LIFE," IS A PROHIBITION DIRECTED TO THE COURTS OF THE UNITED STATES, WHICH OPERATES TO DEPRIVE THEM OF JURISDICTION TO TRY ANY PERSON MORE THAN ONCE FOR HIS LIFE FOR THE SAME OFFENSE, AND NEITHER THE CONSENT OF THE DEFENDANT NOR THE ACTION OF ANY DEPARTMENT OF THE GOVERNMENT CAN OPERATE TO CONFER UPON THE COURTS A JURISDICTION THUS DENIED BY THE ORGANIC LAW."

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