

FILED
United States Court of Appeals
Tenth Circuit

MAY 23 1990

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARTIN J. MARTINEZ,
Defendant-Appellant.

No. 89-4092
(D.C. No. 89-CR-0036A)
(D. Utah)

ORDER AND JUDGMENT*

Before TACHA, BALDOCK, and BRORBY, Circuit Judges.

This appeal is from an order of the district court denying defendant's motion for a new trial. Defendant appeals on the grounds that the district court erred when it denied a motion for new trial based on an affidavit recanting the testimony of a key government witness and on newly discovered evidence relating to the existence of an individual named Jesus Lopez who allegedly was involved in the cocaine transaction. We affirm.

A motion for new trial based on newly discovered evidence should only be granted where the newly discovered evidence is more than impeaching or cumulative, is material to the issues involved, and would probably produce an acquittal. Further, when the motion

* 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.

is based on recanted testimony the trial court must be satisfied that the challenged testimony was actually false. See United States v. Bradshaw, 787 F.2d 1385 (10th Cir. 1986).

The alleged newly discovered evidence in this case included an affidavit in which government witness Gonzales recanted his trial testimony and information with respect to the identity and existence of Jesus Lopez, who the defense alleges was the intended person to whom the delivery of the cocaine was to be made. This proffer of newly discovered evidence is merely impeaching evidence. The record clearly shows that other evidence in this case corroborated Gonzales's original testimony and the involvement of defendant in this case. We cannot say that the district court abused its discretion in denying a new trial under the circumstances of this case. **AFFIRMED.**

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge