United States v. Isgar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT Jan 13, 201

739 F.3d 829 (5th Cir. 2014)

No. 11–20516.

2014-01-13

UNITED STATES of America, Plaintiff–Appellee, v. Gilbert Barry ISGAR; Vincent Wallace Aldrid
Defendants–Appellants.

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Houston, TX, for Plaintiff–Appellee. James Scott Sullivan (argued), Esq., San Antonio, TX, Letitia I
Quinones & Associates, P.L.L.C., Houston, TX, Fred L. Garrett, II (argued), Garrett Law Firm, Alvi
Appellants.

PRISCILLA R. OWEN

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Quinones & Associates, P.L.L.C., Houston, TX, Fred L. Garrett, II (argued), Garrett Law Firm, Alvi
Appellants.
Vincent Wallace Aldridge Seagoville, TX, pro se.

Appeals from the United States District Court for the Southern District of Texas.
Before OWEN and HAYNES, Circuit Judges, and LEMELLE,* District Judge.

PRISCILLA R. OWEN, Circuit Judge:

* District Judge of the Eastern District of Louisiana, sitting by designation.

after approximately*834 one year, the residences would be resold and the straw purchasers might rece time. These straw purchasers provided the Aldridges with their respective names, social security nur information. The Aldridges then used the accurate names and social security numbers, combined wit income, assets, and intent to use the property as a primary residence, to submit fraudulent loan appli representations that each purchaser would be residing in the home purchased permitted the Aldridge

Isgar inflated the sale price of the properties through falsified construction invoices and amendments lenders approved loans to purchase the properties at these inflated practices. When the lenders wired disbursements were made to Isgar as payment for the properties. However, other disbursements were Associates' IOLTA as well as to Superb Construction that were not disclosed on the settlement staten required by the Department of Housing and Urban Development (HUD).

The United States mail, including interstate commercial carriers, and wire communications were use Loan documents traveled across state lines by facsimile, mail and email. Loan proceeds were wire tr banks to FSW.

Also involved in the scheme were Alvin Eiland, a mortgage broker, and his employee, Gary Robinso Aldridge in forming Superb Construction, which laundered proceeds from these transactions. Both E pled guilty to conspiracy to commit wire fraud and money laundering and are not parties to this appe

A federal grand jury returned a 19–count indictment charging the Aldridges with conspiracy to comm violation of 18 U.S.C. §§ 1341, 1343, 1349 (Count 1), aiding and abetting wire fraud, in violation of (Counts 2–12), conspiracy to engage in money laundering, in violation of 18 U.S.C. § 1956(h) (Cou abetting money laundering, in violation of 18 U.S.C. §§ 2, 1957 (Counts 14–19). Isgar was named o returned a guilty verdict as to all three defendants on all counts.

The Defendants appeal their convictions on multiple grounds. Each asserts that the evidence is insuf conviction. The Aldridges challenge subject matter jurisdiction and venue. They further contend that trial because certain FSW documents should not have been admitted, there was prosecutorial miscon errors denied them a fair trial.[1] Tori Aldridge contends that her indictment was constructively amend erred in the denying her motion for new trial and request for an evidentiary hearing. She also claims
835 counsel. Vincent Aldridge appeals his sentence and the amount of restitution owed.*835

> On December 3, 2012, Vincent filed a motion in this court seeking to adopt Tori's brief. On December 18, 2012, To adopt Vincent's brief. Under Federal Rule of Appellate Procedure 28(I), a defendant may adopt another's arguments not fact specific. *United States v. Cantu–Ramirez,* 669 F.3d 619, 632 n. 4 (5th Cir.2012), *cert. denied,*—— U.S. —— L.Ed.2d 131 (2012). Accordingly, we treat all arguments raised by Tori and Vincent that do not concern the particul joint arguments.

II

Each of the Defendants has challenged the sufficiency of the evidence. “Our review of the sufficienc

Moreno–Gonzalez, 662 F.3d at 372 (alteration in original) (citation omitted) (quoting *United States v. Lage,* 183 F.3

A

Tori Aldridge argues that there was insufficient evidence that a prior conspiracy between her and Eil existed and asserts that no reasonable jury could find that a conspiracy existed after March 26, 2005. transaction with Eiland or Robinson, she received only the closing fees disclosed on the HUD form. she suggests exonerates her. A review of the record, however, reveals ample evidence from which th concluded that Tori Aldridge acted with the intent to further the fraudulent scheme.

At trial, Robinson testified that Tori Aldridge prepared the falsified paperwork concerning a straw pu to use the property as a primary residence. He explained that he received and returned the paperwork purchasers, Shawn Stevens, testified that in the documents he signed in purchasing two of the Maxie than one month apart, Tori Aldridge attested that each would be used as his primary residence when actually was used as a residence by him. Tori Aldridge notarized documents that stated Stevens had her when that was false, and she attested that signatures and initials on loan documentation were tho testified that those signatures and initials were forgeries. One witness stated that Tori Aldridge had e

incredible as a matter of law." [10]

Curtis, 635 F.3d at 718 ("The Government was not specifically obligated to prove that the values stated in the appra or inflated. Rather, it had to prove that Curtis made some kind of a false or fraudulent material misrepresentation in defraud."). An overt act was required in *Curtis* because the Government charged the defendant with conspiracy und discussion, then, was focused on the overt act, not on the appraisal itself.

Id. at 719 (alteration omitted).

Id. (alteration in original) (internal quotation marks omitted).

Here, there was circumstantial evidence supporting Isgar's knowing participation in the fraud. Robin in the scheme required that Isgar "be okay with inflating the price." FBI Agent Robert McCallum als the day-to-day business affairs of Waterford and that Isgar had signed the disbursements to the Aldri Construction. Isgar's own statements support the inference that he was a knowing participant. Isgar e that "the sales prices of the properties had been raised" and supported in the documentation with con amendments added to the sales contracts giving the purchaser a $60,000 allowance to pay the contra to make repairs. There was evidence that $60,000 in construction repairs or upgrades to the Maxie V town homes was unnecessary.

Isgar admitted to FBI agents that with regard to the town home Isgar sold to Vincent Aldridge, Isgar Aldridge the day after the sale closed, and Isgar said that he knew that he should not have done so. Is disbursements to Superb Construction Company, the entity formed by Vincent Aldridge but opened legitimate purpose for the disbursements to Superb Construction Company was evident.

Isgar was also a licensed real estate agent. Though he knew that the value of the units was inflated, h asking price and no negotiation with buyers was necessary. His company, Waterford, made approxim profit on each sale.

Isgar's contention that this statement was insufficient to demonstrate his knowing participation goes
837 and "[t]he jury retains the sole authority to weigh any conflicting evidence." [11] The jury here could h concluded from Isgar's acknowledgment of the inflated prices as well as from the other circumstantia knowingly participated in the scheme.

United States v. Grant, 683 F.3d 639, 642 (5th Cir.2012) (internal quotation marks omitted).

C

Vincent Aldridge challenges the sufficiency of the evidence underlying his convictions for conspirac

United States v. Kennedy, 707 F.3d 558, 563 (5th Cir.2013).

We rejected this argument in *United States v. Kennedy.* [15] There, we addressed a similar mortgage fra subsequent disbursements of mortgage loan funds from the title company to the defendants' various different conduct underlying a different crime.[16] We reasoned that wire fraud was completed when th and that subsequent expenditures to make down payments on newly acquired mortgages and to make borrowers to encourage them to invest again were the use of profits to assist the defendants in comm fraud.[17] We concluded that payments of this nature "could not be anything but [the use of] profits." [1

.707 F.3d 558 (5th Cir.2013).

See Kennedy, 707 F.3d at 560–62, 566–67.

Id. at 566–67.

Id. at 567.

In the present case, the Government presented evidence that Isgar inflated the sales prices of the prop construction invoices and amendments to the sales contracts such that the subsequent disbursement o the actual price constituted only profits. Second, the Government also demonstrated that the $10,000 purchasers were given at least in part to encourage them to invest again, and that the disbursements t
838 and Superb Construction were unsupported by consideration but were instead*838 direct payments of scheme. Accordingly, just as in *Kennedy,* there was sufficient evidence from which a jury could have transferred funds were profits, and thereby formed the basis for Vincent Aldridge's money launderin

III

A

Tori Aldridge contends that the district court lacked subject matter jurisdiction over the wire fraud co because state law required the wire transmissions at issue in this case, the transmissions could not ha asserts, "federal jurisdiction is improper as a matter of law." We disagree.

Our review of subject matter jurisdiction is de novo.[19] "Subject matter jurisdiction ... is straightforwa [20] Under 18 U.S.C. § 3231, "[t]he district courts of the United States have original jurisdiction ... of a of the United States." [21] To invoke this jurisdictional grant, "an indictment need only charge a defen the United States in language similar to that used by the relevant statute." [22] Defects in the indictmen

United States v. Cotton, 535 U.S. 625, 630–31, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

See Scruggs, 691 F.3d at 668 (holding that there was no jurisdictional defect when the language of the charging doc statutory language" even though "the facts proffered at the plea hearing [were] insufficient to establish that" the def crime).

Tori Aldridge also contends that venue was improper in the Southern District of Texas for the wire fi has waived any objection to venue. Although a defendant may challenge venue in a motion for judgr Federal Rule of Criminal Procedure 29, [26] the Aldridges' motion failed to raise any venue issue. The
839 properly preserved for appellate review.[27] *839

United States v. Carreon–Palacio, 267 F.3d 381, 392–93 (5th Cir.2001).

Carreon–Palacio, 267 F.3d at 392–93 ("In situations where adequate allegations are made but the impropriety of ve apparent at the close of the government's case, a defendant may address the error by objecting at that time, and thus appellate review.").

B

Each of the Aldridges asserts that the district court abused its discretion in admitting FSW document transactions at issue.[28] The Aldridges maintain that these documents were not admissible under the b which permits "the admission of 'records of regularly conducted activity' " so long as certain condit witness offering the records had never been employed at FSW and could not testify as to its business

See, e.g., United States v. Hale, 685 F.3d 522, 538 (5th Cir.2012) (per curiam), *cert. denied,*—— U.S. ——, 133 S.C (2012) ("We review evidentiary rulings regarding the admission of evidence only for an abuse of discretion." (inter omitted)).

United States v. Ned, 637 F.3d 562, 569 (5th Cir.2011) (per curiam) (alteration in original) (quoting Fed.R.Evid. 80

The witness presenting the foundation for the admission of a record need not be the "author of the re attest to its accuracy." [30] Instead, because this exception hinges on the "trustworthiness of the record discretion by admitting documents from a custodian that never worked for the employer that created custodian explains "how she came to possess them and how they were maintained." [31] Here, the witn

contemporaneous objection at trial, our review is for plain error.[32] Aldridge must show an error, that her substantial rights, *i.e.,* "affected the outcome of the district court proceedings." [33] She asserts tha used a "dormant" guaranty file that pertained to matters outside the statute of limitations. This result allowing the indictment of an otherwise unindictable case, (2) creating a prior conspiracy in order to of the builder, (3) sponsoring*840 perjury known to the prosecution team, (4) creating false unity of p false evidence and testimony that Tori Aldridge received money when the evidence was to the contra based on false information.

United States v. Gracia, 522 F.3d 597, 599–600 (5th Cir.2008).

Puckett v. United States, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).

The documents at issue were used by the prosecution in connection with evidence of the purchase of Stevens, one of the straw purchasers. Tori Aldridge also contends that the prosecutor failed to correc direct examination as to the amount of money disbursed to Tori Aldridge in connection with Stevens properties, and contends that the prosecutor "doubled down on the uncorrected, false testimony." Wh as to the accuracy of Stevens's statements about proceeds disbursements, the prosecutor said, "I think I will double check on that for you."

We hold there is no plain error. First, with regard to the documents at issue, there was considerable e conspiracy in which Tori Aldridge participated, including testimony from Stevens in which he confi of properties in Maxie Village and the facts surrounding his involvement. We are not persuaded that probability that the jury would have failed to convict Tori Aldridge had the government not used the Second, Stevens's misstatement regarding disbursements of loan proceeds merely transposed the disb two different properties, and the disbursement worksheet noting the correct amounts was admitted in that the first two elements of plain error review are met, Tori Aldridge cannot meet her burden of sho the outcome of the trial. Lastly, the prosecutor's comment to the trial judge regarding the accuracy of constitute a false, material statement such that an error, let alone a plain error, occurred.[35]

See Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (defining materiality in terms of a of a different outcome).

See Tassin v. Cain, 517 F.3d 770, 777–78 (5th Cir.2008) (measuring prosecutorial misconduct according to "the ext

Specifically, Aldridge alleges that the district court impermissibly allowed evidence of her role as a l
duties to support an alternative theory of honest services under § 1346 rather than the indicted charg
841 mail and wire fraud *841 under §§ 1341, 1343, and 1349. However, the district court specifically inst
violation of fiduciary duties or regulations was not to be considered a violation of criminal law and c
such facts only "in determining whether the defendants had the required intent to violate the crimina
indictment." [39] Accordingly, we find no error, plain or otherwise.

See Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) ("A jury is presumed to follow it

E

We reject Tori Aldridge's assertion that the district court abused its discretion by denying her motion
an evidentiary hearing.[40] Because her motion was not based on newly discovered evidence, Aldridge
within 14 days after the jury reached its verdict.[41] However, she filed her motion on October 28, 201
the jury reached a verdict. Because Aldridge does not argue that her failure to act stemmed from exc
court did not abuse its discretion in finding that her motion was untimely. [43]

See, e.g., United States v. Munoz, 150 F.3d 401, 413 (5th Cir.1998) ("We review the denial of a motion for new trial

.Fed.R.Crim.P. 33(b).

.Fed.R.Crim.P. 45(b)(1)(B).

See, e.g., Dotson v. Clark Equip. Co., 805 F.2d 1225, 1229 (5th Cir.1986) ("[T]he district court did not abuse its dis
consider [the appellant's] untimely supplement to the original new trial motion....").

F

We do not consider the merits of Tori's ineffective assistance of counsel claim. " "[15] Sixth Amend
assistance of counsel should not be litigated on direct appeal, unless they were previously presented
"[22] only in "rare cases in which the record allows a reviewing court to fairly evaluate the merits o
consider such a claim.[45] Such is not the case here. Although Tori Aldridge's current counsel argued b
ineffective, he did not seek a hearing on that basis. Accordingly, the record is undeveloped as to trial
motivations." [46] We therefore deny this claim without prejudice to collateral review.[47]

United States v. Aguilar, 503 F.3d 431, 436 (5th Cir.2007) (per curiam).

discussed above, none of Tori Aldridge's allegations amount to error. Accordingly, there is no justifi cumulative error doctrine.[50]

United States v. Cervantes, 706 F.3d 603, 619 (5th Cir.2013) (citing *United States v. Delgado,* 672 F.3d 320, 343–4

Id. (quoting *Delgado,* 672 F.3d at 344).

Id. ("Allegations of non-errors do not play a role in cumulative error analysis since there is nothing to accumulate."

IV

Vincent Aldridge raises two issues regarding his sentence. He first asserts that 63 months of impriso properly-calculated Guidelines range of 63 to 78 months, was unreasonable. Because Aldridge failed on this basis, we review for plain error.[51] "A discretionary sentence imposed within a properly calcu presumptively reasonable." [52] "A defendant's disagreement with the propriety of the sentence impos the presumption of reasonableness that attaches to a within-guidelines sentence." [53] Because Aldridg circumstances of his offense warrant a lower sentence under 18 U.S.C. § 3553(a) asserts nothing mo sentence, he fails to show plain error.[54]

See, e.g., United States v. Ruiz, 621 F.3d 390, 398 (5th Cir.2010) (per curiam).

Id. at 398;*see also United States v. Gomez–Herrera,* 523 F.3d 554, 565–66 (5th Cir.2008).

Ruiz, 621 F.3d at 398.

See, e.g., United States v. Rodriguez, 523 F.3d 519, 526 (5th Cir.2008) (refusing to disturb presumption of reasonab within-guidelines sentence when district court considered but rejected arguments for a non-guidelines sentence).

Aldridge argues that the district court abused its discretion in calculating the amount of restitution ov Mandatory Victims Restitution Act.[55] A district court may generally "award restitution to victims of restitution award can encompass only those losses that resulted directly from the offense for which t [56] Aldridge specifically challenges the inclusion of $140,000 payable to Mortgage Investment Lendi transaction involving 5529 Cornish because "there is nothing that indicates that the transaction invol participation [by Vincent]." However, Aldridge does not contest that the transaction was illegal or th transaction as an ESW employee. In *United States v. Arledge,* [57] this court held in similar circumstan