12-14-1981

Appellant's Reply Brief - U.S. v. Henderson, Docket No. 81-1279 (672 F.2d 924 (9th Cir. 1982))

No. 81-1279

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	]
	]
Plaintiff & Appellee,	]
	]
vs.	]
	]
J. WILLIE HENDERSON,	]
	]
Defendant & Appellant.	]
	]

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT J. KELLEHER, JUDGE

APPEAL FROM A JUDGMENT OF CONVICTION

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APPELLANT'S REPLY BRIEF

I

SEVERANCE WAS MANDATED BECAUSE THE APPELLANT MADE A SUFFICIENT SHOWING OF IMPORTANT TESTIMONY TO GIVE ON COUNTS I THROUGH V AND A STRONG NEED TO REFRAIN FROM TESTIFYING ON COUNT VI.

The government makes two arguments in an effort to dispute the above contention. We discuss each separately with appropriate responses.

A. The government in this case was able to prove the falsity of the defendant's testimony before the grand jury in its case in chief, and therefore the defendant had no strong need to refrain from testifying as to Count VI since he would not supply a missing element in the government's case.

To begin with, the government seems to take the position that a defendant can only make a showing of a

"strong need to refrain from testifying" on a Count if he can show that the government cannot prove that Count against him without his own testimony. We quote below the government's contention in this regard:

> "No such 'strong need to refrain from testifying' may be found in instances where the Government is able to establish that it cound prove its case against the defendant even if he elects not to take the stand." [Appellee's Brief, p.8]

The above statement is followed by citations to the following cases: Baker v. U.S., 401 F.2d 958, 976-977 (D.C. Cir. 1968); Cross v. U.S., 335 F.2d 987, 989 (D.C. Cir. 1969); U.S. v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980).

In Cross the decision contains very little as to the extent of the evidence against the appellant concerning the Count on which he maintained he had a "strong need to refrain from testifying." The dissenting judge, however, characterized the case as to Count I as "overwhelming." The majority opinion in a footnote stated that the major evidence against the defendant was testimony of accomplices. Clearly, the basis of the decision in Cross was not that the prosecutor made his case only with the help of the defendant's testimony, but that that testimony aided the prosecution. Thus the defendant had a "strong

need to refrain from testifying" on that Count.-

Appellant also invites the Court's attention to Baker and Armstrong, neither of which holds or even suggests that the government's contention is correct. These cases simply recite the requirement in order to obtain severance and leave the question of what is a sufficient showing to a case by case analysis. We again reiterate that one case which found the showing sufficient (Cross) is far weaker than the facts of the instant case.

Clearly, the question of what the government proved without the defendant's testimony bears on the issue of whether the defendant made a sufficient showing of a "strong need to refrain from testifying" on Count VI. For example, if the evidence was overwhelming to establish fasity independent of the defendant's testimony, the defendant would be hard put to establish a strong need to refrain from testifying. Where, however, the evidence concerning falsity is either totally lacking or extremely slim, such a showing is clearly made. With this in mind, we review what the government claimed it proved in their case in chief. The government maintains that Jacquith was really the client because of each of the following pieces of evidence:

1. Jacquith had contact with Nigeria by traveling there, telephoning to and from there, and sending telegrams there.

2. Jacquith received Reuben Ireroa at the Los

Angeles airport and put him up at his (Jacquith's) home in the month preceding the money transfer. The government argues on Page 8 of its brief that this establishes that Jacquith introduced Ireroa to Henderson at Henderson's office.

3. Jacquith telephoned Henderson repeatedly.

We must expect that the government has made what is considered its best showing in the Appellee's Brief and it is clearly insufficient to establish that Jacquith was the client for whom Henderson opened the Barclay's account. What is lacking is any showing of a connection between Henderson and Jacquith which would prove beyond a reasonable doubt that Jacquith and no one else was that particular client.

B. Even if the government did not prove falsity without the aid of the defendant's testimony, it could have.

This contention, we submit, is absurd. This Court has only one record in this case and it includes all the proof the government chose to offer. We assume the government called all the evidence it thought was helpful on the issues. The appellant does not share the government's view that VanDenheuval would have helped to establish falsity, but we wonder why, if the government believes that she would, she was not called to help establish what must clearly have been an obvious deficiency in the government's case. Roanna VanDenheuval was not called, we submit, because the

prosecutor, an experienced trial lawyer, recognized that her credibility was open to serious question.

II

THE EVIDENCE IN THE GOVERNMENT'S CASE IN CHIEF WAS SO TOTALLY LACKING AS TO THE ELEMENT OF FALSITY THAT IT WAS A MANIFEST MISCARRIAGE OF JUSTICE TO DENY APPELLANT'S RULE 29(a) MOTION AT THE CLOSE OF THE GOVERNMENT'S CASE IN CHIEF.

Appellant relies on U.S. v. Larson, 507 F.2d 385 (9th Cir. 1974) and U.S. v. Ochoa-Torres, 626 F.2d 689 (9th Cir. 1981) for the proposition that error in denying a motion for acquittal at the close of the government's case can be reviewed on appeal even if the defendant put on a defense if there was plain error or a manifest miscarriage of justice in denying the original motion.

Appellee contends that these cases merely address whether failure to renew a sufficiency of the evidence motion at the end of trial bars review on appeal. Both issues are essentially the same, in that if there is plain error or a manifest miscarriage of justice the propriety of the ruling denying the orignal motion for acquittal is reviewable on appeal, whether or not the motion was renewed and whether or not defense evidence was introduced. The rule essentially provides that error in denying the

motion at the close of the government's case in chief is not waived where there is plain error or a manifest miscarriage of justice. In U.S. v. Croxton, 482 F.2d 231 (9th Cir. 1973) the Court stated the rule as follows:

> "Garcia raised the entrapment issue by his motion for a 'directed verdict' at the end of the government's case. However, subsequent to its denial he testified in his own behalf. In doing so, and in the absence of plain error, he waived any right to challenge the denial of his motion for judgment of acquittal." [Emphasis added.][482 F.2d at 233]

The Appellee attempts to put himself in a very unique position. He claims on the one hand that it was perfectly appropriate to combine Counts I through V with Count VI for trial, thereby forcing the defendant to testify as to Counts I through V in order to have any chance for an acquittal. The Appellee then claims on the other hand that in so testifying, testimony which was forced by their joinder of Counts, he somehow waives his right to attack the propriety of the denial of the Rule 29(a) motion at the close of the government's case. This position, we submit, is both illogical and unjust.

CONCLUSION

Appellant again strongly suggests that this Court reverse the conviction on Count VI with directions to

enter a judgment of acquittal or, in the alternative, to reverse the conviction on Count VI and remand for a new trial on the specific condition that none of the appellant's trial testimony may be used in the retrial.

RESPECTFULLY SUBMITTED,

MONROE & RIDDET

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PROOF OF SERVICE BY MAIL

I am employed in the county of Orange, state of California; my business address is 1428 North Broadway, Santa Ana, California, 92706; I am over the age of eighteen years and not a party to the within action.

On December 10, 1981, I served the within Appellant's Reply Brief on the interested parties in said action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

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CLERK, U.S. DISTRICT COURT
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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of December, 1981, at Santa Ana, California.

Donna L. Small

DONNA L. SMALL