UNITED STATES OF AMERICA, Plaintiff - Appellee, v. VIVIAN A. EARLE, AKA Vivian A. Earl, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
2025 U.S. App. LEXIS 13275; 2025 LX 177185
No. 24-48
May 14, 2025, Argued and Submitted, Phoenix, Arizona
May 30, 2025, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2025 U.S. App. LEXIS 1}Appeal from the United States District Court for the District of Arizona. D.C. No. 2:19-cr-01121-GMS-1. G. Murray Snow, District Judge, Presiding.United States v. Earle, 2021 U.S. Dist. LEXIS 57344, 2021 WL 1139850 (Mar. 25, 2021)United States v. Earle, 2021 U.S. Dist. LEXIS 50487 (Mar. 17, 2021)

Disposition:
AFFIRMED.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Mr. Anthony William Church, Office of the U.S. Attorney, Phoenix, AZ.
For **VIVIAN A. EARLE**, Defendant - Appellant: Donna Lee Elm, Cottonwood, AZ.

Judges: Before: RAWLINSON, BUMATAY, and SANCHEZ, Circuit Judges.

CASE SUMMARY The jury was able to consider the circumstances of Earle's arrest and interrogation, and Earle failed to show that his exchange with Officer Hammond rendered his later confession involuntary. Delays caused by Earle's counsel are attributable to Earle, and the court's ends-of-justice determinations were not clearly erroneous.

APPENDIX A
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MEMORANDUM*

Vivian A. Earle ("Earle") appeals his jury conviction on five counts of bank robbery in violation of 18 U.S.C. § 2113(a). We affirm.1

1. We review de novo the denial of a motion to suppress based on challenges to *Miranda* warnings and the voluntariness of a confession. *United States v. Ramos*, 65 F.4th 427, 433 (9th Cir. 2023); *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008). Earle contends that the district court erred by excluding evidence that his confession to Agent Paul Lee was involuntary under *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). We are not persuaded. Unlike in *Crane*, the jury was shown an aerial recording of Earle's arrest and his videotaped interview with Agent Lee, which followed a clear *Miranda* warning. The jury was able to consider the physical circumstances of his arrest and interrogation and determine for itself whether his statements were credible.

Nor has Earle demonstrated that the exclusion of his exchange with Officer Blake**{2025 U.S. App. LEXIS 2}** Hammond constituted error. Although Earle stated that he did not wish to speak to Officer Hammond, he volunteered that he wanted to speak to "the lead detective." The district court concluded that the limited exchange between Officer Hammond and Earle concerning matters unrelated to Earle's arrest did not constitute an interrogation. *See United States v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994). Considering "the totality of all the surrounding circumstances," Earle fails to demonstrate how Officer Hammond's statements rendered his confession to Agent Lee involuntary. *See Dickerson v. United States*, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

2. Reviewing de novo, the district court did not violate the Speedy Trial Act ("STA").2 *United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022). "Because 'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by the defendant's counsel is also charged against the defendant." *Vermont v. Brillon*, 556 U.S. 81, 90-91, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009) (citation omitted). The delays caused by continuances requested by Earle's court-appointed counsel are therefore ascribed to Earle. *Id.* The district court's orders granting trial continuances were also "specifically limited in time" and supported "with reference to the facts as of the time the delay is ordered." *United States v. Henry*, 984 F.3d 1343, 1351 (9th Cir. 2021). Earle fails to show that the district court's ends of justice determinations were clearly erroneous.**{2025 U.S. App. LEXIS 3}** *Olsen*, 21 F.4th at 1040. Moreover, the STA clock did not lapse on November 23, 2021, because Earle filed other motions that tolled the clock. *See* 18 U.S.C. §§ 3161(h)(1)(C)-(D), (H).

3. Reviewing de novo, the district court correctly found that Earle waived his right to counsel by conduct. *United States v. French*, 748 F.3d 922, 929 (9th Cir. 2014). "In general, district courts must ensure that a defendant understands: (1) the nature of the charges against [him]; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation." *Id.* Earle went through four court-appointed attorneys, who moved to withdraw either due to an inability to communicate with Earle or after Earle requested a change in counsel. The district court repeatedly warned Earle that it would not continue granting a change in counsel. After the appointment of a fourth attorney, it issued a *Faretta* order which "correctly advised [Earle] of the risks of self-representation, the nature of the charges against him, and the penalties he faced." *United States v. Sutcliffe*, 505 F.3d 944, 955 (9th Cir. 2007). There was no error in the waiver determination.

4. We "review whether the factual foundation was sufficient to warrant a jury instruction for an abuse of discretion." *United States v. Wiggan*, 700 F.3d 1204, 1210 (9th Cir. 2012). If error occurs, we "need not reverse" if "there is no reasonable possibility that the error materially**{2025 U.S. App.**

LEXIS 4} affected the verdict." *United States v. Bachmeier*, 8 F.4th 1059, 1065 (9th Cir. 2021). The only evidence alluding to duress was Earle's videotaped statement to Agent Lee blaming "the Mexicans" for the bank robberies, which the Government introduced into evidence over Earle's objection. The Government acknowledges that Earle did not assert a duress defense at trial or in closing arguments. Assuming without deciding that the district erred in instructing the jury on a duress defense, that error was harmless beyond a reasonable doubt. The district court qualified its duress instruction, stating that "[t]here is evidence to suggest defendant may have acted under compulsion at the time of the crime charged." It made clear that the Government still had the burden to prove beyond a reasonable doubt that Earle committed each element of bank robbery. The instruction on the robbery counts also reinforced the Government's burden of proof beyond a reasonable doubt. Read together, these instructions would not have caused any juror confusion. There was also substantial physical, video, and testimonial evidence of Earle's guilt.

5. Reviewing de novo, the district court did not violate Earle's Confrontation Clause rights. Unlike the expert in *Smith v. Arizona*, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024), the supervisory forensic examiner**{2025 U.S. App. LEXIS 5}** testified about his own report and did not rely on a non-testifying expert's report. Although the Government's expert did not conduct the DNA tests himself, he supervised and directed the team of lab technicians who performed the tests and provided him with the results. He interpreted the results, drew conclusions, and wrote those conclusions in a Report of Examination, which was the basis of his testimony at trial.

6. Reviewing de novo, the district court properly denied Earle's mid-trial motion to suppress. *United States v. Ruiz*, 428 F.3d 877, 880 (9th Cir. 2005). Because Earle failed to provide any facts to support his mid-trial motion, there were no factual issues involved in deciding the motion. Nor does Earle identify any factual disagreement about the probable cause supporting his arrest and search. In light of our conclusions, we find no cumulative error. *See United States v. Solorio*, 669 F.3d 943, 956 (9th Cir. 2012).

AFFIRMED.

Criminal Case

United States of America, Plaintiff, v. Vivian A. Earle, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
2023 U.S. Dist. LEXIS 180561
No. CR-19-01121-001-PHX-GMS
October 6, 2023, Decided
October 6, 2023, Filed

Counsel {2023 U.S. Dist. LEXIS 1}Vivian A Earle, aka: Vivian A Earl, Defendant, Pro se, FLORENCE, AZ USA.

For Vivian A Earle, aka: Vivian A Earl, Defendant: D Stephen Wallin, LEAD ATTORNEY, Wallin Law Firm PLLC, Phoenix, AZ USA; Donna Lee Elm, LEAD ATTORNEY, Law Practice of Donna Elm, Cottonwood, AZ USA; Eric Walter Kessler, LEAD ATTORNEY, Kessler Law Group, Scottsdale, AZ USA; Mark A Paige, LEAD ATTORNEY, Paige Law Firm, Mesa, AZ USA; Mauri deWaun Gray, LEAD ATTORNEY, Federal Public Defenders Office - Phoenix, Phoenix, AZ USA; Michael Stanley Yucevicius, Attorney at Law, LEAD ATTORNEY, Michael Yucevicius, Phoenix, AZ USA; Philip A Seplow, LEAD ATTORNEY, Law Office of Philip A Seplow, Phoenix, AZ USA.

U.S. Attorneys: Anthony William Church, Raynette M Logan, Robert Ian Brooks - Inactive, LEAD ATTORNEYS, Caitlin Bales Noel, Gayle L Helart, US Attorneys Office - Phoenix, AZ, Phoenix, AZ USA.

Judges: G. Murray Snow, Chief United States District Judge.

Opinion

Opinion by: G. Murray Snow

Opinion

ORDER

Pending before the Court are several pro se motions filed by Defendant. They are:

I. Motion for Acquittal (Doc. 308)

II. Motion for New Trial (Doc. 309)

III. Motion for Release from Custody (Doc. 313)

IV. Motion to Let the Record of the Criminal Docket Reflect Demands{2023 U.S. Dist. LEXIS 2} for Trial (Doc. 317)

V. Motion for Copies (Doc. 318)

VI. Motion to Substitute Attorney (Doc. 323)

VII. Motion or Return of Property (Doc. 326)

VIII. Motion to Expedite Ruling on Motions (Doc. 327)

IX. Second Motion to Expedite Ruling on Motions (Doc. 329)

APPENDIX B

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For the reasons detailed below, Defendant's Motions are denied. The reasoning for each Motion is detailed below.

PENDING MOTIONS

I. Motion for Acquittal (Doc. 308)

A court may grant a motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure when the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29. "First, the evidence must be viewed in the light most favorable to the government; and second, the reviewing court must respect the exclusive province of the jury . . . by assuming that the jury resolved all [factual] matters in a manner which supports the verdict." *U.S. v. Ramos*, 558 F.2d 545, 546 (9th Cir. 1977). As such, if a reasonable jury could find the Defendant guilty based on the admitted evidence, a motion for acquittal must be denied.

Defendant's Motion for Acquittal is premised on the allegation this Court erred as a matter of law by admitting into evidence over 90 of the Government's exhibits and that without this evidence, no reasonable jury could have convicted him. (Doc. 308 at 1-2). This Court does not**{2023 U.S. Dist. LEXIS 3}** find error in its earlier evidentiary rulings. Additionally, Defendant alleges error in relation to the testimony of Jose DeJesus Soto-Quintero on the grounds that Mr. Soto-Quintero was able to identify Defendant in court after completing his own internet research. (Doc. 308 at 2). While Defendant is correct, this Court prevented prejudice against Defendant by instructing the jury to disregard Mr. Soto-Quintero's testimony that was based on outside research. (Doc. 306 at 22). Accordingly, Mr. Soto-Quintero's testimony is not grounds of an acquittal.

Because the jury's verdict was reasonable and based on properly admitted evidence, Defendant's Motion for Acquittal is denied.

II. Motion for New Trial (Doc. 309)

"[A] court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. Generally, an order for a new trial requires that "the evidence[] preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand. *U.S. v. Walker*, 899 F. Supp. 14, 15 (D.C. Cir. 1995).

Defendant argues this Court should grant a new trial because it erred in certain evidentiary rulings and improperly instructed the jury. This Court does not find error in its evidentiary rulings or its**{2023 U.S. Dist. LEXIS 4}** instructions to the jury. Additionally, Defendant alleges that witness testimony presented by the government was not credible. (Doc. 310 at 1). The Court does not find any errors in the record and must defer to the jury's weighing of the witnesses' credibility. Finding no error, it is in the interest of justice to uphold Defendant's conviction. Accordingly, Defendant's Motion for New Trial is denied.

III. Motion for Release from Custody (Doc. 313)

Courts may release defendants from custody pending sentencing or appeal under specific circumstances. 18 U.S.C. § 3143(a)-(b). To make such a finding, the Court must find "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released." *Id.* § 3143(a), (b)(1)(A). Courts are further guided by a non-exhaustive list of factors set by the Ninth Circuit. *U.S. v. Garcia*, 340 F.3d 1013, 1019-21 (9th Cir. 2003). This includes unusual harshness of prison conditions, strength of defendant's argument and likelihood of success on the merits, and the violent nature of the crime. *Id.*

Defendant's grounds for release are that he is likely to succeed on the merits of his acquittal and new

trial motions. (Doc. 313 at 2). Defendant cannot show he is likely to succeed{2023 U.S. Dist. LEXIS 5} on the merits of his Motions for Acquittal and New Trial as the Court has already ruled against him on each. *See supra* Sections I-II. Additionally, considering the violent nature of Defendant's criminal history, this Court cannot find by clear and convincing evidence that Defendant would not be a flight risk or danger to the community. Accordingly, Defendant's Motion for Release from Custody is denied.

IV. Motion to Let the Record of the Criminal Docket Reflect Demands for Trial (Doc. 317)

Defendant moves for the record to reflect certain of his alleged demands for trial. Specifically, Defendant moves for the Court to "correct" the record to reflect certain demands. (Doc. 317 at 1). Any demands made by filing or at hearings will remain on the record, but this Court will not retroactively add such demand into the record where they do not currently exist. As such, all of Defendant's on-the-record demands will be preserved. Accordingly, Defendant's Motion to Let the Record of the Criminal Docket is denied.

V. Motion for Copies (Doc. 318)

Defendant moves for copies of trial transcripts and the docket for post-conviction relief. This Court grants Defendant's Motion in part in that the Court{2023 U.S. Dist. LEXIS 6} orders the trial transcripts be provided to Defendant, including trial proceedings under seal. However, considering the number of pre-trial proceedings, Defendant must refile a Motion for Copies listing all the specific pre-trial dates he would like materials for.

VI. Motion to Substitute Attorney (Doc. 323)

Defendant moves to substitute his appointed advisory counsel. (Doc. 323 at 1). On June 23, 2023, at the beginning of trial, Defendant moved to assert his right to represent himself. (Doc. 290). This Court granted his request, but appointed advisory counsel to assist Defendant in his self-representation if required. (Doc. 294). While an indigent defendant is entitled to court-appointed attorneys, "right to counsel does not carry with it the right to select a particular lawyer as his court-appointed attorney." *U.S. v. Burkeen*, 355 F.2d 241, 245 (6th Cir. 1966). This principal is even more potent here, when Defendant has waived his right to appointed counsel and chose to represent himself. Finding no good cause to remove Defendant's advisory counsel, Defendant's Motion to Substitute Attorney is denied.

VII. Motion for Return of Property (Doc. 326)

"A district court has jurisdiction to entertain motions to return property seized by the{2023 U.S. Dist. LEXIS 7} government when there are no criminal proceedings pending against the movant." *U.S. v. Martinson*, 809 F.2d 1364, 1366-67 (9th Cir. 1987) (citations omitted). "In ruling on the motion, the court must take into account all equitable considerations." *Id.* (citations omitted). Defendant has already moved for additional proceedings at the district court level and has indicated an intent to appeal in his other filings. (Doc. 318). Accordingly, Defendant's motion is premature and his Motion for Return of Property is denied.

VIII. Motion to Expedite Ruling on Motions (Docs. 327, 329)

Defendant filed two separate Motions "demanding" this Court to rule on his pending Motions for Acquittal and New Trial. (Docs. 327, 329). This Court has denied both pending Motions. *See supra* Sections I, II. Accordingly, Defendant's Motions to Expedite Ruling are denied as moot.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's pending Motions (Docs. 308, 309, 313, 317, 323, 326) are **DENIED**.

IT IS FURTHER ORDERED that Defendant's Motion for Copies (Doc. 318) is **GRANTED** as to transcripts for trial dates. Accordingly, the Court Reporter through CJA will provide trial transcripts for June 21, 23, 27, 28, 29, and 30, 2023. The transcripts will be provided on a 30-day deadline**{2023 U.S. Dist. LEXIS 8}** after filing.

IT IS FURTHER ORDERED that Defendant notify the Court within ten days as to whether he would like the transcripts in paper or e-mail form.

IT IS FURTHER ORDERED that Defendant file another Motion listing the exact dates of each pre-trial proceeding for which he would like a transcript. Additionally, the Defendant must notify the Court whether he would like pre-trial proceeding transcripts in paper or e-mail format.

IT IS FINALLY ORDERED that Defendant's Motions to Expedite Ruling (Docs. 327, 329) are denied as moot.

Dated this 6th day of October, 2023.

/s/ G. Murray Snow

G. Murray Snow

Chief United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. VIVIAN A. EARLE, AKA Vivian A. Earl, Defendant - Appellant.	No. 24-48 D.C. No. 2:19-cr-01121-GMS-1 District of Arizona, Phoenix ORDER

Before: RAWLINSON, BUMATAY, and SANCHEZ, Circuit Judges.

Judges Rawlinson, Bumatay, and Sanchez voted to deny the Petition for Panel Rehearing and Petition for Rehearing En Banc. The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote. *See* Fed. R. App. P. 40. The Petition for Panel Rehearing and Petition for Rehearing En Banc, Dkt. No. 77, is DENIED.

APPENDIX H

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