United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 1, 2023
Lyle W. Cayce
Clerk

No. 23-30077
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JMARREON MACK,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:19-CR-29-1

Before BARKSDALE, GRAVES, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Post-affirmance on direct appeal to our court and denial of review by the Supreme Court, *United States v. Mack*, 857 F. App'x 798 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1134 (2022), Jmarreon Mack moved for a new trial under Federal Rule of Criminal Procedure 33, relying on newly-discovered evidence, *see* Rule 33 (b)(1), he claimed the Government had suppressed in

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The district court denied the motion, concluding the evidence was not material.

Mack contests the denial. To assess the merits of a Rule 33 motion based on newly-discovered evidence, our court generally applies the *Berry* rule. *United States v. Turner*, 674 F.3d 420, 429 (5th Cir. 2012) (outlining rule of *Berry v. State*, 10 Ga. 511 (1851)). But when, as here, the movant asserts violations of *Brady* in his Rule 33 motion, our court instead applies the three-pronged *Brady* test. *United States v. Runyan*, 290 F.3d 223, 247 (5th Cir. 2002). *Brady* requires the movant show: "(1) the evidence at issue is favorable to the defense, either because it is exculpatory or impeaching, (2) the prosecution suppressed the evidence, and (3) the evidence is material". *Murphy v. Davis*, 901 F.3d 578, 597 (5th Cir. 2018). Only the materiality prong is at issue in this appeal.

Evidence is material under *Brady* if there is a "reasonable probability" that its disclosure would have led to a different outcome. *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–10 (1976). The defendant must instead show the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict". *Kyles*, 514 U.S. at 435.

"We review the denial of a motion for a new trial for abuse of discretion but consider alleged *Brady* violations de novo." *Turner*, 674 F.3d at 428. The *de novo* review, however, must be "with deference to the factual findings underlying the district court's decision". *Id.* (quoting *United States v. Severns*, 559 F.3d 274, 278 (5th Cir. 2009)).

Mack's convictions stem from the discovery of contraband during a 2018 traffic stop. His new-trial motion was based on evidence that the state trooper who initiated the stop later participated both in the fatal beating of a black motorist (the incident) and the alleged cover-up effort. Evidence of the trooper's participation in the incident was available roughly a month before the suppression hearing but was not disclosed. Mack asserts the evidence could have altered his trial in two ways.

First, he contends he could have prevailed on his motion to suppress the evidence seized in conjunction with the traffic stop by impeaching the trooper at the suppression hearing. Mack fails to establish the materiality of this contention. The sole issue in the suppression hearing was whether the traffic stop was justified at its inception. The district court concluded it was because Mack failed to properly signal a turn. This conclusion is supported by the trooper's suppression-hearing testimony and his vehicle's dash-camera video. (In that regard, our court held the video justified the stop. *Mack*, 857 F. App'x at 802 ("[B]oth [the trooper's] testimony and the video evidence established [the trooper] *did* see Mack approach the left turn without a continuous signal active, then seconds later execute that turn." (emphasis in original))).

Second, Mack contends he could have used the impeachment evidence to induce jurors to reject the trooper's trial testimony. Mack does not demonstrate that the new evidence provides any specific reason for questioning that testimony, only that it bears on the trooper's general credibility—in other words, his character for truthfulness. But Mack's broad condemnation of the trooper does little to explain how he would have used specific acts to impeach the trooper's character for truthfulness. *See* FED. R. EVID. 608(b); *see also* 28 Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure: Federal Rules of Evidence* § 6118 (2d ed.), Westlaw (database updated Apr. 2023) ("[A] central purpose of Rule 608(b)

is to prevent the jury from hearing evidence that might cause it to draw the tenuous inference that, because the witness has committed bad acts, he is a bad person and, thus, a liar."). Moreover, the trooper's account of the facts is well corroborated. Jurors were able to compare his testimony with the testimony of another witness and footage from the trooper's dash camera.

AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

UNITED STATES OF AMERICA	**CRIMINAL NUMBER 19-0029-01**
VERSUS	**JUDGE TERRY A. DOUGHTY**
JMARREON MACK	**MAG. JUDGE KAREN L. HAYES**

MEMORANDUM ORDER

Pending before the Court is a Motion for New Trial [Doc. No. 142] filed by Defendant J'Marreon Mack ("Mack"). An Opposition [Doc. No. 149] was filed by the Government on December 21, 2022. Mack filed a reply [Doc. No. 151].

For the reasons set forth herein, Mack's Motion for New Trial is **DENIED**.

I. BACKGROUND

At the conclusion of a jury trial on November 19, 2019, Mack was found guilty of Possession of Marijuana with the Intent to Distribute (Count I); Possession of a Firearm by a Convicted Felon (Count II); and Possession of a Firearm in Furtherance of a Drug Trafficking Crime (Count III)[1]. This Court sentenced Mack on March 2, 2020. He was sentenced to 120 months as to Count I; 60 months as to Count II, to run concurrently with Count I; and 90 months imprisonment as to Count III, to run consecutively.[2]

The conviction and sentence were affirmed by the United States Court of Appeals for the Fifth Circuit on July 12, 2021.[3] A writ of certiorari to the United States Supreme Court was denied on February 22, 2022.[4]

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[1] [Doc. No. 101].
[2] [Doc. No. 115].
[3] [Doc. No. 132].
[4] [Doc. No. 135].

On November 13, 2022, Mack filed the pending Motion for New Trial. In his Motion for New Trial, Mack alleges that he is entitled to a new trial in accordance with FED. R. CR. PROC. 33 because he was unaware, at the hearing on his Motion to Suppress on June 19, 2019,[5] that Master Trooper Christopher Hollingsworth ("Hollingsworth") had been involved in an arrest which resulted in the death of a defendant named Ronald Greene, approximately one month before the June 19, 2019, hearing. Mack alleged Hollingsworth and other troopers with the Louisiana State Police covered up their involvement in the Ronald Green incident. Because Hollingsworth was the trooper who stopped Mack at the time of his arrest, and the sole witness to the stop, Mack argues this issue relating to Hollingsworth's credibility is "newly discovered evidence", which entitles Mack to a new trial.

II. LAW AND ANALYSIS

A. LAW

FED. R. CR. PROC. 33 provides as follows:

> a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) Time to File.
>
> (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.
>
> (2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

[5] [Doc. No. 51].

Mack maintains this Motion for New Trial is timely as it was brought within three years of the date of his November 14, 2019, jury verdict. This Court agrees that Mack's motion is timely.

The suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This duty applies to exculpatory and impeachment evidence. *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

Undisclosed evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995). A reasonable probability of a different result is shown when nondisclosure puts the case in a different light so as to undermine confidence in the jury verdict. *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). The key is "whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999).

Motions for new trial based on newly discovered evidence are "disfavored and reviewed with great caution." *United States v. Erwin*, 277 F.3d 727, 731 (5th Cir. 2001). The power to grant a new trial based upon newly discovered evidence should be exercised infrequently unless warranted by "exceptional circumstances." *United States v. Tarango*, 396 F.3d 666, 672 (5th Cir. 2005).

In order to justify a new trial based upon newly discovered evidence, a defendant must prove five things:

> (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal.

United States v. Wall, 389 F.3d 457, 467 (5th Cir. 2004). If the defendant fails to demonstrate any one of these factors, the motion for new trial should be denied.

B. ANALYSIS

The only relevance of Hollingsworth's testimony is in regard to the hearing on Mack's Motion to Suppress. Mack argues that this is a Brady violation because the only evidence for the initial stop by Hollingsworth on April 12, 2018, was the testimony of Hollingsworth, and had he known of the Ronald Greene incident at the hearing on the Motion to Suppress, he would have been able to discredit Hollingsworth's testimony."To establish a Brady violation, a petitioner must make three showings: the issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the [prosecution], either willfully or inadvertently; and prejudice must have occurred." *Moore v. Quarterman*, 534 F.3d 454, 460-61 (5th Cir. 2008). The Court finds that Mack has established that there was a Brady violation here. However, this does not affect the Court's ruling because the facts of the case do not establish that this would have affected Mack's verdict of guilty at the conclusion of the jury trial.

However, a review of the transcript of Hollingsworth's testimony, and of the dash-cam video[6] that was introduced at the hearing, provides evidence that corroborated Hollingsworth's testimony. Hollingsworth testified he saw Mack's oncoming vehicle slow down and fail to use his left-hand turn signal to turn. This was corroborated by the video. Hollingsworth turned around and stopped Mack in a parking lot. Mack argues the video showed Mack's back (but not front) left turn signal in operation at that time. When Hollingsworth testified about telling Mack his reasoning for conducting the stop, Mack told him that his blinker was not functioning properly

[6] [Doc. No. 51, Exh. 1].

because of front-end damage to his vehicle. Which corroborated with both the dash-cam video and Hollingsworth's reasoning for stopping Mack.

The video positively shows that Mack's front left turn signal was not signaling just prior to his left turn. Whether the front blinker was inoperable or not activated is irrelevant. In either case, there would have been a violation of La. R.S. 32:104 and, therefore, probable cause for the stop. The Government argues that a Motion for New Trial cannot be based upon a witnesses' truthfulness at a pre-trial hearing.[7] Even assuming that a Motion for New Trial can be based upon a witnesses' truthfulness at a pretrial hearing, Mack has failed to prove a reasonable probability that the outcome of Mack's Motion to Suppress would have been different. Hollingworth's dash-cam video proves Mack's left-front turn signal was not in operation just prior to Mack's left turn.

Additionally, this Court finds because the new evidence contravenes no element of the Government's case and speaks only to the credibility of the witness's testimony, it cannot support a motion for new trial. *United States v. Brumfield*, 713 F. App'x 395, 396 (5th Cir. 2018).

Mack's Motion for New Trial is therefore **DENIED.**

III. CONCLUSION

For the reasons set forth herein,

IT IS ORDERED that the Motion for New Trial [Doc. No. 142] is **DENIED**.

MONROE, LOUISIANA, this 17th day of January 2023.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

[7] [Doc. No. 149, pp.3-4].