FILED
United States Court of Appeals
Tenth Circuit

OCT 25 1989

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LIN EDWARD DAVIS,

Defendant-Appellant.

No. 88-2896
(D.C. No. 88-44-P)
(W.D. Okla.)

ORDER AND JUDGMENT[1]

Before McKAY, BRORBY, and McWILLIAMS, Circuit Judges.

By indictment Lin Edward Davis was charged with ten counts of mail fraud under 18 U.S.C. § 1341. The gist of the several charges was that Davis used the United States Postal Service to further a scheme to defraud various rare coin companies and others by placing orders which were accompanied by bad checks.[2] Davis

[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

[2] Although the indictment is not a part of the record on appeal, it would appear that most of the counts relate to coin companies and Davis' efforts to obtain valuable coins from them through the use of short checks. However, it would also appear that perhaps one count involved a company selling military commemoratives and that two other counts involved companies selling money market funds, and Davis' efforts to obtain interests therein through the use of short or no-account checks. Davis was

pled not guilty to all charges and a jury trial ensued.

At the conclusion of the government's case, Davis moved for a judgment of acquittal under Fed. R. Crim. P. 29. That motion was denied. The defendant's only witness was himself. The government called several rebuttal witnesses, and the case was submitted to the jury, which convicted Davis on all ten counts.

The district judge sentenced Davis to imprisonment for twenty-eight months on counts 1, 9, and 10. On counts 2, 3, and 4, the district judge sentenced Davis to imprisonment for one year to run consecutive to the sentence imposed on counts 1, 9, and 10. On counts 5, 6, 7, and 8 Davis was sentenced to imprisonment for one year to commence after the sentence imposed on counts 2, 3, and 4 was served. After serving all of the above sentences, Davis was to be placed on supervision for an additional three years. Davis appeals his several convictions and sentences imposed thereon.

On appeal, Davis urges two grounds for reversal: (1) The district court erred in denying his motion for acquittal made at the conclusion of the government's case and, in connection therewith, also argues that the evidence does not support the jury's verdicts; and (2) The district court erred in holding that Davis committed perjury when testifying and that, under the Sentencing Reform Act of 1984, he was "obstructing justice" which

---

a resident of Oklahoma City, Oklahoma and the companies involved were all out-of-state. The checks were drawn on a bank in Boston, Massachusetts. The orders and accompanying checks were sent through the United States postal service.

justified adding "two points" under the guidelines. We are not persuaded by either of these arguments and therefore affirm.

Representatives of various coin companies testified that they received orders through the mail for rare coins from an individual who identified himself as Lin Davis. Others stated that they received similar orders for coins from an individual identifying herself as Linda Johnson. In each instance the orders were accompanied by a check that turned out to be a short check. In some instances, the coins ordered were shipped before the checks turned out to be short. In other instances, the shipment of the coins was held up to see whether the check cleared. The shipments of coins, as well as requests that the short checks be made good, were sent to post office boxes and to a residential address in Oklahoma City, Oklahoma.[3]

One government witness, a Ms. Tuggle, who was director of investigations for a company in Boston, Massachusetts, testified, inter alia, that she had talked on several occasions to a man on the telephone who identified himself as Lin Davis, and that on another occasion she had talked to a person identifying herself as Linda Johnson.[4] Ms. Tuggle testified that in her opinion the man

3 The two post office box numbers and residential address consistently referred to by various witnesses are 32607, 94520, and 1004 S.W. 48th Street.

4 The company made investigation of Davis because many accounts were being opened under a variety of names using one of the three addresses listed above or some other Oklahoma address. All of these accounts were opened with bad checks or with checks written on a money market account previously closed by the company.

The company received letters and calls from a person identifying himself as Lin E. Davis, Linda Johnson, or as someone who represents Lin E. Davis. The subject of these communications were demands for the company to turn over money to Lin E. Davis, identifying himself as Lin Davis was the person who later called and identified himself as Linda Johnson.

Ms. Tuggle was in the courtroom when Lin Davis testified and, on the basis of having heard Davis' voice, she, as a rebuttal witness, identified Davis as the person who had called her on the prior occasions, stating, inter alia, that Linda Johnson's voice "was like a male attempting to have it [the voice] to be a female, a falsetto voice." On cross-examination, Ms. Tuggle explained the reasons for her firm belief that it was Davis who had made the calls for both himself and "Linda Johnson."

A postal clerk identified Davis in court as the person who picked up mail from a post box registered to Lin E. and Sherri Davis (P.O. Box 94520)[5]. Another postal clerk identified Davis in court as the person to whom he delivered mail at Davis' home address (1004 S.W. 48th Street). A third postal clerk identified a change of address form for Lin E. Davis, Sherri D. Davis, and Jennifer L. Davis. The form requested that mail previously delivered to 1004 S.W. 48th Street be delivered instead to P.O. Box 94520. Finally, a postal clerk named Norva Crayton identified change of address forms and a post box application signed by Lin E. Davis or Linda Johnson (changing delivery from P.O. Box 32607 to P.O. Box 94520). The change of address forms listed many names, including those used on coin company order forms and on money market accounts which other witnesses had testified about

---

even though there were funds in the accounts.

5 The post office box applicant must list his or her address on the application. The address given by the applicant of Box 94520 was 1004 S.W. 48th Street--Lin E. Davis' home address.

earlier. Ms. Crayton also identified Davis as the person who collected the mail from the box issued to Lin E. and Sherri Davis. Further, a search of Davis' home by postal authorities disclosed coins which had previously been identified as coins shipped to Davis.

As indicated, Davis testified and basically denied all wrongdoing. Specifically, he denied placing any coin orders and he also denied ever talking with Ms. Tuggle. Further, Davis contradicted his identification by the postal clerks as the owner of the post office box in Oklahoma City, Oklahoma.

After the district court denied Davis' Rule 29 motion made at the conclusion of the government's initial presentation of evidence, Davis testified in his own behalf, and the government thereafter called several rebuttal witnesses. The general rule is that a defendant who presents evidence after a motion for acquittal is deemed to have waived any objection to such denial. United States v. Douglas, 668 F.2d 459 (10th Cir. 1982), cert. denied, 477 U.S. 1108, 102 S. Ct. 2908, 73 L.Ed. 2d 1317 (1982). The record before us does not indicate that Davis renewed his motion for acquittal at the close of all the evidence. However, if he had, or perhaps did, the sufficiency of the evidence is to be determined by an examination of the entire record. United States v. Boss, 671 F.2d 396 (10th Cir. 1982).

Although Davis has waived his right to obtain appellate review of the district court's denial of his motion for judgment of acquittal made at the conclusion of the government case, he is entitled to a review of the entire record to determine if there is a plain error or defect affecting his substantial rights. United States v. Parrott, 434 F.2d 294 (10th Cir. 1970), cert. denied, 401 U.S. 979, 91 S. Ct. 1211, 28 L.Ed. 2d 330 (1971). In our view, the totality of the evidence amply supports the jury's verdict. There is no doubt that someone used the postal service to further a scheme to defraud. The orders were for coins of substantial value and were invariably accompanied by short checks. And we believe the government's evidence tied Davis to the scheme. In particular, the testimony of Ms. Tuggle and the postal representatives tended to establish Davis' participation in the scheme. Indeed, it would appear that Davis was the perpetrator of the scheme. His denials at trial simply posed a disputed issue of fact which was resolved adversely to Davis by the jury.[6]

The Sentencing Guidelines Manual provides that if a defendant willfully impedes or obstructs the administration of justice during the investigation or prosecution of a given case, the "offense level" is increased "by 2 levels." United States Sentencing Commission, Sentencing Guidelines Manual, §3C1.1. The "Commentary" under that guideline states that "testifying untruthfully . . . concerning a material fact . . . during a trial" is one form of obstructing justice. The presentence report suggested, if it did

---

6 The basic elements of a violation of 18 U.S.C. § 1341 are a scheme to defraud and use of the mail to further the scheme. A "scheme to defraud" is one which is reasonably calculated to deceive persons of ordinary prudence and comprehension. United States v. Seasholtz, 435 F.2d 4 (10th Cir. 1970). The success or failure of the scheme to defraud is immaterial. United States v. Stewart, 872 F.2d 957 (10th Cir. 1989); United States v. Aigbevbolle, 827 F.2d 664 (10th Cir. 1987); United States v. Curtis, 537 F.2d 1091 (10th Cir. 1976), cert. denied, 429 U.S. 962, 97 S. Ct. 389, 50 L.Ed. 2d 330 (1976).

not recommend, that Davis' offense level should be raised two levels because of his false testimony at trial. In any event, the district judge did raise Davis' offense level by two levels because of what he deemed to be false testimony given by Davis. Specifically, the district judge held that Davis testified falsely in connection with the testimony given by Ms. Tuggle and the postal representatives and accordingly raised the offense level by two.

On appeal, Davis argues that the district judge erred in raising the offense level by two. In thus arguing, counsel relies on two other provisions in the "Commentary" which state that a defendant's testimony "should be evaluated in a light most favorable to the defendant" and that a defendant should not be punished for the exercise of his constitutional right to testify in his own behalf. The defendant, however, does not have a constitutional right to commit perjury. United States v. Grayson, 438 U.S. 41 (1978). The crucial factor for determining whether or not the conviction of a defendant who gave exculpatory testimony triggers the obstruction of justice adjustment is the ability of the trial judge to observe the demeanor of the testifying defendant, and to access that testimony in the context of the full record. United States v. Salvatore Emanuel, No. 588 Cr. 652 (S.D.N.Y. Sept. 15, 1989) (Lexis, Gen. Fed. library, Dist. File). A trial judge may include as a factor in sentencing the judge's conclusion that a defendant's testimony was perjured. Grayson, at 54-55.

18 U.S.C. § 3742 provides for appellate review of an otherwise final sentence and in connection therewith states at 18

U.S.C. § 3742(d) that a "court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses and shall accept the findings of fact of the district court unless they are clearly erroneous."

The district court found that Davis testified falsely when he denied having telephone conversation with Ms. Tuggle and when he denied ownership of the post office box in Oklahoma City, Oklahoma, the latter in the face of testimony of several postal clerks who testified to the contrary. On the record, we do not believe the district court's findings in this regard are clearly erroneous.

Judgment affirmed.

Entered for the Court

Robert H. McWilliams
Circuit Judge