APP A

front and back

Barnes v. United States

United States Court of Appeals for the Eleventh Circuit

September 15, 2020, Filed

No. 20-11839-J

Reporter
2020 U.S. App. LEXIS 29342 *

MARCUS ANTHONY BARNES, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.

Subsequent History: Reconsideration denied by Barnes v. United States, 2020 U.S. App. LEXIS 34455 (11th Cir. Ga., Oct. 29, 2020)

Prior History: [*1] Appeals from the United States District Court for the Northern District of Georgia.

Barnes v. United States, 2020 U.S. Dist. LEXIS 75882 (N.D. Ga., Apr. 30, 2020)

Counsel: Marcus Anthony Barnes, Petitioner - Appellant, Pro se, Atlanta, GA.

For United States of America, Respondent - Appellee: Dashene Cooper, Assistant U.S. Attorney, Jane Elizabeth McBath, U.S. Attorney Service - Northern District of Georgia, U.S. Attorney's Office, Atlanta, GA.

Judges: Jill Pryor, UNITED STATES CIRCUIT JUDGE.

Opinion by: Jill Pryor

Opinion

ORDER:

Marcus Barnes, a federal prisoner serving a 360-month sentence for drug and gun offenses, moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate, in which he had claimed that: (1) appellate counsel was ineffective for not challenging the denial of his motions for judgment of acquittal; (2) appellate counsel was ineffective for not challenging the district court's denial of his motions to suppress evidence seized from his car and his girlfriend's home; and (3) the evidence was insufficient.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional [*2] claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quotation marks omitted). In a § 2255 proceeding, we review legal issues *de novo* and factual findings for clear error. *Thomas v. United States*, 572 F.3d 1300, 1303 (11th Cir. 2009).

Here, the district court did not err by finding that Ground 1 failed, as there was sufficient evidence

from which a jury could conclude that Mr. Barnes was guilty, and, therefore, appellate counsel was not required to challenge that non-meritorious issue. *See Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There also was no merit to Ground 2, as the record showed that evidence from Mr. Barnes's car and his girlfriend's home was not seized in violation of his Fourth Amendment rights, and, therefore, it would have been futile for appellate counsel to have challenged the motions to suppress. *See id.*

Moreover, the district court did not err by finding that Barnes had procedurally defaulted Ground 3, as he failed to challenge on direct appeal the sufficiency of the evidence, or to establish cause and prejudice, or actual innocence, to overcome the default. *See Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004). Finally, Mr. Barnes has not raised any arguments that would lead this Court to believe that the district court committed *Clisby*, or any other procedural, error. *See Clisby v. Jones*, 960 F. 2d 925 (11th Cir. 1992) (*en banc*).

Accordingly, [*3] Mr. Barnes's motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed *in forma pauperis* on appeal is DENIED AS MOOT.

/s/ Jill Pryor

UNITED STATES CIRCUIT JUDGE

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App B front and back

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARCUS ANTHONY BARNES, Movant,	:	
v.	:	CRIMINAL ACTION NO. 1:14-CR-0268-SCJ
UNITED STATES OF AMERICA, Respondent.	:	

ORDER

Presently before the Court is the Magistrate Judge's Report and Recommendation (R&R) recommending that the instant motion to vacate brought pursuant to 28 U.S.C. § 2255 be denied. [Doc. 272]. Movant has filed his objections in response to the R&R. [Doc. 276, as supplemented 277, 278].

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a *de novo* basis and any non-objected portion under a "clearly erroneous" standard. "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988).

On March 8, 2016, a jury of this Court found Movant guilty of possession with intent to distribute at least 500 grams of cocaine, possession of a firearm in furtherance of a drug trafficking crime, possession of firearms by a convicted felon, and possession of firearms not registered to him. [Doc. 168]. This Court imposed a combined sentence of 360 months imprisonment. [Doc. 228]. On October 30, 2018, the United States Court of Appeals for the Eleventh Circuit affirmed Movant's convictions and sentences. United States v. Barnes, 740 F. App'x 980 (11th Cir. 2018). Movant next timely filed his § 2255 motion raising three claims for relief.

In the R&R, the Magistrate Judge recommends denying the § 2255 motion. The Magistrate Judge concluded that Movant's first ground for relief, in which he raised a claim that the appellate counsel was ineffective for failing to challenge the sufficiency of the evidence, was unavailing. The Magistrate Judge concluded that the evidence at Movant's trial was sufficient to sustain the verdict, and appellate counsel was thus not deficient for failing to raise the claim.

In his second claim, Movant contends that appellate counsel was ineffective for failing to raise a claim that the evidence seized from the car he was driving and from his girlfriend's home—drugs, equipment commonly used by drug dealers, guns, ammunition, and silencers—should have been suppressed by this Court. The Magistrate Judge concluded that Movant failed to establish that the underlying claim

is viable. Movant challenged this evidence before his trial, and this Court concluded that the evidence was admissible because the police had probable cause for Movant's traffic stop because he was speeding; Movant voluntarily consented to the search of the car; police had probable cause to search the home; and, in any event, the police had a valid search warrant for the home. The Magistrate Judge concluded that Movant had failed to raise an argument that appellate counsel could have raised on appeal that this Court had not already discounted. Accordingly, Movant failed to demonstrate that his appellate counsel was ineffective.

In his final claim, Movant challenges the sufficiency of he evidence. Movant failed to raise this claim on appeal, and the Magistrate Judge concluded that it is procedurally defaulted under § 2255 review. The Magistrate Judge further concluded that Movant failed to establish either cause and prejudice or actual innocence to overcome the default because Movant failed to allege an external factor prevented him from raising the claim, and, as discussed above, appellate counsel was not ineffective for failing to raise the claim. This Court also points out that, as is discussed below, a merits review of the claim demonstrates that the evidence was sufficient to sustain the jury's verdicts.

In his objections, Movant reargues his sufficiency of the evidence claim and his claim that the evidence seized from the car and the home should have been suppressed.

However, all of those arguments have already been considered and rejected by the Magistrate Judge and this Court. See Chester v. Bank of Am., N.A., 1:11-CV-1562-MHS, 2012 WL 13009233 at *1 (N.D. Ga. Mar. 29, 2012) ("[G]eneral objections to a magistrate judge's report and recommendation, reiterating arguments already presented, lack the specificity required by Rule 72 and have the same effect as a failure to object.").

With respect to his claim that the evidence was insufficient at his trial, this Court further notes that Movant cannot establish an entitlement to relief on that claim by pointing to piecemeal inconsistencies and exculpatory evidence in the trial record. Rather, the sufficiency of the evidence is determined by looking at the entire record. The undersigned both sat through Movant's trial and, in reviewing this § 2255 motion, reviewed relevant portions of the trial transcript. Based on that review, this Court now concludes—for the third time—that the Government's evidence was clearly sufficient for the jury to find that Movant possessed the cocaine and gun found in the car that he was driving and that Movant possessed the guns, ammunition and silencers found in his girlfriend's home.

With respect to his arguments that the evidence should have been suppressed, this Court carefully weighed that question prior to Movant's trial, and Movant has not raised any new evidence or argument that causes this Court to doubt its prior

conclusions. In summary, this Court concludes that Movant has failed to demonstrate that he is entitled to relief under § 2255.

Accordingly, the R&R, [Doc. 272], is hereby **ADOPTED** as the order of this Court, and the pending § 2255 motion, [Doc. 253], is **DENIED**. The Clerk is **DIRECTED** to close Civil Case Number 1:19-CV-4482-SCJ.

This Court further agrees with the Magistrate Judge that (1) "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. § 2255(b), and no hearing is required, and (2) Movant has failed to make a substantial showing of the denial of a constitutional right, and a Certificate of Appealability is **DENIED** pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED, this 30th day of April, 2020.

s/Steve C. Jones
STEVE C. JONES
UNITED STATES DISTRICT JUDGE

App C front and backs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARCUS ANTHONY BARNES,	::	MOTION TO VACATE
Movant,	::	28 U.S.C. § 2255
	::	
v.	::	CRIMINAL NO.
	::	1:14-CR-0268-SCJ-RGV-1
UNITED STATES OF AMERICA,	::	
Respondent.	::	CIVIL ACTION NO.
	::	1:19-CV-4482-SCJ-RGV

ORDER AND FINAL REPORT AND RECOMMENDATION

This matter has been submitted to the undersigned Magistrate Judge for consideration of Marcus Anthony Barnes' pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, [Doc. 253], the government's response, [Doc. 266], Barnes' motion for an extension of time to file his reply, [Doc. 270], and his reply, [Doc: 271]. Barnes' motion for an extension of time, [Doc. 270], is **GRANTED**, and his reply is deemed timely filed. For the reasons that follow, it is **RECOMMENDED** that Barnes' § 2255 motion be **DENIED**.

I. PROCEDURAL HISTORY

A federal grand jury in the Northern District of Georgia returned a four-count indictment against Barnes charging him in Count One with possession with intent to distribute at least 500 grams of cocaine, in violation of 21 U.S.C. §§ 841(a)(1)

and (b)(1)(B)(ii); in Count Two with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i); in Count Three with possession of firearms by a convicted felon, in violation of 18 U.S.C. § 922(g)(1); and in Count Four with possession of firearms not registered to him, in violation of 26 U.S.C. § 5861(d). [Doc. 1]. Barnes pleaded not guilty, [Doc. 6], and proceeded to a five-day jury trial represented by his retained counsel, Andrew C. Hall, [Docs. 160-63; 166; 204-08]. The jury found Barnes guilty on all counts. [Doc. 168]. The Court imposed a total sentence of 360 months of imprisonment. [Doc. 228].

Barnes, represented by new court-appointed counsel Adam Marshall Hames, appealed, arguing that the Court violated his Sixth Amendment right to counsel of his choice by not providing him a meaningful opportunity to obtain new retained counsel. Br. of Appellant at 6-29 (June 25, 2018), United States v. Barnes, 740 F. App'x 980 (11th Cir. 2018) (per curiam) (No. 18-10702-E), 2018 WL 3140513, at *6-29. On October 30, 2018, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court. Barnes, 740 F. App'x at 981.

Barnes timely filed this § 2255 motion, arguing that Hames provided him ineffective assistance by not appealing the denial of his motion for judgment of acquittal at the end of the evidence and his motion to suppress evidence seized

during a traffic stop and that there was insufficient evidence to support his convictions. [Doc. 253 at 5-7; Doc. 253-1 at 5, 12-16; Doc. 253-2; Doc. 268]. The government responds that his first two grounds asserting ineffective assistance of appellate counsel lack merit and that his third ground challenging the sufficiency of the evidence is procedurally barred. [Doc. 266 at 6-13]. Barnes' reply reiterates arguments raised in the brief in support of his § 2255 motion. [Doc. 271].

II. DISCUSSION

A federal prisoner may file a motion to vacate his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "[T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982) (footnote omitted). An evidentiary hearing is not warranted if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Based on the record before the Court, the undersigned finds that an evidentiary hearing is not required in this case. See Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991) (noting that, although prisoner seeking collateral relief is

entitled to evidentiary hearing if relief is warranted by facts he alleges, which court must accept as true, hearing is not required if record conclusively demonstrates that no relief is warranted).

A. Grounds One and Two: Assistance of Appellate Counsel

The standard for evaluating ineffective assistance of counsel claims is set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). The analysis is two-pronged. However, a court need not address both prongs "if the defendant makes an insufficient showing on one." Id. at 697. A defendant asserting a claim of ineffective assistance of counsel must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690. Second, a defendant must demonstrate that counsel's unreasonable acts or omissions prejudiced him. In order to demonstrate prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

"Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under Strickland." Dell v. United States, 710 F.3d 1267, 1273 (11th Cir. 2013) (citations omitted). Thus, to succeed on a claim of ineffective assistance of appellate counsel, a defendant must demonstrate

"that counsel's performance was so deficient that it fell below an objective standard of reasonableness . . . [and] that but for the deficient performance, the outcome of the appeal would have been different." Ferrell v. Hall, 640 F.3d 1199, 1236 (11th Cir. 2011) (citations omitted). As to the prejudice prong, a defendant must show a reasonable probability that, but for appellate counsel's deficient performance, the appellate court would have granted him a new trial. Id. "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (internal quotation marks and citation omitted).

1. Motion for Acquittal

At the conclusion of the government's case, Barnes moved for a judgment of acquittal, arguing that the government had failed to prove that he knowingly possessed the cocaine and firearms found in an Impala and at a residence. [Doc. 206 at 100-01]. The Court denied the motion. [Id. at 102]. Barnes renewed his motion at the close of all the evidence, reiterating the argument that he did not knowingly possess the cocaine and firearms. [Doc. 207 at 62-63]. The Court again denied the motion. [Id. at 63].

A district court may grant a motion for a judgment of acquittal at the conclusion of the government's case if "the evidence is insufficient to sustain a

conviction." Fed. R. Crim. P. 29(a). The court views "the evidence in the light most favorable to the government and draw[s] all reasonable factual inferences in favor of the verdict." United States v. Stahlman, 934 F.3d 1199, 1226 (11th Cir. 2019) (citation omitted). The court will not overturn the verdict "if there is 'any reasonable construction of the evidence that would have allowed the jury to find the defendant guilty beyond a reasonable doubt.'" Id. (citation omitted).

The evidence presented at trial, viewed in the light most favorable to the government, showed that, on March 26, 2014, Officer Ronnie Viar stopped a white Impala driven by Barnes for speeding and found a kilo of cocaine, a firearm, and ammunition hidden in the vehicle. [Doc. 205 at 15, 17, 21-24]. Officer Viar also searched a residence at 5706 Mountain Crescent Court, where Barnes stayed overnight three to four times per week, and found silencers and firearms in the attic. [Id. at 29, 32-33, 36-38, 40-43, 217; Doc. 206 at 45]. The evidence further showed that Barnes drove the Impala regularly, [Doc. 206 at 55, 57-58], that he drove it in and out of garages at houses other than his residence, [id. at 24, 37], that packaging material found in the residence was consistent with material used in trafficking drugs such as the cocaine found in the car, [Doc. 205 at 116, 121, 242], and that he used driving techniques consistent with people who are trying to avoid surveillance, [id. at 81, 236-37; Doc. 206 at 18-19]. Additionally, in the attic of the residence

where firearms and silencers were found, officers found a safe Barnes had purchased with his credit card that contained vacuum sealed currency. [Doc. 203-18; Doc. 203-19 at 64; Doc. 205 at 120, 189, 191-95; Doc. 206 at 60-61]. A reasonable construction of this evidence allowed the jury to find that Barnes knowingly possessed both the firearms and the drugs.

Barnes challenges the credibility of the government's witnesses and points to evidence presented at trial that he contends conflicts with the government's evidence. [Doc. 253-2 at 2-14; Doc. 271 at 3-7]. However, the Court "must accept all reasonable inferences and credibility determinations made by the jury . . . and assume[s] the jury made all 'credibility choices . . . in the way that supports the verdict.'" United States v. Garcia-Benites, 720 F. App'x 818, 820 (11th Cir. 2017) (per curiam) (citations omitted). A reasonable fact-finder could determine, based on the government's evidence, that Barnes knowingly possessed the firearms and drugs. As such, appellate counsel's failure to raise this meritless issue did not amount to constitutionally deficient performance or result in prejudice, as Barnes cannot show that there is a reasonable probability that the outcome of his appeal would have been different had counsel appealed the denial of his motion for a judgment of acquittal. Barnes' "disagreement with the jury's verdict does not alone establish that counsel was ineffective because he failed to appeal the denial of the

motion for judgment of acquittal." United States v. Pritchett, Nos. 3:03cr114/RV, 3:06cv284/RV/MD, 2006 WL 3826980, at *8 (N.D. Fla. Dec. 27, 2006), report and recommendation adopted at, *1. Accordingly, Barnes is not entitled to relief on ground one.

2. Motion to Suppress Evidence

Barnes moved to suppress evidence obtained from both the March 26, 2014, traffic stop and the search warrant issued for the residence. [Docs. 24-25]. Following a suppression hearing held on January 30, 2015, and February 6, 2015, [Docs. 64-65], the undersigned recommended that the motions be denied, [Doc. 87]. The District Judge adopted the Report and Recommendation over Barnes' objections. [Docs. 93, 122]. Specifically, the Court found that Officer Viar had probable cause to stop Barnes for speeding, that Barnes' voluntary consent to the search of the vehicle was lawfully obtained, that there was probable cause to search the residence, and that, in any event, a lack of probable cause would not render the evidence inadmissible because the officers acted in reasonable reliance upon a search warrant. [Doc. 122 at 8-25].

In both the brief in support of his § 2255 motion and his reply, Barnes challenges the Court's findings regarding the credibility of the witnesses who testified at the suppression hearing and reiterates arguments that he raised in his

objections. [Doc. 253-2 at 18-31; Doc. 271 at 7-11]. However, the District Judge previously rejected these arguments when denying the motion to suppress, see [Docs. 87, 122], and Barnes "has offered no additional factual or legal arguments that appellate counsel could have made which would have resulted in a reversal of the district court's ruling on the motions to suppress. Counsel is not constitutionally ineffective for failing to pursue non-meritorious issues, . . . and [Barnes] is not entitled to relief [on ground two]." Pritchett, 2006 WL 3826980, at *8 (citation omitted).

B. Procedural Default of Ground Three

Barnes did not raise ground three challenging the sufficiency of the evidence on direct appeal. A criminal defendant who fails to raise an issue on direct appeal is procedurally barred from raising the claim in a § 2255 motion, absent (1) a showing of cause for the default and actual prejudice or (2) a showing of actual innocence. McKay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011). "[T]o show cause for procedural default, [a movant] must show that some objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal . . ." or that the matter was not raised because of ineffective assistance of counsel. Lynn v. United States, 365 F.3d 1225, 1235 (11th Cir. 2004) (per curiam). A movant may also establish cause for the procedural default if he can

show "that his attorney's performance failed to meet the Strickland standard for effective assistance of counsel." Reece v. United States, 119 F.3d 1462, 1465 (11th Cir. 1997) (internal quotation marks and citation omitted). If a movant shows cause, he must also show prejudice, i.e., that the error complained of "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Reece, 119 F.3d at 1467 (citation omitted).

To make a credible showing of actual innocence, "a movant 'must show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt' in light of . . . new evidence of innocence." McKay, 657 F.3d at 1196 (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)). "The [actual innocence] gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" McQuiggin v. Perkins, 569 U.S. 383, 401 (2013) (citing Schlup, 513 U.S. at 316).

Barnes has not alleged that an objective factor external to the defense prevented him or counsel from challenging the sufficiency of the evidence on appeal, and, as discussed in section II.A.1., appellate counsel's failure to challenge the denial of Barnes' motion for a judgment of acquittal did not amount to

ineffective assistance. Additionally, Barnes has not presented "new" evidence showing that no reasonable juror would have found him guilty beyond a reasonable doubt. Accordingly, Barnes may not raise ground three in this § 2255 motion.

III. CERTIFICATE OF APPEALABILITY

Rule 22(b)(1) of the Federal Rules of Appellate Procedure provides that an applicant for § 2255 relief "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts provides, "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Section 2253(c)(2) of Title 28 states that a certificate of appealability ("COA") shall not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." A movant satisfies this standard by showing "that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Based on the foregoing discussion of Barnes' grounds for relief, the resolution of the issues presented is not debatable by jurists of reason, and the undersigned recommends that he be denied a COA.

IV. CONCLUSION

For the reasons stated, Barnes' motion for an extension of time, [Doc. 270], is **GRANTED**, and **IT IS HEREBY RECOMMENDED** that Barnes' § 2255 motion, [Doc. 253], and a COA be **DENIED**.

The Clerk is **DIRECTED** to terminate the referral of the § 2255 motion to the Magistrate Judge.

SO ORDERED AND RECOMMENDED, this 3rd day of April, 2020.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

App D

Barnes v. United States

United States Court of Appeals for the Eleventh Circuit

October 29, 2020, Filed

No. 20-11839-J

Reporter
2020 U.S. App. LEXIS 34455 *

MARCUS ANTHONY BARNES, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.

Prior History: [*1] Appeals from the United States District Court for the Northern District of Georgia.

Barnes v. United States, 2020 U.S. App. LEXIS 29342 (11th Cir. Ga., Sept. 15, 2020)

Counsel: Marcus Anthony Barnes, Petitioner - Appellant, Pro se, Atlanta, GA.

For United States of America, Respondent - Appellee: Dashene Cooper, Assistant U.S. Attorney, Jane Elizabeth McBath, U.S. Attorney Service - Northern District of Georgia, U.S. Attorney's Office, Atlanta, GA.

Judges: Before: JILL PRYOR and BRASHER, Circuit Judges.

Opinion

BY THE COURT:

Marcus Barnes has filed a motion for reconsideration of this Court's September 15, 2020, order denying a certificate of appealability and leave to proceed *in forma pauperis* in his appeal from the denial of his underlying 28 U.S.C. § 2255 motion to vacate. Upon review, Barnes's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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App E

TRULINCS 66185019 - BARNES, MARCUS ANTHONY - Unit: ATL-B-A

FROM: Marshall Hames, Adam
TO: 66185019
SUBJECT: RE: regarding docket sheet
DATE: 06/22/2018 12:21:04 PM

You are right and you are wrong about not being able to raise such a claim in a 2255. Such a claim would be procedurally defaulted, but that default can be overcome by alleging a claim of ineffective assistance of appellate counsel. The truth is that Judge Vineyard will look at the underlining claim to determine if there was prejudice. If I thought you had a snowballs chance on some of your claims, I would raise them.

Unlike at trial, there is no constitutional right to represent yourself on direct appeal. You can write the court if you must, but it is highly unlikely that they will appoint any new counsel or allow you to represent yourself. Writing the court would also grossly undercut one of your claims about going to trial with Andrew. You will be seen as a defendant that is trying to manipulate the system.

I know that you do not trust lawyers, but ask yourself this. If you needed surgery would you perform it yourself, or would you let someone that has been trained in medicine and surgery, who has handled other procedures like yours several times, and that is willing to help you perform the surgery. If you answer that I would perform the surgery on myself I cannot help you. I cannot make you any promises on an outcome.

MARCUS ANTHONY BARNES on 6/21/2018 6:51:30 PM wrote
I'm just now seeing this part of the message about circumstantial evidence there is not a mountain of it pointing towards me and there no direct evidence neither. Got to challenge the sufficiency of the evidence ,the motion to suppress ,jury instructions, and right to present a complete defense, and can explain in detail if you where to come up here. that's what god told me when i prayed on it. I asked that you please ask for a continuance since you waited until the week before Monday that its due please. If its not brought up on direct appeal then i can't raise it on 2255 motion. I maintain my innocents. I already know what they will tri use for circumstantial evidence but i have defense for it. If we caint agree on that please do not abuse your power and allow me state my claim to the judge and proceed pro se if thats what it takes.
-----Marshall Hames, Adam on 6/20/2018 6:06 PM wrote:

>

You mean that I have not responded to all of the dozens of emails that you have sent. Frankly, I am not sure what I am going to raise. I have just finished reading the transcript for the second time. I know the issues that you want to raise, but here are some of the problems with those issues. First, many of the issues you created. For example, the choice of counsel issue will not likely be considered well by the Court. The record reads like you were seeking to delay the trial solely for the purpose of delaying the trial.

Second, the motion to suppress is difficult because Judge Vineyard and then Judge Jones made actual determinations against you. What does that mean? If the law requires there to be a traffic violation to pull you over, and you say you were not speeding and a police officer says you were speeding then how the Court resolves that dispute is almost unreviewable on appeal. None of the appellate judges were there when you were pulled over, nor where they there was an evidentiary hearing. They put their faith that the judge who actually heard the evidence made the right call.

Third, there is very little direct evidence against you. However, there is a mountain of circumstantial evidence that points to your guilt. The law does not weigh one kind of evidence, direct, greater than another kind of evidence, circumstantial. Therefore if there was a good issue for you to raise, proving that you were harmed would be, at best, an uphill climb.

I have not made a final decision on what issues to raise. I have considered each of the issues that you wanted to be raised. You are clearly a bright man, but let me do my job.

MARCUS ANTHONY BARNES on 6/20/2018 2:50:58 PM wrote
I like to be envolved when dealing with my case,its very important to me, and you havent responded to none of my emails regarding what issue's to raise. You are inducing anxiety and have me worried about what are you going to raise in my appeal. You keep putting focus on considering when the issue's that I put in the brief and ect... are the issue's that should be raised, and know your not communicating with me. So I notified the courts about this communicating issue.
-----Marshall Hames, Adam on 6/13/2018 2:51 PM wrote:

>

TRULINCS 66185019 - BARNES, MARCUS ANTHONY - Unit: ATL-B-A

FROM: 66185019
TO: Marshall Hames, Adam
SUBJECT: RE: RE: regarding docket sheet
DATE: 06/21/2018 09:38:19 AM

1.Hey man i been through a lot with lawyers in my past and I'm just scared, and the the council issue's wasn't a issue i created the lawyer said he thinks we are going to lose, that clearly says that he wasn't going to do his best. lack of confidents is what it shows. I asked for a federal defender. (It's not the strongest argument I will admit.)
2. Chanthasouxat 342 F.3d 1271,1277-79 (11th cir 2003) stated that the pertinent question is whether it was reasonable for the officer to believe that a traffic offence has been commited.It was also noted that it must be circumstances confronting the police officer support the reasonable belief that the driver committed even a minor traffic offence for the officer to have probable cause to stop the driver. This is the case they used but didn't point to any circumstances. they only applied the first part of the law.
3.in evaluating the factual version of event between officers and a criminal defendant,we should defer to the magistrate judes determinations UNLESS HIS UNDERSTANDING OF THE FACT APPEARS TO BE UNBELIEVABLE,Ramirez-chilel 289 F.3d 744,749(11th cir.2002), Look at the facts majority of them wieght in our favor.We had an expert witness, Viar was never considered an expert. Did you read the notes that I sent?

App F 1 front and backs

Q. WHERE DID THOSE CAMERAS COME FROM?
A. MR. BARNES PUT THEM UP.
Q. WHO PURCHASED THEM?
A. HE DID.
Q. AND DID HE INSTALL THEM WITH THE WIRING TOO?
A. I THINK HIM AND SOME OTHER PERSON DID THEM.
Q. MS. WATERS, DO YOU OWN ANY VEHICLES?
A. YES.
Q. YOU DO?
A. YES.
Q. WHAT TYPES OF VEHICLES?
A. WELL, I HAD A WHITE IMPALA, CHEVY IMPALA, AND NOW I CURRENTLY OWN A NISSAN SENTRA.
Q. LET'S TALK ABOUT THE IMPALA.
WHO DROVE THE IMPALA?
A. I DROVE IT MOST OF THE TIME BUT SOMETIMES MARCUS DROVE IT ALSO.
Q. ANYBODY ELSE?
A. SOMETIMES MY BROTHER WOULD DRIVE.
Q. AND HOW OFTEN WOULD -- LET'S SAY HOW OFTEN WOULD YOUR BROTHER DRIVE IT?
A. IT WAS LIKE EVERY BLUE MOON.
Q. EVERY BLUE MOON MEANS NOT VERY OFTEN?
A. YES.
Q. AND WHEN YOUR BROTHER DROVE THE IMPALA, WOULD HE KEEP IT

OVERNIGHT?
A. NO.
Q. DESCRIBE SORT OF HOW YOUR BROTHER WOULD COME TO DRIVE THE IMPALA.
A. IT WOULD PROBABLY BE JUST TO GO TO THE STORE OR SOMETHING, SOMETHING LIKE THAT, TO GO TO THE GROCERY STORE OR THE STORE UP THE STREET, OR IF HE HAD TO RUN AN ERRAND THAT REQUIRED HIM TO LEAVE THIS SIDE OF TOWN, YOU KNOW, BECAUSE I STAYED AT STONE MOUNTAIN AND HE STAYED AT A DIFFERENT SIDE OF TOWN, SO IF HE HAD TO GO HOME OR SOMETHING OR, YOU KNOW, SOMETHING LIKE THAT.
Q. WOULD HE KEEP THE CAR FOR AN ENTIRE DAY?
A. NO.
Q. WHEN DID YOU GET THE IMPALA?
A. GOODNESS. I WANT TO SAY MAYBE 2012 OR '11, '11 OR '12.
Q. WHERE DID YOU BUY IT FROM?
A. IT WAS A DEALERSHIP ON MEMORIAL DRIVE, A "BUY HERE, PAY HERE."
Q. I'M SORRY? I DIDN'T HEAR YOU.
A. A DEALERSHIP ON MEMORIAL DRIVE, A "BUY HERE, PAY HERE."
Q. NOW, IN MARCH OF 2014, DID MR. BARNES HAVE A KEY TO THE IMPALA?
A. IF HE USED IT, HE WOULD HAVE TO HAVE THE KEY, BUT IT WASN'T HIS PERSONAL KEY, NO.
Q. HE HAD ACCESS TO THE KEY?
A. YES.

Q. HE COULD FREELY JUST KEEP THE KEY IN HIS POCKET UNTIL HE NEEDED TO USE A CAR, RIGHT?
A. IF HE IS WALKING AROUND IN PUBLIC AND THE CAR IS MOVED, HE HAS THE KEY IN HIS POCKET, BUT IF THE CAR IS IN THE PARKING LOT, THE DRIVEWAY, HE DIDN'T JUST FREELY WALK AROUND WITH IT IN HIS POCKET. I WOULD PROBABLY HAVE THE KEY UNTIL HE ASKED ME FOR IT.
Q. WELL, IN MARCH OF 2014 WAS MR. BARNES FREE TO USE THE IMPALA AS HE WISHED?
A. HE WAS DRIVING IT, YES.
Q. AND DID HE HAVE TO ASK YOUR PERMISSION TO DRIVE IT?
A. YES.
Q. DO YOU EVER REMEMBER TELLING HIM THAT HE COULD NOT USE THE IMPALA?
A. NO.
Q. SO HE COULD USE IT WHENEVER HE WANTED; HE JUST NEEDED TO CHECK WITH YOU?
A. UNLESS WE GOT INTO IT OR SOMETHING LIKE THAT.
Q. WHAT DO YOU MEAN "GOT INTO IT"? I'M SORRY.
A. ARGUE OR SOMETIMES I'LL BE LIKE, NO, YOU CAN'T USE IT JUST WHEN I FELT LIKE IT, YOU KNOW. IF WE ARGUED OR GOT INTO AN ARGUMENT, ALTERCATION, BUT OTHER THAN THAT HE HAD ACCESS TO IT WHEN HE ASKED.
Q. AND THE DAY THAT MR. BARNES WAS ARRESTED, MARCH 26, 2014, HE WAS DRIVING THE IMPALA, RIGHT?

A. YES.
Q. AND HE WOULD HAVE HAD YOUR PERMISSION TO DRIVE THE IMPALA THAT DAY, RIGHT?
A. YES.
Q. DID ANYONE ELSE HAVE KEYS TO THE IMPALA?
A. NO.
Q. JUST YOU?
A. YES.
Q. DID YOUR BROTHER HAVE A KEY?
A. NO.
Q. I BELIEVE IT'S YOUR TESTIMONY THAT IF MR. BARNES WAS NOT DRIVING THE IMPALA, YOU DROVE IT?
A. EXCUSE ME?
Q. IF MR. BARNES WAS NOT DRIVING THE IMPALA, YOU WOULD DRIVE THE IMPALA, RIGHT?
A. YOU SAID I TESTIFIED THAT?
Q. CORRECT ME IF I'M WRONG.
A. OH.
Q. IN MARCH OF 2014, WHO DROVE THE IMPALA?
A. THE DAY OF HIS ARREST YOU ARE SAYING OR JUST THE MONTH, PERIOD?
Q. GENERALLY THAT MONTH.
A. USUALLY I WOULD BE DRIVING IT.
Q. OKAY. AND WHEN YOU DROVE IT, DID YOU PLAY MUSIC IN IT?
A. YES, I DO.

A. YES.
Q. ALL RIGHT. IS IT FAIR TO SAY THAT SOME WEEKS IT'S MORE AND SOME WEEKS IT'S LESS?
A. YOU COULD SAY THAT.
Q. OKAY. WELL, I DON'T WANT TO SAY IT. I KIND OF WANT TO KNOW IS THAT FAIR. IS THAT AN ACCURATE STATEMENT?
A. IT'S FAIR.
Q. OKAY. AND I GUESS THE INVERSE WOULD BE TRUE, TOO, MEANING THAT ON AVERAGE, ON A SEVEN-DAY WEEK, THREE TO FOUR NIGHTS HE WOULD NOT SPEND THERE, CORRECT?
A. YES, YES.
Q. SO JUST SO YOU KNOW, BECAUSE THE COURT REPORTER HAS TO TAKE EVERYTHING DOWN, IT'S IMPORTANT TO GIVE AN OUT-LOUD RESPONSE, OKAY?
A. OKAY.
Q. NOW, YOUR NAME IS ON THE LEASE AT 5706 MOUNTAIN CRESCENT COURT, CORRECT?
A. YES.
Q. AND MR. BARNES'S IS NOT?
A. NO.
Q. AND THE IMPALA IS IN YOUR NAME, CORRECT?
A. YES.
Q. ALL RIGHT. AND TAG AND TITLE BOTH ARE IN YOUR NAME, CORRECT?
A. YES.

Q. AND IT'S NOT IN MR. BARNES'S NAME?
A. NO.
Q. AND I THINK YOU'VE ALREADY TOLD US THAT - LET ME MAKE SURE I'M RIGHT ABOUT THIS - THAT MR. BARNES MOSTLY DROVE THE CADILLAC BUT SOMETIMES WOULD ASK YOU TO USE THE IMPALA, CORRECT?
A. YES.
Q. AND THOSE OCCASIONS YOU WOULD HAVE TIME TO OR YOU WOULD DRIVE THE CADILLAC, CORRECT?
A. YES.
Q. SO YOU ARE PRETTY FAMILIAR WITH THE CADILLAC?
A. YES.
Q. AND AS I RECALL YOU TELLING ME, THE KEYS TO THE IMPALA, YOU HAD A SET, CORRECT?
A. YES.
Q. ALL RIGHT. AND WHEN MR. BARNES WANTED TO USE THE IMPALA, HE WOULD HAVE TO ASK YOUR PERMISSION TO USE IT, CORRECT?
A. YES.
Q. AND OTHER PEOPLE WOULD USE THE IMPALA TOO, CORRECT?
A. JUST TWO OTHER PEOPLE. WELL, YES.
Q. ALL RIGHT.
A. YEAH.
Q. YOUR BROTHER WOULD USE THE IMPALA?
A. YEAH, SOME.
Q. NOW, TELL THE JURY, IF YOU WOULD, PLEASE, WHY WAS THE

INTERNET BILL IN MR. BARNES'S NAME?
A. WELL, I HAD A BILL. THE BILL WAS IN MY NAME AT ONE TIME WHEN MY MOM WAS STAYING WITH ME. SHE HAD ASKED ME TO PUT THE BILL IN MY NAME. I DIDN'T WANT TO. BUT SHE TOLD ME THAT SHE WAS GOING TO PAY IT. AND THEN AFTER IT STARTED GETTING TOO HIGH, SHE WAS JUST, LIKE, STOPPED PAYING IT AND IT GOT DISCONNECTED. SO I ASKED HIM IF I CAN PUT IT IN HIS NAME TO GET IT TURNED BACK ON AGAIN.
Q. OKAY. AND SO HE AGREED TO PUT IT IN HIS NAME TO HELP YOU OUT, CORRECT?
A. YES.
Q. ALL RIGHT. WAS IT REALLY YOUR INTERNET, THOUGH?
A. YES.
Q. ALL RIGHT. AND IT WAS FOR THE KIDS SO THEY COULD USE IT FOR SCHOOL?
A. PLUS, I WAS IN THE SCHOOL AT THE TIME. I WAS IN SCHOOL AT THE TIME.
Q. ALL RIGHT. YES, MA'AM.
NOW, I THINK YOU ALSO SAID THAT MR. BARNES WOULD RECEIVE JUNK MAIL THERE?
A. YES.
Q. DID THAT JUNK MAIL START SHOWING UP SHORTLY AFTER HE AGREED TO PUT THE INTERNET IN HIS NAME?
A. PRETTY MUCH, YES.
MR. HALL: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY APPROACH.

BY MR. HALL:

Q. I'M GOING TO SHOW YOU WHAT'S BEEN MARKED -- EXCUSE ME -- ALREADY ADMITTED INTO EVIDENCE AS GOVERNMENT'S EXHIBIT 54, 55 AND 56. TAKE A MOMENT AND TAKE A LOOK AT THAT.

A. (COMPLIES).

Q. ALL RIGHT. ARE THOSE EXAMPLES OF JUNK MAIL THAT HE WOULD RECEIVE?

A. YES.

Q. OKAY. AND WOULD YOU PLEASE TELL THE JURY WHETHER THAT PARTICULAR JUNK MAIL, HAS THAT BEEN OPENED OR IS IT STILL CLOSED?

A. IT'S STILL CLOSED.

Q. ALL RIGHT. AND NORMALLY, WHEN THE JUNK MAIL WOULD COME, YOU WOULD THROW IT AWAY, CORRECT?

A. SOMETIMES IT WOULD PROBABLY JUST GET THROWED AROUND THE HOUSE.

Q. OKAY. I'M GOING TO SHOW YOU WHAT'S BEEN ADMITTED AS GOVERNMENT'S EXHIBIT 71. GOVERNMENT'S 71 HAS BEEN ADMITTED AND I ASK YOU DO YOU RECOGNIZE THAT?

A. YES.

Q. OKAY. AND WITH RESPECT TO GOVERNMENT'S 71, WHAT IS IT?

A. IT'S A ZIPLOC BAG WITH SOME CHANGE AND DOLLAR BILLS OR CURRENCY, I GUESS. IT WAS MY SON'S, MY YOUNGEST SON'S, MONEY FOR -- HE WAS COLLECTING FOR SCHOOL.

App FL front and back

AND SPELL YOUR NAME FOR THE RECORD.

THE WITNESS: SHAI JASON. S-H-A-I C-H-A-S-O-N.

MR. COOPER: YOUR HONOR, AT THIS TIME THE GOVERNMENT WOULD LIKE TO MOVE INTO EVIDENCE GOVERNMENT'S EXHIBIT 103, WHICH ARE CERTIFIED BANK RECORDS FROM BANK OF AMERICA FOR MR. BARNES INTO EVIDENCE PURSUANT TO RULE 902(11).

THE COURT: ANY OBJECTION, MR. HALL?

MR. HALL: NO. I BELIEVE IT MEETS THE CERTIFICATION, SO NO OBJECTION.

THE COURT: ALL RIGHT. THEY ARE ADMITTED WITHOUT OBJECTION.

MR. COOPER: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. COOPER:

Q. GOOD AFTERNOON, MR. CHASON. HOW ARE YOU?

A. GOOD. THANK YOU.

Q. I AM GOING TO SHOW YOU ON PAGE 65 OF WHAT HAS PREVIOUSLY BEEN MARKED INTO EVIDENCE OR ENTERED INTO EVIDENCE AS GOVERNMENT EXHIBIT 103.

ARE YOU FAMILIAR WITH THE COMPANY BUYASAFE?

A. YES. THAT'S MY COMPANY.

Q. TELL US WHETHER YOU RECOGNIZE ANY OF THE NAMES IN GOVERNMENT EXHIBIT 103.

A. I CAN'T SEE IT. I'M SORRY.

Q. OKAY.

MR. COOPER: PERMISSION TO APPROACH?

THE COURT: YOU MAY.

THE WITNESS: YES. BUYASAFE.COM, WHICH IS MY COMPANY, AND THE PHONE NUMBER IS CORRECT.

BY MR. COOPER:

Q. OKAY. ACTUALLY, WHY DON'T YOU HOLD ONTO THAT. I MAY HAVE SOME OTHER QUESTIONS.

A. OKAY.

Q. ALL RIGHT. GREAT. SO CAN YOU TELL US WHAT TYPE OF -- EXCUSE ME.

ACTUALLY, CAN YOU TELL US WHAT THE AMOUNT LISTED ON THE BANK RECORD FOR THIS TRANSACTION IN GOVERNMENT EXHIBIT 103 IS?

A. $364.96.

Q. OKAY. AND WHAT TYPE OF COMPANY IS BUYASAFE?

A. WE SELL SAFES ONLINE, SAFES AND OTHER --

Q. AND DOES IT HAVE -- EXCUSE ME?

A. SAFES AND OTHER SECURITY PRODUCTS ONLINE.

Q. AND DOES IT HAVE ANY OTHER NAMES?

A. CHASON KEY WAY, WHICH IS MY LAST NAME. KEY WAY.

Q. AND WHERE IS BUYASAFE HEADQUARTERED?

A. IN CANOGA PARK, CALIFORNIA, LOS ANGELES COUNTY.

Q. HOW LONG HAVE YOU WORKED AT BUYASAFE?

A. I'VE OWNED IT SINCE 2000.

Q. AND SO YOU ARE THE OWNER OF BUYASAFE?

A. YES.
Q. OKAY. AND WHAT ARE YOUR DUTIES AS THE OWNER OF BUYASAFE?
A. I OVERSEE EVERYTHING. I TAKE CARE OF THE WEBSITE. I DO THE PURCHASING, DESIGN OF SOME OF OUR OWN SAFES, OVERSEE THE ENTIRE OPERATION.
Q. AND ARE YOU -- AND THAT MEANS YOU ARE FAMILIAR WITH THE ITEMS THAT ARE SOLD AT BUYASAFE?
A. SURE, YES.
Q. AND IN 2014, WHERE DID YOU SHOWCASE THE PRODUCTS THAT YOU SOLD FOR YOUR COMPANY BUYASAFE?
A. ON OUR WEBSITE, BUYASAFE.COM.
Q. OKAY. AND WHEN A CUSTOMER MAKES AN ORDER ON YOUR WEBSITE, DO YOU PROVIDE THEM WITH AN INVOICE?
A. THEY GET IT AUTOMATICALLY BY EMAIL FROM THE SYSTEM.
MR. COOPER: OKAY. I HAVE IN MY HAND WHAT HAS BEEN PREVIOUSLY MARKED AS GOVERNMENT 102.
PERMISSION TO APPROACH?
THE COURT: YOU MAY APPROACH.
BY MR. COOPER:
Q. CAN YOU TELL US WHAT EXHIBIT 102 IS?
A. THIS IS A SALES RECEIPT THAT WE ACTUALLY MANUALLY INPUT IN OUR ACCOUNTING SOFTWARE FROM THE ORDER THAT WE GET ONLINE.
MR. COOPER: OKAY. AT THIS POINT THE GOVERNMENT MOVES TO ADMIT INTO EVIDENCE GOVERNMENT EXHIBIT 102.
THE COURT: I THINK IT'S ALREADY IN.

MR. COOPER: I DON'T --
THE COURT: 102 ISN'T ALREADY IN?
MR. COOPER: NO.
THE COURT: ALL RIGHT. ANY OBJECTIONS?
MR. HALL: OKAY. NO OBJECTION.
THE COURT: ADMITTED WITHOUT OBJECTION.
MR. COOPER: AND MOVE TO PUBLISH 102, EXHIBIT 102.
THE COURT: YOU MAY PUBLISH IT.
MR. COOPER: OKAY.
BY MR. COOPER:
Q. YOU HAVE EXHIBIT 102 IN YOUR HAND. WHAT WAS THE PURCHASE ON THIS INVOICE FOR?
A. A WALL SAFE MODEL NUMBER WES2113-DF.
Q. AND WHERE WAS THE SAFE ON THIS INVOICE SHIPPED TO?
A. TO THE ADDRESS THAT IT WAS SOLD TO.
Q. CAN YOU TELL US, CAN YOU READ OUT LOUD WHAT THE NAME OF THAT IS?
A. YES. 5706 MOUNTAIN CRESCENT, STONE MOUNTAIN, GEORGIA 30087.
Q. AND DO YOU KNOW WHEN, APPROXIMATELY, IT WAS SHIPPED?
A. THE EXACT DATE, NO. PROBABLY WITHIN A COUPLE OF DAYS OF WHEN THE ORDER WAS PLACED.
Q. AND WHEN WAS THE ORDER PLACED?
A. IT SAYS HERE MARCH 10TH, 2014.
Q. AND WHEN A CUSTOMER BUYS AN ITEM ON YOUR WEBSITE, WHO

FILLS OUT THE "SOLD TO" AND THE "SHIPPING TO" FIELDS?
A. THE CUSTOMER HIMSELF.
Q. SO YOU DON'T INDEPENDENTLY CONFIRM WHO FILLS OUT THAT SECTION?
A. NO.
Q. AND THE INVOICE SAYS SOLD TO NIKEIA WATERS, BUT YOU DON'T KNOW ONE WAY OR ANOTHER WHETHER IT WAS MS. WATERS OR SOMEONE ELSE WHO TYPED THAT IN?
A. WE DON'T KNOW THAT.
MR. COOPER: OKAY. I AM GOING TO HAND YOU WHAT HAS BEEN PREVIOUSLY ENTERED INTO EVIDENCE AS GOVERNMENT'S EXHIBIT 83.
PERMISSION TO APPROACH?
THE COURT: YOU MAY APPROACH.
BY MR. COOPER:
Q. IN GOVERNMENT EXHIBIT 83, DO YOU RECOGNIZE ANY OF THE ITEMS IN THIS PICTURE?
A. YEAH, THE WALL SAFE ON THE RIGHT.
Q. OKAY. AND CAN YOU DESCRIBE IT JUST SO THAT WE ARE CLEAR WE ARE ON THE SAME --
A. THE WHITE, IT'S THE WHITE SAFE.
Q. OKAY.
A. IT USED TO HAVE AN ELECTRONIC KEY PAD BUT IT'S BROKEN OFF.
Q. OKAY. AND WAS THAT SAFE PURCHASED ON YOUR WEBSITE?
A. YES.

Q. AND CAN YOU TELL US HOW YOU KNOW THAT?
A. WE ARE THE SOLE MANUFACTURER OF THIS SAFE. I MYSELF DESIGNED IT AND WE HAVE A FACTORY IN CHINA THAT MAKES IT FOR US.
Q. AND HAVE YOU LOOKED AT ANY OTHER INVOICES OR SHIPPING DOCUMENTS RELATING TO THIS TRANSACTION?
A. WHAT DO YOU MEAN IF I LOOKED INTO?
Q. FOR THIS PURCHASE THAT YOU -- FOR THE SAFE. HAVE YOU LOOKED AT ANY INFORMATION RELATED TO IT?
A. YES, THIS INVOICE.
MR. COOPER: OKAY. THANK YOU.
NO FURTHER QUESTIONS.
THE COURT: YOUR WITNESS, MR. HALL.

CROSS-EXAMINATION

BY MR. HALL:
Q. AS I UNDERSTAND IT, WHAT YOU ARE HERE TO SAY IS THAT ON OR ABOUT MARCH 10, 2014, YOU SHIPPED A SAFE, THE ONE THAT WAS JUST DESCRIBED, TO MS. NIKEIA WATERS, 5706 MOUNTAIN CRESCENT, STONE MOUNTAIN, GEORGIA, 30087; IS THAT CORRECT?
A. YES; FROM WHAT THE DOCUMENTS SHOW, YES.
Q. OKAY. AND THAT DOCUMENT IN PARTICULAR IS THE SALES RECEIPT YOU WERE JUST REFERRING TO, CORRECT?
A. THERE ARE TWO MORE DOCUMENTS.
Q. OKAY. I'M REFERRING SPECIFICALLY TO THE SALES RECEIPT. IS THAT WHAT IT SHOWS?

A. YES.
Q. OKAY. AND AM I RIGHT THAT ALL YOUR DOCUMENTS SHOW THAT THE SAFE WAS SOLD AND SHIPPED TO MS. NIKEIA WATERS AT THAT ADDRESS?
A. CORRECT, YES.
MR. HALL: OKAY. NO MORE QUESTIONS.
THE COURT: REDIRECT?
MR. COOPER: NONE FROM THE GOVERNMENT, YOUR HONOR.
THE COURT: THANK YOU, SIR. YOU MAY STEP DOWN.
CALL YOUR NEXT WITNESS.
MR. BUCHANAN: YOUR HONOR, THE UNITED STATES CALLS YOLANDA BARON.
THE CLERK: WOULD YOU RAISE YOUR RIGHT HAND, PLEASE?

- - -

Y.C. BARON,

CALLED AS A WITNESS ON BEHALF OF THE UNITED STATES, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

- - -

THE CLERK: IF YOU WILL HAVE A SEAT. IF YOU COULD PLEASE STATE AND SPELL YOUR NAME FOR THE RECORD.
THE WITNESS: Y.C. BARON, B-A-R-O-N.

DIRECT EXAMINATION

BY MR. BUCHANAN:
Q. HOW ARE YOU EMPLOYED?
A. I AM EMPLOYED WITH DEKALB COUNTY POLICE DEPARTMENT

App F3

ARE YOU READY TO CALL YOUR FIRST WITNESS?

MR. HALL: YES, JUDGE.

THE COURT: OKAY. ASK THE JURY TO COME ON BACK OUT.

WHEN THE JURY COMES IN, I WILL DIRECT THE JURY THAT THE DEFENDANT HAS NO BURDEN OF PROOF WHATSOEVER BUT THE DEFENDANT HAS A RIGHT TO PRESENT EVIDENCE, IF THEY SO ELECT, AND THE DEFENDANT IN THIS CASE IS ELECTING TO PRESENT EVIDENCE.

MR. HALL: CAN I GO GET MY WITNESS?

THE COURT: YES.

(PAUSE IN PROCEEDINGS)

(JURY RETURNED)

LADIES AND GENTLEMEN OF THE JURY, AS YOU CAN SEE, THE GOVERNMENT HAS RESTED THEIR CASE. THE DEFENDANT HAS NO BURDEN OF PROOF WHATSOEVER. THE BURDEN OF PROOF RESTS WITH THE GOVERNMENT. THE DEFENDANT, IF THEY SO CHOOSE, THEY HAVE A RIGHT TO PRESENT EVIDENCE IF THEY CHOOSE TO DO SO. IN THIS CASE, THE DEFENDANT HAS ELECTED TO PRESENT EVIDENCE IN THIS CASE AND THEY WILL NOW CALL THEIR FIRST WITNESS.

MR. HALL: THE DEFENSE WILL CALL MS. RITA WYNTER.

THE CLERK: MA'AM, IF YOU COULD RAISE YOUR RIGHT HAND, PLEASE.

- - -

RITA WYNTER,

CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

- - -

THE CLERK: IF YOU COULD PLEASE STATE AND SPELL YOUR NAME FOR US.

THE WITNESS: MY NAME IS RITA WYNTER, R-I-T-A. LAST NAME IS WYNTER, W-Y-N-T-E-R.

DIRECT EXAMINATION

BY MR. HALL:

Q. ALL RIGHT, MA'AM. PLEASE TELL THE JURY. WHERE ARE YOU EMPLOYED?

A. I WORK FOR DEKALB COUNTY POLICE DEPARTMENT, CENTRAL RECORDS.

Q. ALL RIGHT. AND WHAT IS YOUR POSITION THERE?

A. I AM A SUPERVISOR.

Q. HOW LONG HAVE YOU WORKED THERE?

A. FIVE YEARS.

Q. ALL RIGHT. HAVE YOU HAD THE OCCASION TO PULL CERTAIN RECORDS THAT I HAVE SUBPOENAED FOR YOU TO PULL?

A. YES, SIR.

Q. ALL RIGHT. I AM GOING TO SHOW YOU WHAT I HAVE MARKED FOR IDENTIFICATION AS DEFENSE EXHIBIT 17.

THE COURT: MA'AM, IF YOU CAN GET A LITTLE CLOSER TO THE MIC? THANK YOU.

MR. HALL: MAY I APPROACH, YOUR HONOR?

THE COURT: YES.

BY MR. HALL:

Q. I WANT TO SHOW YOU WHAT I HAVE MARKED FOR IDENTIFICATION AS DEFENSE EXHIBIT 17 AND DEFENSE EXHIBIT 18.

DO YOU RECOGNIZE THOSE DOCUMENTS?

A. YES, SIR.

Q. WHAT ARE THEY?

A. THE FIRST DOCUMENT, THE POLICE, DEKALB COUNTY POLICE DEPARTMENT INCIDENT REPORT, THESE ARE REPORTS THAT WE -- WHEN WE RECEIVE AN ITEM IN OR INCIDENT, WE TAKE THE REPORT AND WE PUT IT INTO THE SYSTEM.

Q. OKAY. AND IS THAT A TRUE AND ACCURATE COPY OF THAT REPORT?

A. YES, SIR.

Q. ALL RIGHT. AND WAS THAT REPORT MADE AT OR NEAR THE TIME INDICATED ON THE POLICE REPORT OR FROM INFORMATION TRANSMITTED BY SOMEONE WITH KNOWLEDGE OF IT?

A. YES, SIR.

Q. ALL RIGHT. WAS THAT POLICE REPORT KEPT IN THE ORDINARY COURSE OF THE REGULARLY CONDUCTED ACTIVITY OF THE DEKALB COUNTY POLICE DEPARTMENT'S BUSINESS?

A. YES, SIR.

Q. AND WAS THAT POLICE REPORT A REGULAR PART OR MAKING THAT POLICE REPORT A REGULAR PART OF THE DEKALB COUNTY POLICE DEPARTMENT'S BUSINESS?

A. YES, SIR.

MR. HALL: ALL RIGHT. YOUR HONOR, I WOULD

RESPECTFULLY MOVE FOR THE ADMISSION OF DEFENSE EXHIBIT 17.

THE COURT: ANY OBJECTION?

MR. BUCHANAN: I OBJECT. IT'S NOT RELEVANT.

(AT THE BENCH)

THE COURT: LET ME SEE IT. WHO'S GOT IT?

MR. HALL: I HAVE A COPY YOU CAN USE.

THE COURT: LET'S SEE. IT SAYS BURGLARY OF KELVIN ERLER'S HOUSE.

MR. HALL: RIGHT. YES, SIR. SO KEVIN ERLER IS THE INDIVIDUAL WHO HAD A FIREARM. ONE OF THOSE FIREARMS WAS FOUND ON MARCH 26, 2014, AT THE 5706 MOUNTAIN CRESCENT PLACE LOCATION, MARCH 26. HOWEVER, ON MAY 10TH, 2014, A MONTH AND A HALF LATER, HE HAS REPORTED IT STOLEN TO THE DEKALB COUNTY POLICE DEPARTMENT. THAT'S THE FIRST TIME IT WAS EVER REPORTED STOLEN. THAT'S THE FIRST TIME IT WAS EVER PLACED ON NCIC.

THIS IS THE BEGINNING OF OUR CASE THAT WE ARE PUTTING ON UNDER UNITED STATES VS. HOLMES WHICH ALLOWS US TO POINT TO THE GUILT OF A THIRD PARTY AS OPPOSED TO THE DEFENDANT. AND THIS WOULD BE THE, YOU KNOW, PRELIMINARY EVIDENTIARY FOUNDATION FOR THAT WHERE WE WOULD PUT IN THIS EVIDENCE HERE TO SHOW THAT MR. BARNES ISN'T THE ONE THAT COMMITTED THESE OFFENSES, IT WAS MR. ERLER WHO HAS COMMITTED THESE OFFENSES, AND WE ARE SPECIFICALLY ALLOWED TO DO THAT.

(IN OPEN COURT)

THE COURT: LADIES AND GENTLEMEN OF THE JURY, STEP

INSIDE THE JURY ROOM, PLEASE.

(JURY RETIRED)

YOU ALL CAN STEP BACK AND ARGUE RIGHT THERE.

THIS IS A BURGLARY OF MR. KEVIN ERLER'S HOUSE AND IT IS YOU ALL'S ARGUMENT TO ME THAT MR. ERLER IS THE ONE THAT COMMITTED THE OFFENSES IN THIS INDICTMENT?

MR. HALL: THAT'S GOING TO BE OUR DEFENSE, YES, SIR, OR HE IS ONE OF THE POSSIBLE PEOPLE WHO COMMITTED THE OFFENSES IN THIS INDICTMENT. THAT'S EXACTLY CORRECT.

THE COURT: SOMEONE STOLE A GUN OUT OF MR. ERLER'S HOUSE. THE GUN APPEARS AT 5706, OR WHATEVER, AND YOU ALL ARE SAYING MR. ERLER IS THE ONE THAT COMMITTED THESE OFFENSES?

MR. HALL: IT'S THE TIMING OF IT, JUDGE. THE GUN AT 5706 WAS LOCATED ON MARCH 26. THE ALLEGED BURGLARY OF THE GUN, ACCORDING TO MR. ERLER'S REPORT, WAS ON MAY 10TH, 2014. WELL, WE KNOW THAT THAT IS IMPOSSIBLE, BECAUSE BY THAT POINT THE GUN WAS ALREADY IN THE POSSESSION OF LAW ENFORCEMENT, AND THEREFORE IT'S IMPOSSIBLE FOR IT TO HAVE BEEN STOLEN ON MAY 10TH, 2014, WHICH IS WHEN IT WAS REPORTED STOLEN AND WHEN IT WAS FIRST LISTED AS STOLEN ON THE NCIC.

MR. BUCHANAN: YOUR HONOR, IF I MAY?

THE COURT: YES.

MR. BUCHANAN: IT'S NOT IMPOSSIBLE FOR THAT TO HAVE BEEN THE FIRST DATE THAT MR. ERLER NOTICED THAT HIS GUN WAS GONE, SO WE WOULD ARGUE THAT THERE HAS BEEN NO PROOF THAT

MR. ERLER HAS ANY CONNECTION TO THAT RESIDENCE.

MS. WATERS TESTIFIED EARLIER SHE DIDN'T EVEN KNOW WHO HE WAS. SO I THINK THAT INTRODUCING THIS EVIDENCE, ONE, IT'S IRRELEVANT; TWO, IT'S I WOULD IMAGINE CONFUSING AND MISLEADING TO THE JURY. THERE IS NO PROOF THAT MR. ERLER HAS EVER SET FOOT IN 5706 MOUNTAIN CRESCENT COURT.

THE COURT: THAT'S THE POINT I AM HAVING PROBLEMS WITH, MR. HALL, IS THAT THE GUN IS THERE AND YOUR ARGUMENT OR DEFENSE IS GOING TO BE ALL THESE OTHER GUNS AND ALL THESE DRUGS WERE PLACED IN THIS HOUSE BY MR. ERLER.

MR. HALL: YES. A COUPLE OF THINGS. A STEP AT A TIME, I GUESS.

FIRST OF ALL, I RESPECTFULLY SUBMIT THAT WE ARE ALLOWED TO PUT ON A DEFENSE.

THE COURT: THAT'S TRUE.

MR. HALL: OKAY. AND OUR DEFENSE CAN BE A DEFENSE THAT IT'S NOT US, IT'S ANOTHER PARTY WHO HAS COMMITTED THE OFFENSE. FOR INSTANCE, AND I KNOW YOUR HONOR KNOWS THIS ALREADY, BUT FOR PURPOSES OF THE RECORD IN U.S. V. STEPHENS, 365 F.3D 967, THE ELEVENTH CIRCUIT SPECIFICALLY ALLOWED EVIDENCE THAT IT WAS NOT THE DEFENDANT WHO PERPETRATED THE CRIME BUT ANOTHER INDIVIDUAL.

THE COURT: WELL, THAT'S OBVIOUS. YOU OBVIOUSLY CAN PUT UP A DEFENSE SAYING THAT.

MR. HALL: OKAY. I'M SORRY. I'M JUST TRYING TO TAKE

IT A STEP AT A TIME. I DIDN'T MEAN -- SO THAT'S OUR APPROACH IS THAT OF THESE GUNS, JUST SO YOU KNOW WHERE WE ARE GOING, SEVERAL OF THEM HAVE NEVER BEEN REPORTED STOLEN, SO THEY ARE STILL LAWFULLY REGISTERED TO THE INDIVIDUALS TO WHOM THEY WERE ORIGINALLY REGISTERED, NUMBER ONE.

OF THAT GROUP SEVERAL OF THEM OR MORE THAN ONE OF THEM ARE FROM THE STONE MOUNTAIN, GEORGIA AREA. SO I COULD UNDERSTAND THE ATTENUATION IF I WAS UP HERE SAYING SOME GUY HAS GOT THEM FROM CALIFORNIA AND THEY ARE SUDDENLY SHOWING UP AT 5706, BUT MR. ERLER LIVES IN STONE MOUNTAIN AS WELL AS SOME OF THESE OTHER INDIVIDUALS. SO IF THE GUNS WERE STOLEN BEFORE MARCH 26, 2014, AND I GET IT, I DON'T REALLY SEE HOW THERE IS THAT CAUSAL CONNECTION.

IN THIS SITUATION THE GUNS EITHER WERE NOT REPORTED STOLEN OR, IN MR. ERLER'S CASE, AFFIRMATIVELY REPORTED STOLEN AFTER MARCH 26, 2014. AND SO WITH RESPECT TO MR. ERLER, WHILE THE GOVERNMENT MAY HAVE COUNTER-ARGUMENTS OR COUNTER-PROOF THAT THEY CAN PUT BEFORE THE JURY, IT SEEMS TO ME THAT WE HAVE SHOWN A CONNECTION BETWEEN MR. ERLER AND 5706 BY VIRTUE OF THAT LAWFULLY REGISTERED, UNREPORTED STOLEN FIREARM, AND THIS IS OUR FIRST POINT IN THAT.

THE COURT: HERE IS WHAT I AM GOING TO DO, MR. BUCHANAN: I AM GOING TO LET HIM PROCEED WITH THIS. IF IT DOESN'T TIE IN, I CAN ALWAYS TELL THE JURY JUST TO STRIKE IT ALL.