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United States District Court,
N.D. Illinois, Eastern Division.

UNITED STATES of America
v.
Lee G. LOVETT.

Nos. 87 C 8978, 85 CR 284. | May 16, 1988.

Opinion

MEMORANDUM OPINION AND ORDER

PLUNKETT, District Judge.

***1** After a jury trial in federal court, Petitioner Lee Lovett was convicted on two counts of mail fraud and sentenced to three months in prison and five years probation. Lovett's conviction was affirmed on appeal. Lovett, who has served his prison sentence but is still on probation, now moves pursuant to 28 U.S.C. 2255 to vacate his conviction and sentence. He asserts that the conviction must be vacated as a result of the Supreme Court's decision in *McNally v. United States,* 107 S.Ct. 2875 (1987), which repudiated the "intangible rights" theory of mail fraud. For the reasons set forth below, we agree with Petitioner, and therefore vacate his conviction and sentence.

Background

In 1980, Lovett was a partner in a Washington, D.C. law firm specializing in communications law. His firm was retained by U.S. Cable Corporation to assist the company in obtaining the cable television franchise for Fox Lake, Illinois. Lovett was indicted on April 29, 1985, for alleged criminal violations arising from his efforts on behalf of U.S. Cable. He was charged, in essence, with bribing Richard Hamm, the Mayor of Fox Lake, in an effort to ensure that U.S. Cable was awarded the franchise. Count I charged Lovett with conspiring to violate the Travel Act by travelling in interstate commerce to promote bribery under the laws of the state of Illinois. Counts II, III, and IV alleged substantive violations of the Travel Act involving the promotion of bribery. Lovett was also charged, in Counts V and VI, with mail fraud.

The mail fraud counts alleged that Lovett schemed to defraud the Village of its right to the faithful services of Mayor Hamm, its right to have the Village's business conducted free from conflicts of interest and fraud, and its right to make the franchise award with full disclosure of ownership interest; and that he schemed to obtain the cable franchise by means of fraudulent representations.

At the trial before Judge Getzendanner, the main prosecution witness was Mayor Hamm, who had already pled guilty to a crime in connection with the award of the cable franchise. Hamm testified that Lovett had offered him a 5% interest in the local subsidiary of U.S. Cable in return for Hamm's assistance in obtaining the franchise for U.S. Cable. He further testified that he told Lovett that he could not hold the interest in his own name, and that Lovett then suggested placing the interest in the name of a nominee. Lovett, on the other hand, testified that he had not offered Hamm a 5% interest in the company, but rather had only offered him the opportunity to select a local partner to hold a 5% interest. The jury acquitted Lovett on Counts I through IV, the bribery counts, but convicted him of mail fraud on Counts V and VI.

Discussion

Lovett argues that his conviction must be vacated because he was convicted under the "intangible rights" theory of mail fraud, a theory which was recently repudiated by the Supreme Court in *McNally v. United States,* 107 S.Ct. 2875 (1987). Before discussing the merits of Lovett's arguments, we must first address a number of procedural issues.

I.

A. *The Availability of Section 2255*

In order to seek relief under Section 2255, the Petitioner must be "in custody" for purposes of that provision. Lovett has already completed his prison sentence, but he is still on probation. A person on probation is "in custody" for purposes of a Section 2255 motion. *See United States v. Re,* 372 F.2d 641, 643 (2d Cir.1967). Thus, Lovett clearly meets the custody requirement. [1]

B. *Procedural Default*

***2** We must also consider the government's argument that Petitioner waived the right to challenge the intangible rights theory by failing to object at trial and on appeal to the government's use of this theory. Despite Petitioner's assertion to the contrary, it appears clear to us that he never challenged the validity of the theory—whether by way of

pre-trial motion, objection to the relevant jury instructions, post-trial motion, or direct appeal. Instead, he merely argued (in his post-trial motion and on appeal) that there was no criminal fraud because no evidence had been presented which established that Mayor Hamm had actually failed to carry out his duties and responsibilities as the mayor of Fox Lake. *See* Memorandum of Points and Authorities in Support of Motion for Judgment of Acquittal or, in the Alternative, for a New Trial; *United States v. Lovett,* 811 F.2d 979, 984–85 (7th Cir.1987).

Because of Lovett's previous failure to challenge the intangible rights theory, we may not consider his claim on collateral attack unless he shows both " 'cause' excusing his double procedural default, and 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady,* 456 U.S. 152, 168 (1982). As to cause, we ruled in *Moore v. United States,* 87 C 8542 (slip op. Jan. 14, 1988), another post-*McNally* petition to vacate an intangible rights theory mail fraud conviction, that petitioner indeed had cause not to object to use of the intangible rights theory. We relied in *Moore* on *Reed v. Ross,* 468 U.S. 1 (1984), where the Supreme Court held that the cause requirement is satisfied when existing law did not afford petitioner a "reasonable basis" for the claim at issue at the time of trial and appeal. *McNally*'s repudiation of the intangible rights theory was such a clear break with the past, we held, that a head-on attack on the intangible rights theory was not a claim reasonably available to counsel at the time of petitioner's trial and appeal. The government has brought to our attention Judge Shadur's ruling to the contrary in a similar case. *See United States v. Gill,* 84 CR 20020 (slip op. Nov. 3, 1987). However, as we explain below, we remain convinced that adequate cause existed for the failure of one in Lovett's position to challenge the intangible rights theory at trial and on appeal.

In *Reed,* the Court reasoned that

Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a ... procedural bar. Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim.... Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose.

468 U.S. at 15. The Court therefore went on to hold that cause is present where existing law does not offer a reasonable basis for a particular challenge. More specifically, it indicated that cause will nearly always exist where a decision of the Court "overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.* at 17 (citation omitted).

***3** We think the existence of cause is clear under the *Reed* standard. Prior to *McNally,* the intangible rights theory was well-entrenched in the Seventh Circuit; the court had explicitly approved its use on numerous occasions. *See* discussion in *Moore,* slip op. at 3. Moreover, the theory had also been approved by every other circuit which considered it. *See McNally,* 107 S.Ct. 2882–84 and n. 1–3 (Stevens, J., dissenting). As the First Circuit noted in *United States v. Ochs,* (slip op. Mar. 15, 1988): "The Supreme Court's decision in *McNally* has been variously described as 'blockbusting,' as 'a total surprise' and as a 'wholly unexpected explication of the law of mail fraud.' It was, without a doubt, a departure from the law of every court of appeals ... to consider the issue of intangible rights mail fraud prosecutions." *Id.* at 15 (citations omitted) Under these circumstances, we simply cannot say that Lovett's counsel had a reasonable basis in existing law for raising such a challenge.

Unlike Judge Shadur, we do not believe that the Supreme Court's decision in *Smith v. Murray,* 106 S.Ct. 2661 (1986), requires a holding of insufficient cause. Judge Shadur construes *Smith* as holding that "[n]o claim can be said to be 'unavailable' ... where that claim had previously been made in the lower courts." *Gill,* slip op. at 9. We disagree with this interpretation. In *Smith,* the Court noted that "various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal." 106 S.Ct. at 2667. Where the intangible rights theory was concerned, it appears to us that no "percolation" was going on; instead, it was simply becoming increasingly evident that no appellate court (least of all the Seventh Circuit) was willing to entertain a frontal assault on the intangible rights theory. [2]

In the end, we are brought back to the rationale of *Reed,* and most particularly, to the reasoning of the Fourth Circuit's Judge Haynsworth as quoted approvingly by the Court:

"If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable ... claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened

with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable."

Reed, 468 U.S. at 16. We wholeheartedly agree with these sentiments (which of course apply as aptly to trial as to appellate litigation), and we find that under *Reed* Lovett had sufficient cause for his previous failure to challenge the intangible rights theory.

***4** The prejudice prong of the cause and prejudice test may be dispensed with much more quickly. As we stated in *Moore,* "If [petitioner] succeeds in establishing that the acts which the jury found he committed do not constitute a federal crime, he has suffered great prejudice.... [T]o be convicted and sentenced by a federal court for acts which are not a federal crime seems to us to be the essence of prejudice." *Moore,* slip op. at 3–4.[3] Thus, we find that Lovett has met the cause and prejudice test, and now move on to the last of the threshold barriers—the issue of retroactivity.

C. *Retroactivity*

Before considering Petitioner's argument that *McNally v. United States* requires vacating his conviction, we must of course step back and consider whether *McNally* applies retroactively to convictions already final. We are convinced that it does so apply. As Judge Smalkin pointed out in *United States v. Mandel,* 672 F.Supp. 864, 874–75 (D.Md.1987):

There is persuasive authority to the effect that a Supreme Court decision construing the mail fraud statute as not reaching a particular scheme to defraud is fully retroactive. *See Strauss v. United States,* 516 F.2d 980 (7th Cir.1975) (habeas corpus); *United States v. Travers,* 514 F.2d 1171 (2d Cir.1974) (writ of error *coram nobis*). The backdrop to these cases was the Supreme Court's decision in *United States v. Maze,* 414 U.S. 395 (1974), that Section 1341, the mail fraud statute, does not reach certain credit card schemes to defraud. The courts deciding both the *Strauss and Travers* cases permitted collateral attack on pre–*Maze* mail fraud convictions in light of *Maze.* They explained, quite simply, that 'Section 1341 [the mail fraud statute] has always had the meaning given it by the Supreme Court in *Maze.*' "

Similarly, the mail fraud statute has always had the meaning given it by the Court in *McNally.* Thus, *McNally* applies retroactively and we may now weigh the merits of Petitioner's argument that his conviction must be vacated in light of *McNally.*

II.

A. *McNally*

In *McNally,* the Supreme Court considered the scope of the mail fraud statute, 18 U.S.C. 1341, which prohibits the use of the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." It held that the mail fraud statute applies only to schemes to defraud others of money or property rights; it does not proscribe schemes to defraud citizens of an intangible right to honest and impartial government. Petitioners in *McNally* had been charged with devising a scheme to defraud the citizens of Kentucky of their intangible right to have the state's affairs conducted honestly, and to obtain money by means of false pretenses and the concealment of material facts. The jury was instructed that it could convict if it found either of two schemes to exist. One scheme involved a deprivation of property rights, but the other involved only the deprivation of the intangible right to good government. The Court reversed petitioners' convictions because the jury had not been required to find that the state was defrauded of any money or property in order to convict. Reversal was necessitated because the jury instruction permitted a conviction for conduct (deprivation of the right to good government) not within the scope of Section 1341.

B. *The Effect of McNally on Lovett's Conviction*

Lovett's indictment contained both an intangible rights prong and a property prong. It alleged that Lovett devised and intended to devise and participate in a scheme to defraud

***5** (a) the Village of Fox Lake and its citizens of their right to the legal, faithful and honest services of Richard Hamm in the performance of acts related to his public employment;

(b) the Village of Fox Lake and its citizens, public officials and its public employees of the right to have the business of the Village of Fox Lake conducted honestly, fairly and impartially, free from collusion, partiality, dishonesty, conflicts of interests, and fraud;

(c) the Village of Fox Lake and its citizens, its public officials and its public employees of the right to make a cable television franchise award with full disclosure of ownership interests; and to obtain the Village of Fox Lake

cable television franchise contract by means of false and fraudulent representation and promises, knowing them to be false when made, ...

The jury was instructed that

A scheme means some plan or course of action intended to deceive another and to deprive another of something of value by means of false pretenses, representations, or promises.

A scheme to defraud under the mail fraud statute may include a plan to deprive citizens of the honest and impartial functioning of a public official, and this is "something of value" within the meaning of the mail fraud statute.

... [I]t is not necessary that the government prove all of the false pretenses, representations, promises and acts charged in the portion of the indictment describing the scheme, [but] it is essential that one or more of them be proved beyond a reasonable doubt establishing the existence of the scheme to defraud, ... [and] you must unanimously agree upon which one or more of them has been proven.

The phrase "intent to defraud" means that the acts charged were done knowingly and with the intent to take financial advantage of a confidential relationship, or to deceive Fox Lake and its citizens in order to cause the loss of their right to the loyal, faithful and honest services of Mayor Richard Hamm in the performance of his official duties, or in order to cause the loss of the honest, fair and impartial conduct of business of the office of mayor or village.

The instructions presented the theories outlined in the indictment in the alternative (i.e., using the word "or"); the jury was told that it could convict Lovett as long as it agreed upon any one of them. As in *McNally,* then, the jury was not required to find that the citizenry was defrauded of any money or property. Thus, the instructions allowed the jury to convict for conduct that is outside the scope of the mail fraud statute, and the conviction must therefore be vacated. *McNally,* 107 S.Ct. at 2882; *see also United States v. Gimbel,* 830 F.2d 621, 627 (7th Cir.1987); *United States v. Ochs,* (1st Cir.) (slip op. Mar. 15, 1988); *United States v. Mandel,* 672 F.Supp. 864 (D.Md.1987); *United States v. Slay,* (E.D.Mo.) (slip op. Nov. 4, 1987).

Contrary to the government's assertion, this case does not fall within the rule of *United States v. Wellman,* 830 F.2d 1453 (7th Cir.1987), where the Seventh Circuit refused to overturn a mail fraud conviction on *McNally* grounds. In *Wellman,* defendant was charged with using the mail to sell chemical transportation tanks based on misrepresentations that they met government specifications. The scheme was characterized as one to defraud the buyer of "its right to have safe and authorized equipment for the storage and shipment of hazardous chemicals and of its right to know that equipment it purchased was in full compliance with [government] regulations," and to "obtain [ ] money by means of false and fraudulent pretenses, representations and promises." The Seventh Circuit found that the jury could not have convicted for conduct outside the statute's reach, for "the government could not logically prove one scheme without proving the other since the elements of the two were identical." 830 F.2d at 1463.

***6** The government argues that this case is analogous to *Wellman.* Indeed, it goes so far as to argue that

Like the conduct charged and proved in *Wellman,* "far from involving intangible rights, this case presents a typical garden variety fraud perpetrated against [the victims] in part through use of the United States mail. Such conduct was precisely what Congress intended to proscribe."

Government's Response at 5, quoting *Wellman,* 830 F.2d at 1463.

It seems to us that this argument can only be characterized as disingenuous. Both the district court and the court of appeals explicitly noted that the mail fraud counts were tried to the jury on an intangible rights theory—i.e., the theory that the defendant intended to deprive the citizens of Fox Lake of their rights to good government and to the honest services of public officials. *See* Memorandum Opinion and Order of October 28, 1985 at 2; *United States v. Lovett,* 811 F.2d 979, 984 (7th Cir.1987). Indeed, the government argued to the jury that it should convict Lovett even if it believed his testimony that he only offered Mayor Hamm the right to choose the holder of the 5% interest—on the theory that such conduct created a conflict of interest for the mayor and thereby deprived the citizens of Fox Lake of their right to good government, i.e., government free of conflicts of interest. *See* Transcript of August 8, 1985 at 34, 88, 102. This case is thus totally unlike *Wellman,* in which defendant was in essence charged with bilking a buyer of chemical storage tanks out of his money by falsely claiming that the tanks complied with government regulations. The Lovett jury might well have found that Lovett schemed to defraud the citizens of Fox Lake of their right to good government (e.g., by placing the mayor in a conflict of interest) without finding that he deprived the citizens of any sort of property rights. Thus,

Lovett may have been convicted for conduct outside the scope of the mail fraud statute, and his conviction cannot stand.

For the foregoing reasons, Petitioner's motion to vacate his conviction and sentence is granted.

Conclusion

Footnotes

1 We also note that the error alleged need not be a constitutional one in order to be subject to collateral attack under Section 2255. *See Davis v. United States,* 417 U.S. 333, 345 (1974); *Strauss v. United States,* 516 F.2d 980 (7th Cir.1975).

2 Neither do we believe that the Court's language in *Engle v. Isaac,* 456 U.S. 107, 130 (1982) mandates a finding of insufficient cause in this case. *Engle's* statement to the effect that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial" does give us some pause. However, we believe that the rationale so carefully set forth in the Court's subsequent *Reed* decision strongly supports a finding of cause in this case, and we cannot find that this rationale is overridden by the brief discussion in *Engle.*

3 Indeed, even had we found Lovett to be in procedural default (through failure to establish cause), we most likely would have allowed his collateral attack notwithstanding the default, in order to avoid a fundamental miscarriage of justice.

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