

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-14496

Non-Argument Calendar

MAMBERTO REAL,

Plaintiff-Appellant,

versus

MICHAEL PERRY,
Individual capacity,

Defendant-Appellee,

CITY OF FORT MYERS,
Official capacity,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:18-cv-00331-JES-NPM

Before BRANCH, ANDERSON and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Mamberto Real appeals from the district court's order denying his Federal Rule of Civil Procedure 60(b)(2) motion for a new trial based on newly discovered evidence. Real argues that his motion for a new trial should have been granted because it offered newly discovered evidence that he saw a witness for the defense speak with members of the jury during a break in his trial. Having read the parties' briefs and reviewed the record, we affirm the district court's order denying Real's motion for a new trial.

I.

We review a district court's treatment of a motion for new trial under a deferential abuse of discretion standard. *Dear v. Q Club Hotel, LLC*, 933 F.3d 1286, 1301 (11th Cir. 2019) (citation omitted). Thus, to overturn the denial of such a motion, "it is not enough that a grant of the motion[] might have been permissible or warranted; rather, the decision to deny the motion[] must have

21-14496

Opinion of the Court

3

been sufficiently unwarranted as to amount to an abuse of discretion.” *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984). We generally disfavor motions for new trial based on newly discovered evidence. *Dear*, 933 F.3d at 1301 (citation omitted).

II.

Rule 60(b)(2) allows a court to grant relief from a final judgment due to newly discovered evidence which, by due diligence, could not have been discovered in time to move for a new trial under Rule 59(b). Fed. R. Civ. P. 60(b)(2). Relief pursuant to Rule 60(b) is an extraordinary remedy, and the moving party must meet strictly the requirements of the rule. *Crapp v. City of Miami Beach*, 242 F.3d 1017, 1019-20 (11th Cir. 2001). The moving party must meet the following five-part test: (1) the evidence must be newly discovered since the trial; (2) the movant used due diligence to discover the new evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that a new trial would probably produce a new result. *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1316 (11th Cir. 2000).

III.

The record demonstrates that the district court did not abuse its discretion in denying Real’s motion because Real’s proffered evidence in the motion was not newly discovered. Thus, Real did not meet the requirements for the district court to grant his motion for a new trial. Real’s motion relies on evidence of a defense witness’s contact with his trial jury. However, this is not

newly discovered evidence because the jury rendered a verdict after Real allegedly saw the witness with the jurors. Real had the opportunity to raise his concerns at trial but he did not. Thus, his evidence does not qualify as newly discovered. Moreover, Real has not demonstrated that the witness's alleged contact with the jurors, if brought to the attention of the district court, would have yielded a different result in the outcome of his trial.

Real cannot satisfy the requirements to show that the district court should have granted his motion for a new trial; thus, he cannot show that the district court abused its discretion. Accordingly, based on the aforementioned reasons, we affirm the district court's order denying Real's motion for a new trial.

AFFIRMED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 01, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-14496-DD
Case Style: Mamberto Real v. Michael Perry
District Court Docket No: 2:18-cv-00331-JES-NPM

Electronic Filing

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Bradly Wallace Holland, DD at 404-335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MAMBERTO REAL,

Plaintiff,

v.

Case No: 2:18-cv-331-JES-NPM

MICHAEL PERRY, individual
capacity,

Defendant.

JUDGMENT IN A CIVIL CASE

Jury Verdict:

This action came before the Court for a trial by jury. The issues have been tried or heard and the Jury rendered its Verdict on December 3, 2021.

IT IS ORDERED AND ADJUDGED:

Judgment is entered in favor of Defendant, Michael Perry and against Plaintiff, Mamberto Real.

ELIZABETH M. WARREN, CLERK

By: /s/Juan Garcia Gonzalez, Deputy Clerk
Date: December 6, 2021

Copies: All parties and counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 2:18-CV-331-JES-NPM

MAMBERTO REAL,

Plaintiff,

vs.

MICHAEL PERRY,

Defendant.

VERDICT FORM

We the jury find:

1. Mamberto Real has proven by a preponderance of the evidence that
Officer Michael Perry used excessive force against him.

Answer Yes or No No

If your answer is "No," this ends your deliberations, and your
foreperson should sign and date the last page of this verdict form. If your
answer is "Yes," go to the next questions.

2. Mamberto Real has proven by a preponderance of the evidence that he suffered the following damages caused by the excessive use of force by Officer Michael Perry.

Compensatory Damages: \$ _____

– OR –

Nominal damages: \$ _____

3. Mamberto Real reached for something in the back seat of the car.

Yes _____ No _____

4. Officer Perry said, "Show me your hands."

Yes _____ No _____

5. Mamberto Real complied with any command to show his hands.

Yes _____ No _____

6. Officer Perry pointed his firearm at Mamberto Real's head.

Yes _____ No _____

7. If Officer Perry pointed his firearm at Mamberto Real's head, he did so for a reasonable length of time.

Yes _____ No _____

8. Mamberto Real was committing a serious crime when Defendant encountered him.

Yes _____ No _____

9. Mamberto Real posed an immediate threat of death or serious bodily injury to defendant.

Yes _____ No _____

10. Mamberto Real was actively resisting or attempting to evade seizure of his person.

Yes _____ No _____

11. The parking lot was public or private.

Public _____ Private _____

12. Mamberto Real had permission to be there on the property.

Yes _____ No _____

13. Mamberto Real immediately complied with Officer Perry's commands.

Yes _____ No _____

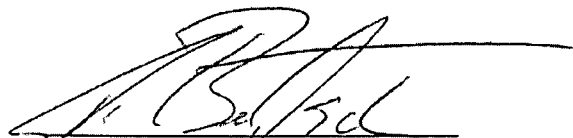
14. Mamberto Real reached for an item inside the car.

Yes _____ No _____

15. Officer Perry had reasonable fear for his safety.

Yes _____ No _____

SO SAY WE ALL.

A handwritten signature in black ink, appearing to be "J. B. [unclear]", written over a horizontal line.

Foreperson's Signature

DATE: 0/03/21

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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December 29, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-14496-DD
Case Style: Mamberto Real v. Michael Perry
District Court Docket No: 2:18-cv-00331-JES-NPM

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Bradley Wallace Holland, DD
Phone #: 404-335-6130

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-14496-DD

MAMBERTO REAL,

Plaintiff - Appellant,

versus

MICHAEL PERRY,
Individual capacity,

Defendant - Appellee,

CITY OF FORT MYERS,
Official capacity,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: BRANCH, ANDERSON, and DUBINA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

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