

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-6806

UNITED STATES OF AMERICA,

Appellee

v.

WILLIAM A. WHITE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

INFORMAL RESPONSE BRIEF FOR THE UNITED STATES AS APPELLEE

ISSUE FOR REVIEW

Whether the district court erred in ordering defendant's trial counsel to return discovery material to counsel for the United States.

SUPPORTING FACTS AND ARGUMENT

A. Facts

A federal grand jury charged the defendant in a seven-count indictment under 18 U.S.C. 875(b) and (c) for unlawful threats and 18 U.S.C. 1512(b)(1) for

obstruction of justice. Doc. 11.¹ A jury found the defendant guilty on Counts 1, 3, 5, and 6, and acquitted on Counts 2, 4, and 7.² Doc. 137. The district court overturned the jury's verdict on Count 6. Doc. 155. The court sentenced the defendant on the remaining counts of conviction and entered final judgment on April 19, 2010. Doc. 190. Both the United States and defendant appealed. *United States v. White*, Nos. 10-4241, 10-4452, 10-4597. Those appeals have been fully briefed and are pending in this Court. *Ibid.*

During the pre-trial discovery process, the district court had entered a protective order governing disclosure of materials provided by the United States to defendant and his counsel. Doc. 58. The protective order explained that discovery would provide defendant with access to substantial information, including “names, addresses, and other personally identifiable information.” Doc. 58 at 1. Thus, the order restricted “viewing and distribution” of all discovery materials provided to defendant “in this case” to the “Defendant, Defense Counsel of Record, Investigators of Defense Counsel of Record, and expert witnesses retained by Defense Counsel of Record.” Doc. 58 at 1. The protective order was signed by

¹ “Doc. __” refers to documents in the district court record by docket number.

² Counts 1, 2, and 4-7 charged defendant with violations of 18 U.S.C. 875. Count 2 charged a violation of 18 U.S.C. 1512(b)(1). Doc. 11.

counsel for the defendant and for the United States, as well as the district judge. Doc. 58 at 2.

On May 20, 2011, more than a year after the district judge entered final judgment, defendant filed a motion in the district court seeking an order compelling his trial counsel “to turn over to the Defendant copies of all discovery, and to return to the Defendant all material provided by him to [trial counsel] for purposes of use in his defense.” Doc. 246 at 3. In support of his motion defendant made numerous unsupported allegations, including (1) that his trial counsel had “broadened his interpretation of ‘discovery’ to include items that were not part of the government’s discovery, but which were given privately” by defendant to his counsel; (2) that his trial counsel had “made a series of ‘side deals’ with the [prosecution] in which he agreed not to allow the Defendant full access to the discovery, and that these ‘side deals’ are memorialized in letters contained in the discovery file”; and (3) that his trial counsel had denied access to the discovery materials to two other attorneys employed by defendant. Doc. 246 at 2. Defendant contended that he needed the discovery materials for “the possible filing of an 18 USC 2255 motion for inadequate assistance of counsel and collusion between defendant’s counsel and Prosecutors.” Doc. 246 at 2.

Defendant’s trial counsel filed a response to the motion. Doc. 249. He stated that he had provided defendant with “full access” to “all discovery materials

while preparing for trial and during the trial.” Doc. 249 at 1. But he stated that he believed the court’s protective order prohibited him from providing defendant with copies of the discovery materials under present circumstances and sought clarification from the court. Doc. 249 at 1-2. Trial counsel specifically denied three of defendant’s allegations. First, he denied that he had refused to provide defendant with materials that defendant had provided to him, stating that he had told defendant that he could “come by and pick up any materials supplied by sources other than the government.” Doc. 249 at 2. Second, he denied defendant’s allegation that he had made “side deals” with the prosecution. Doc. 249 at 2. Third, trial counsel denied that he had refused to provide access to discovery materials to defendant’s Chicago attorneys. Doc. 249 at 2. According to defendant’s trial counsel, he had told the attorneys that there was a protective order and that they should seek an order releasing materials that they believed they needed, but that they had not filed any such request. Doc. 249 at 2. He stated that he had provided the attorneys with copies of other materials that had not been produced by the government during discovery. Doc. 249 at 2.

The United States opposed defendant’s motion and sought an order directing defendant’s trial counsel to return the discovery materials to the United States. Doc. 250. The protective order, the United States explained, restricted the dissemination of the discovery materials to defendant and members of his trial

team in this case. Doc. 250 at 2-3. Through his motion, however, defendant sought access to the materials for his counsel in an unrelated case, attorneys who are not counsel of record in this case, did not sign the protective order, and are not subject to its restrictions. Doc. 250 at 1, 3. Moreover, the United States argued, the need for the protective order – to prevent the dissemination of sensitive personal information – remained viable, while his post-trial need for the materials was reduced. Doc. 250 at 3-4. Thus, “the risk of inappropriate disclosure outweigh[ed] the present needs of the” defendant. Doc. 250 at 4.³

The district court denied defendant’s motion and ordered defendant’s trial counsel “to return all Government-provided discovery materials to counsel for the United States.” Doc. 251. The district court held that defendant had no constitutional right to the discovery materials, and that he had not provided any compelling reason to modify the protective order. Doc. 251. Further, the court found, “the materials White seeks contain sensitive identifying information of victims and witnesses, which if made public, could subject them to the type of threats and harassment that resulted in White’s previous convictions.” Doc. 251.

Contrary to defendant’s representation, the district court did not order that the materials be destroyed. Informal Brief of Defendant 1-2. Indeed, defendant’s

³ Defendant filed a Reply to the United States’s response, in which he made additional, unsupported allegations of improprieties, but did not provide any additional need for the discovery materials beyond the preparation of a motion pursuant to 28 U.S.C. 2255. Doc. 252.

trial counsel returned the discovery materials to the office of the United States Attorney, which will retain them until this case is fully resolved.

B. Argument

The district court's order should be affirmed.

A defendant has no "general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). To be sure, the prosecution must provide certain materials to the defendant before trial to ensure the fairness of the trial itself. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). But because trial has been completed in this case, defendant's need for discovery for that purpose has abated.

Defendant contends that he requires access to the discovery materials to prepare a motion under 28 U.S.C. 2255, alleging ineffective assistance of counsel and collusion between his trial counsel and the prosecution. But with defendant's appeal of his conviction still pending in this Court, such a motion would be premature. A motion would not be due until one year after his conviction is final. 28 U.S.C. 2255(f)(1). Moreover, because defendant is not presently incarcerated, there is no compelling need for any such motion to be filed or resolved before the appeal of his conviction is decided. If and when defendant does file a motion, the court adjudicating it may determine whether and to what extent defendant should

be granted access to the discovery materials, and what restrictions should be placed on that access to prevent any improper dissemination.

CONCLUSION

The district court's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2011, I electronically filed the foregoing
INFORMAL RESPONSE BRIEF FOR THE UNITED STATES AS APPELLEE
with the Clerk of the Court using the CM/ECF system.

I further certify that on July 28, 2011, I mailed one copy of the foregoing
INFORMAL RESPONSE BRIEF FOR THE UNITED STATES AS APPELLEE
to the following non-CM/ECF participant, by first class mail, addressed as follows:

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