

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3113

UNITED STATES OF AMERICA

v.

AUBREY ERNEST BOONE,
Appellant

On Appeal from the District Court of the Virgin Islands
Division of St. Thomas and St. John
D.C. Criminal No. 97-cr-00072
(Honorable Thomas K. Moore)

Argued December 8, 1999

Before: BECKER, Chief Judge, SCIRICA and GARTH, Circuit Judges

(Filed January 27, 2000)

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Attorney for Appellee

MEMORANDUM OPINION

SCIRICA, Circuit Judge.

Defendant Aubrey Ernest Boone appeals his conviction following a jury trial for one count of possession with intent to deliver cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(ii)(II); one count of importation of cocaine, in violation of 21 U.S.C. § 952(a); and one count of possessing cocaine aboard an aircraft, in violation of 21 U.S.C. § 955.

Boone filed post trial motions for Judgment of Acquittal and New Trial, which the District Court denied.¹ The District Court sentenced Boone to 70 months imprisonment on each count, to be served concurrently, and five years of supervised release and a special assessment of \$100.00 on each count.

I.

¹In his post trial motions for acquittal and new trial, Boone also argued the District Court erred in not giving a lesser included instruction for simple possession of a controlled substance in the jury charge, which we will not address as it has not been raised on appeal.

On May 23, 1997, Boone arrived at the Cyril E. King Airport in St. Thomas, U.S. Virgin Islands, on a flight from St. Kitts, West Indies. Boone had two boxes and a duffle bag, which he presented for inspection. At trial, United States Department of Agriculture Inspector Karen Stewart testified that she opened the first box and found agricultural products. Inspecting the second box, Stewart felt something in the bottom of the box, and when she asked Boone what it was, he replied in a low voice, “help me.” When Stewart asked Boone what he had said, he repeated the same words. Stewart told Boone she could not help him, and turned the inspection over to U.S. Customs Inspector Carolyn Brown. Boone maintains, as he did in his testimony at trial, that he never said “help me.”²

According to the government’s witnesses, Boone responded to Brown’s questions indicating the box was his, and that it contained fish. He said the fish belonged to someone named “Brooks,” but he did not know Brooks or his first name.³ Inspecting the box, Brown found a black plastic bag between the fish. The bag contained a hard substance in a clear plastic bag which later tested positive for cocaine. United States

²Boone’s testimony differed from both Inspectors Stewart’s and Brown’s regarding the content of the second box, whether both boxes were actually inspected, and the manner in which they opened the box in which the cocaine was found. Both parties discuss in their briefs whether Boone tried to open the box for Stewart by stabbing it with a pen, or whether Stewart opened the box with her knife, a factual issue which we find irrelevant to the issues presented on appeal.

³Boone contests having ever mentioned anyone named “Brooks” and maintains that he did not know the person who gave him the box at the St. Kitts airport.

Customs Special Agent Joseph Schwartz was then called to the airport. At trial, Schwartz testified that he and his supervisor advised Boone of his constitutional rights.⁴ Boone denied knowledge of the cocaine found in the box. Schwartz also testified that the next morning he asked Boone more questions, after reminding Boone of his rights, including his right to an attorney. Schwartz testified Boone admitted knowing there was cocaine in the box, which he was supposed to give to a man named “Peanut” in St. Thomas.

Boone testified he was given the box containing cocaine by a stranger in St. Kitts, who told him the box contained fish. Boone said the stranger placed the box with Boone’s luggage, but departed when a guard told him to move his car. Boone never saw him again. Boone asserts he checked in the box and paid the overweight charges. He testified the stranger told him someone at the St. Thomas airport would retrieve the box. Although Boone did not know who this person was, he expected to be recognized by his disability.⁵ Boone testified he did not know the box contained cocaine, and never stated otherwise to Special Agent Schwartz.

⁴Boone admitted at trial he was advised of his rights by Schwartz, and the record contains a copy of the written Miranda form with Boone’s initials next to every recitation.

⁵Boone is partially paralyzed on his left side and walks with a limp. At times, he wears a brace on his hand.

II.

A.

Boone contends the Government engaged in prosecutorial misconduct in violation of his Fifth Amendment due process rights. Specifically, he claims that the Government's failure to produce a copy of Boone's alleged statements to Customs Inspector Brown and Customs Special Agent Schwartz until November 21, 1997, and related rough notes until after a hearing on the motion to suppress held December 4, 1997, amounted to bad faith.⁶

1.

On November 24, defense counsel orally requested dismissal as a sanction for the late production of evidence, requesting in the alternative that the alleged statements be excluded. The District Court found no evidence the prosecutor had acted in bad faith, and denied the motion.⁷

⁶Defendant served the Government on November 24, 1997, a written request for "any and all reports, notes, rough notes, hand-written documents concerning an (sic) verbal, written or recorded statements, admissions or confessions made by the defendant." The Government provided the Grand Jury transcript of Agent Schwartz at the hearing on the motion to suppress held on December 4.

⁷Defense counsel contends she relied on the government's representation that it did not know of this statement at the time of initial discovery at the November 24 hearing, and told the District Court that she had no knowledge of any evidence which would indicate that the government had acted in bad faith. It was not until she reviewed the transcript from the grand jury hearing, that she discovered the government in fact must have had prior knowledge of Boone's "alleged" confession.

On December 3, 1997, Boone's counsel filed a motion to suppress Boone's statements as a sanction for their late disclosure.⁸ The District Court held a hearing on December 4, 1997, during which Boone asserted the Grand Jury transcript revealed the Government had full knowledge of the alleged confession as early as June 19, 1997, which pre-dated the initial discovery response letter sent to defense counsel on June 27, 1997. Boone argued the record establishes bad faith on the part of the Government in its late disclosure.

The District Court denied the motion, holding the Government did not act in bad faith, and Boone was not materially prejudiced in the preparation of his defense. The District Court found:

Although the government did not disclose the evidence until November 21, 1997, less than two weeks before the original trial date, it appeared that this delay was occasioned by neglect on the prosecutor's part. The Court declined to exclude or suppress the evidence or dismiss the case because the government did not act in bad faith, and the defendant was not materially prejudiced in the preparation of his defense. Boone received a short continuance to allow his counsel to examine the statements. (See Tr., Nov. 24, 1997, at 18-19.) Boone's counsel complained that a plea offer had expired before the government disclosed this evidence. In response to the Court's request, the government renewed its offer. (See Tr., Dec. 4, 1997, at 93-96.) The Court made certain that the defendant did not lose any opportunities due to the government's sloth.

Appendix at 823.

⁸In the same motion, Boone argued the statements should be suppressed because he had not been advised of his Miranda rights. This argument is discussed below.

Whether there was insufficient evidence to demonstrate bad faith by the government in its late disclosure of Boone's statements and the inspectors' notes is reviewed for abuse of discretion. United States v. Ramos, 27 F.3d 65, 67 (3d Cir. 1994); United States v. Hill, 976 F.2d 132 (3d Cir. 1992). We believe the government's late disclosure was improper and unwarranted. But we agree there was no bad faith and that Boone was not materially prejudiced by this late disclosure, primarily because of the sound judgment exercised by the District Court.⁹ As the court noted, it assured that Boone "did not lose any opportunities" because of the government's late disclosure. Boone offers no evidence, nor provides any argument, how he was prejudiced by the government's late disclosure.¹⁰ We see no abuse of discretion by the District Court in declining to dismiss on this ground.

⁹In his brief, Boone cites to United States v. Pelullo, 105 F.3d 117 (3d Cir. 1997). But there is no evidence that the notes here would have been useful to Boone, or that he was denied the opportunity to use that information during trial. Furthermore, Pelullo is clearly distinguishable because the notes at issue there contained potential impeachment evidence. In Pelullo, we relied on Brady v. Maryland, in which the Supreme Court held: "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S.83, 87 (1963). The notes here did not contain evidence favorable to Boone, but instead contained inculpatory statements.

¹⁰At oral argument, Defense Counsel did not articulate how Boone was prejudiced by the late disclosure of Boone's "alleged" confession, though she noted that the District Court ruled that the confession would be admissible on Friday, December 5, and the trial began on Monday, December 8, thus implying that she did not have the time needed to address this new evidence. But she conceded that she did not ask for a continuance.

2.

Boone argues the Government engaged in prosecutorial misconduct when it impermissibly shifted the burden of proof through the following statement made during his closing argument:

Mr. Aubrey Boone knows the only way he cannot be found guilty is if he convinces you that he didn't have the cocaine in the box. That is why he took the stand and told you he didn't know there was cocaine in this box.

But, as noted by the District Court, the next thing the prosecutor said was:

But there is no question that when you look at all the evidence in this case, when you look at all the evidence in this case, and all the facts that have been presented to you, and all the circumstances of this case as testified to by the Government and testified to by Mr. Boone, you will find the Government has met each and every element required under Courts One, Two and Three, and I will ask you to return a verdict of guilty on all three counts.

In reviewing the evidence presented during trial, the prosecutor explained what the government had to prove beyond a reasonable doubt. The District Court found the prosecutor's comments, when taken in context, did not impermissibly shift the burden of proof, and did not constitute prosecutorial misconduct warranting a new trial.

Reviewing the prosecutor's entire closing argument, as well as the court's instructions to the jury both at the beginning of trial, and in his charge, we believe the error was cured. The court addressed the prosecutor's erroneous statement immediately after the prosecutor's closing argument:

Ladies and gentlemen, [l]et me make one comment and that is – that I will repeat to you. You have already heard several times the burden of proof never shifts to the defendant. It doesn't have – defendant doesn't have to do

anything. It is the [g]overnment's burden to prove all the elements and guilt beyond a reasonable doubt.

In addition, the District Court instructed the jury at the beginning of trial:

[Mr. Boone] is innocent unless and until proved guilty beyond a reasonable doubt. A defendant has the right to remain silent. It never has to prove its innocence or even to present any evidence.

App. at 228. And, again in the charge to the jury, the District Court instructed:

Remember as well that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence because the burden of proving guilt beyond a reasonable doubt is always assumed by the Government.

. . . .

The guilt of Mr. Boone of any offenses charged against him must be established beyond a reasonable doubt by the proof, consisting of the evidence before you, considered in light of these instructions.

I remind you that Mr. Boone is presumed to be innocent, doesn't have to testify or present any evidence to prove innocence. The law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence. The defendant is not obligated to produce any evidence by cross-examining the witnesses for the Government.

The defendant Boone has pleaded not guilty to the indictment, all three charges. He denies that he is guilty of those charges and, therefore, the Government has the burden of proving every element beyond a reasonable doubt. If it fails to do so, you must return a not guilty verdict.

Boone relies in part on United States v. Cruz, 797 F.2d 90 (2d Cir. 1986), to support his argument that the prosecutor's statement requires reversal. But the Cruz Court found the prosecutor's use of the phrase "[t]he defense . . . has to convince you" in summation, when taken in context, was not enough to overturn a jury conviction.

While this phrasing is indefensible, we will not lightly overturn a conviction solely on the basis of a prosecutor's misstatement in summation. This misstatement was surrounded by statements to the jury, both by the government and the court, that the burden at all times remained on the

government to prove its case beyond a reasonable doubt; a curative instruction by the court was directed specifically toward this misstatement. We conclude that the misstatement, viewed against the entire argument before the jury, did not deprive Cruz of a fair trial.

Id. at 93, fn. 1. It is true that here the District Court's curative instruction was not directed specifically to the prosecutor's misstatement. Although as a general matter curative instructions addressing improper statements should specifically reference the misstatement, we find the number of references to the proper burden of proof throughout closing arguments and the charge, and the immediacy of the court's response, adequately cured any error.

B.

Boone contends the District Court violated his Fifth Amendment right against self incrimination by failing to suppress statements made before the Miranda warning. Because the District Court's evidentiary ruling was based upon an interpretation of law, we exercise plenary review. United States v. Pellulo, 105 F.3d 117, 125 (3d Cir. 1997); United States v. Sokolow, 91 F.3d 396, 402 (3d Cir. 1996).

Boone argues that when Agricultural Inspector Stewart turned over the inspection of his box containing the fish and cocaine to Inspector Brown, she already had developed a suspicion of criminal activity, and had communicated that suspicion to Inspector Brown and Inspector Hodge. At that time, he argues, the search was no longer routine, and he should have been advised of his Miranda rights. Any statements made thereafter to either Inspector Brown or Inspector Hodge, he contends, should have been suppressed.

It is clear, however, that Boone's Miranda rights did not attach until he was taken into custody and questioned by Agent Schwartz.¹¹ Before that point, Stewart, Brown and Hodge were merely conducting routine border inspections, and did not need to advise Boone of his Miranda rights. See United States v. Ezeiruaku, 936 F.2d 136, 140 (3d Cir. 1991) ("An incoming routine search at the border needs no articulable suspicion to justify it; a non-routine search triggers the requirement of reasonable suspicion. (Citation omitted.)"); United States v. Layne, 973 F.2d 1417, 1420 (8th Cir. 1992) ("Routine questioning by customs officials is normally not custodial interrogation that triggers a Miranda warning. See United States v. Troise, 796 F.2d 310, 314 (9th Cir. 1986) citing United States v. Espericueta-Reyes, 631 F.2d 616, 622 (9th Cir. 1980)."). We find no evidence supporting Boone's contention that Stewart, Brown or Hodge were conducting anything more than a routine border inspection. Because Boone's Miranda rights were not violated, the District Court did not abuse its discretion in denying the motion to suppress statements made to Stewart, Brown and Hodge.

C.

Boone contends there was insufficient evidence upon which the jury could find him guilty. In this regard, we exercise plenary review, considering all the evidence in the light most favorable to the government, and will affirm if there is sufficient evidence from

¹¹Boone does not contest Schwartz' testimony that Schwartz advised him of his Miranda rights before taking him into custody and questioning him, and does not seek suppression on Miranda grounds of statements he allegedly made to Schwartz.

which a rational trier of fact could find guilt beyond a reasonable doubt. United States v. Jenkins, 90 F.3d 814, 817 (3d Cir. 1996).

Boone contends his testimony was more credible than the government's testimony. Specifically, Boone claims that Agent Schwartz' testimony about Boone's "alleged" confession is "inherently incredible." But credibility determinations are for the jury. As the District Court noted, the "Court cannot usurp the jury's function and weigh Schwartz's credibility, as defendant suggests, in judging the merits of his motion for acquittal. See Burks v. United States, 437 U.S. 1, 16 (1978)." Appendix at 817-818. Nor can we weigh the credibility of Boone against that of the other witnesses at trial.

Boone claims he "produced evidence to refute the claim that he had any knowledge that there was cocaine in the box. There was no evidence that Appellant's fingerprints were found on the inside of the box or on the wrapping material surrounding the cocaine." But the lack of fingerprints does not undermine the jury's verdict. Boone also presented evidence that it was common practice in the islands for airline passengers to carry packages for non-passengers. But this testimony did not establish that it was common practice to carry packages for strangers with no questions asked. When looking at all the evidence presented in the light most favorable to the government at trial, we believe there was sufficient evidence from which a reasonable juror could conclude that Boone possessed the requisite knowledge and was guilty as charged.

D.

Boone contends the District Court erred in allowing the cocaine into evidence, arguing there was a break in the chain of custody. We review for clear abuse of discretion. United States v. Clark, 425 F.2d 827, 833 (3d Cir. 1969) (“A trial judge’s determination that the showing as to identification and nature of contents is sufficient to warrant reception in evidence of the results of a test on the article may not be overturned except for a clear abuse of discretion.”).

In ruling on Boone’s post-trial motions, the District Court reasoned:

Although Boone identified a possible weak link in the government’s chain of custody for the cocaine allegedly taken from him, the jury was entitled to consider the authenticity of the evidence. Smith was one of two authorized custodians for the evidence obtained by the Customs Service; her inability to account for a single examination hardly obviates the possibility that the evidence was cocaine. Indeed, the defendant did not even allege that the cocaine left the custody of the authorized custodians. See United States v. Jackson, 649 F.2d 967 (3d Cir. 1981) (declaring that “evidence is admissible if the trial judge determines that ‘there is a reasonable probability that the evidence has not been altered in any material respect since the time of the crime’”) (citation omitted).

We agree.

E.

With regard to excluded evidence, Boone asserts the District Court should have allowed testimonial evidence of systemic bias by the Customs Service against the Federal Public Defender's office. Boone sought to elicit testimony from Murray David, Customs Inspector Supervisor, that David had received instructions from his division head to prevent inspectors from speaking to representatives from the Federal Defender's office. The District Court sustained the government's objection on relevancy grounds, striking David's testimony and disallowing the presentation of other witnesses on this issue. Boone asserts the evidence was relevant, demonstrating bias of the Customs Service witnesses. We review for abuse of discretion. United States v. Morgan, 581 F.2d 933, 936 (D.C. Cir. 1978).

The District Court correctly noted that evidence of personal bias of any witness testifying in this case would have been relevant. But the District Court found that "Boone's line of questioning, however, was directed at an administrative problem or misplaced directive within the Customs Service." Furthermore, Boone's counsel conceded that a meeting had been arranged with an investigator from the Federal Public Defender's office. On appeal, Boone simply reasserts that the directive from the chief supervisor "is clearly evidence of systemic bias," and then jumps to the conclusion that the evidence "was clearly relevant as is evidence of bias against any witness." We find this unconvincing. The District Court did not abuse its discretion.

F.

Boone's final argument is that the District Court denied him his constitutional right to confront through cross-examination the DEA chemist Raoul Morales. The court ruled that questioning Morales about the negative test result for cocaine traces on Boone's clothing obtained from the gas chromatography mass spectrometer would render admissible the positive test result obtained through the ion scan.

As the District Court noted in denying Boone's post-trial motions: "His counsel's tactical decision to inquire no further did not violate his constitutional rights. The confrontation clause safeguards the right to effect cross-examination, not the right to effective cross-examination. See Delaware v. Fensterer, 474 U.S. 14, 20 (1985)." We have held: "A restriction will not constitute reversible error unless it is so severe as to constitute a denial of the defendant's right to confront witnesses against him and it is prejudicial to substantial rights of the defendant." United States v. Adams, 759 F.2d 1099, 1110 (3d Cir. 1985).

We agree with the District Court that the "restriction" on Boone's right to cross-examine Morales was not so severe as to constitute a denial of his right to confrontation. Morales testified at trial that the plastic bag contained cocaine. Boone had the opportunity to cross-examine Morales regarding the testing of the cocaine, and vigorously did so. Neither Morales nor any other witness for the government testified as to either drug test conducted on Boone's clothing, one of which revealed traces of cocaine, and one of which did not. Thus, there was no evidence regarding cocaine on Boone's clothing for Boone to rebut. Boone's counsel's decision not to introduce the negative

drug test because it would open the door to the positive drug test was a tactical decision not implicating his right to confrontation. We see no abuse of discretion here.

III.

For the reasons stated above, we will affirm the District Court's order denying Boone's Motion for Acquittal or New Trial.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

DATED:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3113

UNITED STATES OF AMERICA

v.

AUBREY ERNEST BOONE,
Appellant

On Appeal from the District Court of the Virgin Islands
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D.C. Criminal No. 97-cr-00072
(Honorable Thomas K. Moore)

Argued December 8, 1999

Before: BECKER, Chief Judge, SCIRICA and GARTH, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John, and was argued on December 8, 1999. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this court that the judgment of the District Court entered January 26, 1999, be, and the same is hereby affirmed.

ATTEST:

P. Douglas Sisk, Clerk

DATED:

January 24, 2000

TO: P. Douglas Sisk, Clerk

FROM: Judge Scirica

RE: United States v. Aubrey Ernest Boone
No. 99-3113
Argued: December 8, 1999

Dear Doug:

Please file the attached memorandum opinion (unreported-not precedential) which has been cleared in accordance with our procedure. The signed original is being delivered to your office.

Sincerely,

Anthony J. Scirica

AJS/sss

cc (letter only): Chief Judge Becker
Judge Garth
3CA: Reports