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United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Andrea SARDELLI, Defendant-Appellant.

No. 86-2194.

March 19, 1987.

Defendant was convicted of making false statements in loan application to Small Business Administration by the United States District Court for the Southern District of Texas, Ross N. Sterling, J., and defendant appealed. The Court of Appeals, Van Graafeiland, Circuit Judge, sitting by designation, held that: (1) district court had jurisdiction to try defendant, even though conviction was later vacated based on determination that defendant did not violate statute; (2) when defendant made statement that he was not on probation to federal lender, it was false, though conviction was later held invalid; (3) prosecutor improperly commented upon defendant's right against self-incrimination; and (4) admission of evidence that defendant had been indicted on 17 dismissed counts constituted prejudicial error.

Reversed and remanded.

West Headnotes

[1] Criminal Law 95
110k95 Most Cited Cases
District court had jurisdiction to try defendant for act which it believed violated federal statute, and fact that conviction was later vacated did not alter jurisdictional power, where statute was not invalidated, but it was determined that defendant did not violate it. 18 U.S.C.A. § 1014.

[2] Fraud 68.10(1)
184k68.10(1) Most Cited Cases
Although defendant's prior conviction had later been vacated, defendant nevertheless falsely informed federal lender that he was not on probation, where at time statement was made, conviction was still valid; thus, conviction of defendant for making false statements in loan application to Small Business Administration was not legally impossible. Small Business Act, § 2[16](a), 15 U.S.C.A. § 645(a).

[3] Criminal Law 721.5(1)
110k721.5(1) Most Cited Cases
(Formerly 110k7211/2(1))
Where arguably favorable evidence other than defendant's own testimony is available to him, comment upon his failure to produce it may be justified.

[4] Criminal Law 721(6)
110k721(6) Most Cited Cases
Prosecutor's comments on absence of defense evidence constituted impermissible

comment on defendant's exercise of right against self-incrimination, where defendant was only knowledgeable witness and his purpose and intent in informing federal lender that he was not on probation were crucial issues to trial of charge of making false statements in loan application to Small Business Administration. U.S.C.A. Const.Amend. 5; Small Business Act, § 2 [16](a), 15 U.S.C.A. § 645(a).

[5] Criminal Law 369.1

110k369.1 Most Cited Cases

Jury may not be told of arrests or indictments which are not followed by conviction.

[6] Criminal Law 369.2(1)

110k369.2(1) Most Cited Cases

In order to be admissible, evidence of other crimes must be relevant to issue other than defendant's character and must possess probative value that is not substantially outweighed by undue prejudice.

[7] Criminal Law 369.1

110k369.1 Most Cited Cases

Evidence that defendant had been indicted on 17 dismissed counts was improperly admitted against defendant, as it was not relevant to issue of whether defendant was on probation when he informed federal lender that he was not, as defendant was on probation only because of one count on which he was convicted, not on 17 counts that were dismissed, and such evidence was prejudicial.

***655** Jack B. Zimmerman, Jim E. Lavine, Albert M. Dworkin, Houston, Tex., for defendant-appellant.

James R. Gough, Asst. U.S. Atty., Henry K. Oncken, U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before VAN GRAAFEILAND, [FN*] HIGGINBOTHAM, and JONES, Circuit Judges.

FN* Circuit Judge of the Second Circuit, sitting by designation.

VAN GRAAFEILAND, Circuit Judge:

Andrea Sardelli appeals from a judgment of the United States District Court for the Southern District of Texas convicting him, after a jury trial before Judge Sterling, of making false statements in a loan application to the Small Business Administration. 15 U.S.C. § 645(a). We reverse and remand for a new trial.

Sardelli's troubles began in 1980 when he pled guilty in the United States District Court for the District of Vermont to a charge of making a false statement to a federally insured bank. 18 U.S.C. § 1014. This charge was based on Sardelli's deposit of a kited check. Execution of his one-year prison sentence was suspended, and he was placed on probation for three years. One year later, Sardelli applied for a Small Business Administration loan in Houston, Texas. John Diaz, a professional consultant, testified on behalf of the Government that he assisted in the preparation of Sardelli's application.

***656** The "Statement of Personal History" which accompanied the application asked three questions which are pertinent to this appeal, (1) whether Sardelli had been arrested for a criminal offense, (2) whether he had been convicted, and (3) whether

he was on probation. Sardelli, who had signed the application form in blank, told Diaz about his arrest and conviction, and Diaz answered the first two questions correctly. However, Sardelli told Diaz only that he had received a suspended sentence, and Diaz, who did not equate this with probation, answered the third question in the negative. It was this answer that led to Sardelli's conviction. Sardelli now urges five grounds for reversal, only three of which merit discussion.

I

Approximately nine months after Sardelli misstated his status as a probationer, the Supreme Court held in *Williams v. United States,* 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982), that 18 U.S.C. § 1014 does not proscribe the deposit of a bad check in a federally insured bank. Thereafter, the Vermont district court granted Sardelli's motion to withdraw his guilty plea and vacate his conviction. Sardelli contends that, because of the *Williams* holding, the Vermont district court never had jurisdiction to hear the charges against him and therefore it was "legally impossible" for him to have falsely stated in 1981 that he was not then on probation. This argument is without merit.

[1] Jurisdiction is the authority conferred upon a court to decide a given type of case one way or the other. *Hagans v. Lavine,* 415 U.S. 528, 538, 94 S.Ct. 1372, 1379, 39 L.Ed.2d 577 (1974). Because 18 U.S.C. § 1014 states an offense against the United States, the Vermont district court had jurisdiction to hear cases in which its violation was charged. *See Camp v. United States,* 587 F.2d 397, 399 (8th Cir.1978). When the Supreme Court in *Williams, supra,* reversed the defendant's conviction, it did not hold that the trial court was without jurisdiction. Instead, in the words of Justice White who dissented, the reversal was "on the grounds that the Government has not shown that [the defendant] made a 'false statement or report' or 'willfully overvalue[d] any land, property or security.' " 458 U.S. at 291, 102 S.Ct. at 3095. The Court did not invalidate the statute; it simply held that Williams did not violate it. The same was true of Sardelli. The fact that Sardelli's conviction was vacated does not mean that the district court was without jurisdiction to try him.

[2] Even if there were merit in Sardelli's jurisdiction argument, this would not help his case. Sardelli's conviction here was not based upon his prior conviction in Vermont, but upon his statement that he was not on probation. When he made that statement, it was false. The fact that the Vermont conviction later was held invalid did not make his statement any the less false. *United States v. Ransom,* 545 F.2d 481, 483-84 (5th Cir.), *cert. denied,* 434 U.S. 908, 98 S.Ct. 310, 54 L.Ed.2d 196 (1977); *Cassity v. United States,* 521 F.2d 1320, 1323 (6th Cir.1975); *see Lewis v. United States,* 445 U.S. 55 (1980).

It is interesting to note that in Sardelli's brief before this Court, he says, with reference to his 1980 conviction:

> Execution of sentence was suspended and the Appellant was placed on probation for three years.

This, we suggest, is what Sardelli should have told the Small Business Administration in 1981.

II

Sardelli's counsel emphasized in his summation that the defense had called no witnesses because it was willing to rest on the weakness of the Government's case. In response to this argument, the prosecutor said:

> Mr. Zimmermann told you that Mr. Sardelli did not take the stand, and he wanted you to draw certain inferences from that. You decide the facts in this case, but the law you must take from His Honor. And I believe His Honor will tell you that you can make no inferences--***657** none--from Mr. Sardelli not taking the stand.

When defense counsel's objection to this comment was overruled, the prosecutor continued:

> Isn't it peculiar how Mr. Zimmermann likes to argue things but doesn't want the whole thing brought out to you.

Appellant contends that these statements, taken together, violated the well-settled rule that comment by the prosecution on a defendant's failure to testify is a violation of the Fifth Amendment. *United States v. Bright,* 630 F.2d 804, 825 (5th Cir.1980). Although we would not recommend that the prosecutor's first-quoted comment be incorporated in a form book on model summations, standing alone, it might have survived Sardelli's constitutional challenge. *But see Lakeside v. Oregon,* 435 U.S. 333, 345-46, 98 S.Ct. 1091, 1097-98, 55 L.Ed.2d 319 (1978) (Stevens, J., dissenting). However, on the facts of the instant case, when the prosecutor continued as he did, he went too far.

[3][4] Where arguably favorable evidence other than the defendant's own testimony is available to him, comment upon his failure to produce it may be justified. *United States v. Jennings,* 527 F.2d 862, 871 (5th Cir.1976); *Garcia v. United States,* 315 F.2d 133, 137 (5th Cir.), *cert. denied,* 375 U.S. 855, 84 S.Ct. 117, 11 L.Ed.2d 82 (1963). However, in the instant case, it is quite obvious that the prosecutor's comments referred to Sardelli, since the only knowledgeable witnesses other than Sardelli himself had been produced by the Government. Moreover, Sardelli's purpose and intent were crucial issues in the case, and the prosecutor twice mentioned Sardelli by name when commenting on the absence of defense evidence. We are satisfied that the jury would "naturally and necessarily" construe the prosecutor's remarks as a comment on defendant's silence. *See United States v. Chisem,* 667 F.2d 1192, 1195 (5th Cir.1982) (per curiam).

We need not decide whether, if this were the only error in the case, it properly could be treated as harmless. *See United States v. Hasting,* 461 U.S. 499, 507-12, 103 S.Ct. 1974, 1979-82, 76 L.Ed.2d 96 (1983). When it is coupled with the evidentiary error hereafter discussed, the cumulative effect mandates reversal.

III

Sardelli's Vermont indictment contained eighteen counts. The first fourteen charged him with transporting stolen cattle across State lines, and the other four charged him with four separate incidents of check kiting. Seventeen of these counts were dismissed when Sardelli pled guilty to one count of check kiting. Nevertheless, the district court, over Sardelli's objection, permitted the Government to offer the entire indictment into evidence, ostensibly to establish that Sardelli knew he was on probation. This was clear error, the prejudice of which was exacerbated when the court refused to give any cautionary instructions.

[5] It is "hornbook law" that indictments are not evidence of guilt, *United States v. Cox,* 536 F.2d 65, 72 (5th Cir.1976); a jury may not be told of arrests or indictments which are not followed by a conviction, *United States v. Labarbera,* 581 F.2d 107, 108-09 (5th Cir.1978); *Hurst v. United States,* 337 F.2d 678, 681 (5th Cir.1964). Sardelli was on probation only because of the one count on which he was convicted, not the seventeen counts that were dismissed. The prosecutor's offer of the entire indictment was simply a device to get improper evidence before the jury.

[6][7] To be admissible, evidence of other crimes must meet a two-step test: (1) it must be relevant to an issue other than the defendant's character and (2) it must possess probative value that is not substantially outweighed by its undue prejudice. *United States v. Lemaire,* 712 F.2d 944, 946 (5th Cir.), *cert. denied,* 464 U.S. 1012, 104 S.Ct. 535, 78 L.Ed.2d 716 (1983). Moreover, "evidence of an extrinsic offense is relevant to intent only if the act in fact occurred and the defendant in fact committed it." *Id.* Evidence that Sardelli was indicted on the seventeen dismissed counts satisfied neither of the foregoing requirements. Its admission was prejudicial error.

***658** IV

Because we are reversing on other grounds and because the district court's charge, viewed as a whole, fairly summarized the law and the parties' contentions, we see no need to discuss Sardelli's relatively insignificant claims of instructional error.

The judgment of conviction is reversed, and the matter is remanded to the district court for retrial.

813 F.2d 654, 22 Fed. R. Evid. Serv. 1267

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