

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4484

UNITED STATES OF AMERICA,

Appellee

v.

ARAB ALI,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 01-cr-00595)
District Judge: Honorable Michael M. Baylson

Submitted Under Third Circuit L.A.R. 34.1(a),
September 14, 2007

Before: RENDELL, FUENTES, and CHAGARES, Circuit Judges.

(Opinion Filed October 25, 2007)

OPINION OF THE COURT

FUENTES, Circuit Judge:

Following his conviction on two counts of bank fraud, in violation of 18 U.S.C. § 1344, the District Court sentenced Arab Ali to 27 months of imprisonment followed by 5

years of supervised release and fined him \$5,000. Ali challenges both his conviction and sentence, alleging (1) that the District Court abused its discretion by denying a continuance for new defense counsel to appear; (2) that the District Court abused its discretion in allowing the government to reopen its case-in-chief following the jury charge, but before jury deliberation; (3) ineffective assistance of counsel; and (4) that his sentence was unreasonable. We conclude that arguments (1), (2), and (4) are without merit and that, in accordance with our case law, argument (3) cannot be decided on direct appeal. Therefore, we will affirm the conviction and sentence, and deny the ineffective assistance claim without prejudice.¹

I.

The charges on which Ali was convicted arose out of his participation in a counterfeit check scam, in which Ali would receive checks from counterfeiters in Nigeria on the condition that he would remit 50% of any proceeds should the checks be cashed. Through this scheme, Ali attempted to deposit five checks totaling \$215,174 into two business bank accounts. In addition, when he was arrested, he was in possession of five counterfeit checks in the sum of \$182,257. The total attempted loss was just over \$397,431.

After several delays, due in part to changes of defense counsel, trial was scheduled for December 6, 2004. However, on Sunday, December 5, 2004, Ali faxed a letter to the

¹We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

District Court requesting a continuance and claiming that he had retained a new attorney. The next day, on the morning of trial, the new attorney did not appear. As a result, the District Court engaged in a lengthy discussion with Ali, the defense counsel he had retained six months prior, and the government attorney regarding the propriety of delaying trial. At the hearing, Ali asserted that he had just recently discovered his defense counsel's lack of experience and failure to review documents relevant to the case. However, his defense counsel stated that Ali was aware at all times of his trial experience and that he had reviewed all of the documentary evidence. The District Court contacted the office of the new attorney Ali claimed to have retained, only to find that the attorney did not represent Ali. Thereafter, the District Court denied the motion for a continuance and Ali proceeded to trial, represented by the attorney he had retained six months earlier.²

During its case-in-chief, the government neglected to provide evidence that the banks named in the indictment were federally insured, which is an essential element of bank fraud. See 18 U.S.C. §§ 20, 1344. After closing arguments and the jury charge, but before the jury began deliberating, the government requested an off-the-record sidebar conference, after which the District Court allowed the government to reopen its case-in-chief and produce an additional witness, a special agent in the Secret Service. The District Court explicitly limited direct and cross-examination of the special agent to "one

²The District Court found that Ali did not fire his attorney and did not waive his right to counsel. Ali does not challenge this determination.

point, . . . whether the financial institutions that are mentioned in the indictment were [f]ederally insured.” (App. 331.) Defense counsel declined the opportunity to cross-examine the witness.

Ultimately, the jury convicted Ali. At the sentencing hearing, the District Court adopted the facts and conclusions set forth in the Presentence Investigation Report (“Report”). Using the 2000 edition of the United States Sentencing Guidelines (“Guidelines”), the Report calculated the total offense level as follows: a base offense level of 6 pursuant to Guidelines § 2F1.1; an additional 9-level increase pursuant to Guidelines § 2F1.1(b)(1)(J) based on the attempted loss of \$397,431; and a 2-level increase pursuant to Guidelines §§ 2F1.1(b)(2)(A) and (B) because the offense involved both more than minimal planning and a scheme to defraud more than one victim. The total offense level was 17, which, when combined with a criminal history category of II, resulted in a recommended Guidelines range of 27 to 33 months of imprisonment.³ The District Court imposed a within-Guidelines sentence of 27 months of imprisonment followed by 5 years of supervised release and fined Ali \$5,000.

II.

We must determine whether the District Court abused its discretion in denying Ali’s request for a continuance, United States v. Goldberg, 67 F.3d 1092, 1097 (3d Cir. 1995), and granting the government’s motion to reopen, United States v. Coward, 296

³Ali’s criminal history category reflected a 1983 federal jury conviction for 3 counts of interstate transportation of property obtained by fraud and 2 counts of income tax evasion.

F.3d 176, 180 (3d Cir. 2002) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 332 (1971)).

We review a defendant's sentence for reasonableness with regard to the sentencing factors set forth in 18 U.S.C. § 3553(a). United States v. Booker, 543 U.S. 220, 261 (2005). In reviewing a sentence, "we apply a deferential standard, the trial court being in the best position to determine the appropriate sentence in light of the particular circumstances of the case." United States v. Cooper, 437 F.3d 324, 330 (3d Cir. 2006). The appellant bears the burden of proving unreasonableness. Id. at 332.

III.

Ali contends that the District Court erred when it denied his request for a continuance to obtain new counsel. We have held that "although it is 'desirable' that a criminal defendant 'obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice.'" Paullet v. Howard, 634 F.2d 117, 119 (3d Cir. 1980) (quoting United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1214 (3d Cir. 1969)). We will only reverse a trial court's decision to deny a continuance on a showing of abuse of discretion, "even when a denial has the effect of depriving a defendant of counsel of his choice." Paullet, 634 F.2d at 119.

To succeed on a motion for a continuance, the moving party must show good

cause. United States v. Welty, 674 F.2d 185, 187 (3d Cir. 1982).⁴ The basis for Ali's request for a continuance was his allegedly last-minute realization that his attorney had never litigated a jury trial and had not reviewed certain documents. Further, Ali claimed to have hired a new attorney who would represent him should the District Court grant a continuance.

Following a long discussion with Ali and the attorneys present, the District Court concluded that Ali was motivated by strategic reasons and manipulation, not good cause. The District Court found that Ali had not retained new counsel, despite his claims to the contrary. Meanwhile, Ali had personally retained defense counsel six months prior to the December 2004 trial date and had plenty of time to change counsel if he was truly dissatisfied. Although Ali claimed to have discovered only shortly before trial that his attorney had limited experience, his defense counsel asserted that Ali was aware of his experience when he was first retained and that he had reviewed all of the documents provided to him. Therefore, the District Court did not abuse its discretion in denying the continuance.

IV.

Ali also asserts that the District Court abused its discretion when it permitted the government to reopen its case-in-chief following the jury charge in order to offer

⁴If a continuance is denied, the district court must ensure that a decision by the defendant to proceed pro se, which involves a waiver of the Sixth Amendment right to counsel, is made knowingly and intelligently. United States v. Welty, 674 F.2d 185, 187–88 (3d Cir. 1982). Because Ali chose to proceed to trial with defense counsel after the denial of his request for a continuance, we need not address the waiver issue.

evidence regarding the federally insured status of the victim banks. While the decision whether to reopen a case is traditionally within the discretion of the District Court, we have held that “courts should be extremely reluctant to grant reopenings.” United States v. Kithcart, 218 F.3d 213, 219-20 (3d Cir. 2000) (quoting United States v. Blankenship, 775 F.2d 735, 740 (6th Cir.1985)). We have endorsed the following guidelines for assisting a district court in making this determination:

In exercising its discretion, the court must consider the timeliness of the motion, the character of the testimony, and the effect of the granting of the motion. The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief. The evidence proffered should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused. The belated receipt of such testimony should not imbue the evidence with distorted importance, prejudice the opposing party’s case, or preclude an adversary from having an adequate opportunity to meet the additional evidence offered.

Coward, 296 F.3d at 181 (quoting Blankenship, 775 F.2d at 741).

In our view, the District Court did not abuse its discretion in allowing the government to provide evidence regarding the limited jurisdictional issue of whether the victim banks were federally insured. The additional evidence presented was purely technical and undisputed. The “belated receipt” of the testimony did not “imbue the evidence with distorted importance,” especially considering the nature and duration of the testimony. The government’s reason for its failure to offer the evidence was inadvertence, which is a reasonable explanation for failing to fulfill a technical requirement. See Blankenship, 775 F.2d at 740 (“Reopening is often permitted to supply

some technical requirement such as the location of a crime—needed to establish venue—or to supply some detail overlooked by inadvertence.” (citing United States v. Hinderman, 625 F.2d 994, 996 (10th Cir.1980))). We have previously found no abuse of discretion when a district court allowed the government to reopen its case after closing arguments to offer evidence of the federally insured status of a bank. United States v. Schartner, 426 F.2d 470, 474-75 (3d Cir. 1970) (finding no abuse of discretion in the grant of the government’s motion to offer additional evidence of a bank’s federally insured status following closing arguments in a bank robbery prosecution brought under 18 U.S.C. § 2113). Accordingly, we find that the District Court did not abuse its discretion by allowing the government to reopen its case.

V.

Ali claims that his defense counsel was ineffective for failing to impeach the credibility of the government’s cooperating witness by showing a motive to testify against the defendant in exchange for a lesser sentence. A claim of ineffective assistance of counsel is ordinarily not entertained on direct appeal. United States v. Haywood, 155 F.3d 674, 678 (3d Cir. 1998). Rather, we have held that the proper method to bring such claims is on collateral attack. Id. While there is an exception when the record is adequately developed, United States v. Headley, 923 F.2d 1079, 1083 (3d Cir.1991), this case does not fall within that exception. We will reject this claim without prejudice to Ali’s ability to raise the issue under 28 U.S.C. § 2255.

VI.

Finally, Ali challenges his 27-month sentence, arguing that 18 U.S.C. § 3553(a) mandates a non-Guidelines sentence because of his old age, medical condition, and risk of deportation following his conviction. In determining an appropriate sentence, a sentencing court must consider the factors set forth in § 3553(a).⁵ We have noted that a sentence within the Guidelines range is more likely to be considered “reasonable,” given that the Guidelines range is one of the § 3553(a) factors. Cooper, 437 F.3d at 331 (citing 18 U.S.C. § 3553(a)(4)).

The record shows that the District Court adequately considered the factors set forth

⁵ The relevant factors are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available; [and]
- (4) the kinds of sentence and the sentencing range established for--
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines

18 U.S.C. § 3553(a).

in § 3553(a). Ali's sentence represents the lowest possible prison term within the Guidelines range. The District Court refused to impose a lesser sentence, especially in light of Ali's prior fraud conviction, stating that "[i]t's also of serious concern to the Court that he has a prior conviction in 1983, also for fraud. And, I think it's relevant that this fraud was committed about . . . four years after he came off probation in the prior case." (App. 383.) In addition, the District Court considered Ali's age, found that the defendant was not "totally infirm," and determined that the threat of deportation was pure speculation. (App. 371, 382, 373.) The District Court explicitly found that alternative sentences, such as home confinement or a community halfway house, were not appropriate given Ali's recidivism.

In this case, the record shows that the District Court fully considered the factors set forth in § 3553(a). Accordingly, we find that the sentence imposed by the District Court was reasonable.

VII.

For the foregoing reasons, the judgment of conviction and sentence will be affirmed and the ineffective assistance of counsel claim will be denied without prejudice.