NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4875

UNITED STATES OF AMERICA

v.

CLASFORD DENNIS GREEN,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Criminal No. 04-cr-00873
(Honorable Stanley R. Chesler)

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 10, 2007

Before: SCIRICA, *Chief Judge*, RENDELL and FUENTES, *Circuit Judges*.

(Filed October 25, 2007)

OPINION OF THE COURT

SCIRICA, *Chief Judge*.

Clasford Dennis Green appeals his conviction for illegal reentry after deportation for an aggravated felony on two grounds: 1) the District Court's refusal to admit into evidence a letter to Green from his former counsel under Fed. R. Evid. 807, and 2) the

District Court's denial of Green's motion for acquittal under Fed. R. Crim. P. 29(a). At issue is whether Green was a U.S. citizen when he reentered the country in 2001. We will affirm.

I.

Green, a Jamaican citizen, entered the United States in 1982 without a visa, joining his mother, a naturalized U.S. citizen. Green's mother had petitioned for Green to enter as an immigrant, but the petition was denied. Green's 1983 application for a visitor's visa was also denied. Between 1982 and 1991, Green established a business in New Jersey, registered to vote, and filed one income tax return. Green was married to a U.S. citizen from 1986-1989.

After Green was convicted of four separate offenses,[1] deportation proceedings were commenced by Immigration and Naturalization Services ("INS") in 1990, but were stayed for Green's incarceration. In the 1990 deportation proceedings, Green was represented by counsel who conceded Green was not a citizen. Green's deportation proceedings recommenced in 1997. Green was found not to be a citizen of the U.S. and was ordered deported. Green was removed on January 11, 2001, and was warned not to return to the United States absent permission from the Attorney General. But Green reentered the country without permission in August 2001, and was arrested on August 24, 2004.

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[1] Green was convicted in 1986, 1987, 1992, and 1993 of possession of marijuana with intent to distribute, an aggravated felony as defined by 8 U.S.C. § 1101.

Green was indicted for illegal reentry after deportation for an aggravated felony under 8 U.S.C. § 1326(a) and (b)(2) and was tried before a jury. At trial, Green argued he was a U.S. citizen and, therefore, did not reenter the country illegally. As proof, Green attempted to enter into evidence prior counsel's 1996 letter to Green, written in response to Green's disenfranchisement while in prison. The relevant portion of the letter stated, "My immediate reaction to this statement is that you are still a citizen of the United States but the [sic] you are not authorized to vote. Loss of citizenship normally occurs through Denaturalization. Unless this has happened, you are still a citizen of the United States." The District Court excluded the letter, finding that it failed to meet the residual hearsay exception of Rule 807.

Following the government's case and his own, Green moved for acquittal pursuant to Fed. R. Crim. P. 29(a). The District Court denied these motions, and the jury subsequently found Green guilty of illegal reentry.

II.

We have jurisdiction over this appeal under 28 U.S.C. § 1291. The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

Under Fed. R. Evid. 807, a statement which would otherwise be considered hearsay may be admitted where 1) the statement is offered as evidence of proof of a material fact, 2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure under reasonable efforts, and 3) the general purposes of the Rules and the interests of justice will best be served by the admission. The District Court found prior counsel's letter failed to meet the second and third requirements.

The District Court found that Green could have entered into evidence naturalization papers or paperwork, testified to his citizenship status, or had someone else testify to that effect.[2] An unverified letter containing an unsupported and unexplained statement by Green's former counsel is not of greater probative value than these potential proffers, failing to meet the second requirement of Rule 807.

Nor did the District Court find admission of the prior counsel's letter to be in the interests of justice, due to its questionable probative value. In 1990, prior counsel told the Immigration Court that Green was not a U.S. citizen, and then (if we read the letter as Green urges) stated the opposite six years later. No explanation was given and prior counsel was unavailable to provide one. Furthermore, it remained uncertain whether prior counsel was told or simply assumed Green was a citizen and drafted his response accordingly. The letter revealed only that Green was disenfranchised and that prior counsel responded to a related inquiry. The District Court did not abuse its discretion in deciding that admission of prior counsel's letter would not be in the interests of justice.

Moreover, Rule 807 is "to be used only rarely, and in exceptional circumstances and appl[ies] only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present." *United States v. Wright*, 363

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[2]Green argues both he and the INS may have lost his naturalization papers.

F.3d 237, 245 (3d Cir. 2004) (internal quotation marks omitted) (quoting *United States v. Bailey*, 581 F.2d 341, 347 (3d Cir. 1978)). For the reasons discussed, there were neither requisite exceptional circumstances nor exceptional guarantees of trustworthiness. Prior counsel's representation that Green was still a citizen, without explanation or support, contained in a letter addressing only disenfranchisement, lacked probative value.

Turning to Green's acquittal motions, we exercise plenary review over whether there was sufficient evidence to support the jury's guilty verdict when viewed in the light most favorable to the prosecution, drawing all reasonable inferences in favor of the jury's verdict. *United States v. Smith*, 294 F.3d 473, 477 (3d Cir. 2002). Specifically, Green challenges the sufficiency of the evidence, asserting that the lack of naturalization documents in his immigration file was insufficient to prove he was not a U.S. citizen.

Green did not obtain citizenship through his mother or his marriage to a U.S. citizen. Running a business, registering to vote, and filing income tax returns were likewise insufficient to establish citizenship. Green's immigration file contained no evidence of naturalization. The Department of Homeland Security agent who was in charge of Green's immigration file testified that Green was not a naturalized citizen and was not eligible for naturalization, and described the immigration file's contents. The agent did not know when the file had been created or who had custody of the file prior to 1997, but explained routine file maintenance procedure and responsibility. Green's FBI NCIC record was also admitted into evidence, listing his citizenship status as "unknown" as of August 2004.

Green's immigration file was accurately maintained and was properly admitted into evidence. The unrebutted file provided sufficient evidence to support the jury's guilty verdict.

III.

For the foregoing reasons, we will affirm the judgment of the District Court.