

addressing the Defendant's ineffective assistance of counsel claims until after the initial hearing in order for the court to make a determination as to the need for further evidentiary hearing.

Having reviewed the trial transcripts and heard the testimony at the evidentiary hearing, I recommend that the Court adopt these proposed findings of fact and **DENY** the Defendant's Motion for a New Trial.

Proposed Findings of Fact

In his Motion for a New Trial Defendant asserts that since the trial ended, Wendy Rhodes, the sister of John Nicholas, a witness for the prosecution at the trial of this matter, obtained new evidence from her brother which impeached his trial testimony and strongly supported the argument that he had himself thrown away the gun used in the robbery. Defendant also alleges in his Motion for a New Trial that Justin Meserve (a/ka/ Justin Nicholas) would testify that in approximately mid-1997 he observed John Nicholas sawing off the shotgun used in the robbery. Defendant also claims that Justin Meserve would testify that he disposed of parts of the sawed off shotgun in a stream at the request of his uncle. Both Wendy Rhodes and Justin Meserve testified under oath at the May 24th hearing.

Brian Meserve's convictions for robbery and possession of this shotgun turned in large measure upon the testimony of Holly Grant, his ex-girlfriend and a co-participant in the robbery. Ms. Grant testified that the Defendant threw the sawed off shotgun from the vehicle as they left the scene of the robbery. A sawed off shotgun had been recovered shortly after the robbery at the location described by Ms. Grant. The shotgun's serial numbers were traced to Robert Nicholas who in turn identified John Nicholas as the person to whom he had given the gun. John Nicholas testified that he last saw the gun ~~A~~years ago and that Brian told him he had disposed of the gun

before he went to Ohio in the early 1980's. (Trial Tr., Vol. I, p. 169). Furthermore, eyewitnesses to the robbery testified at trial that Brian Meserve looked like the robber, corroborating Holly Grant's testimony. It is against this factual background that the Defendant claims that Wendy Rhodes and Justin Meserve would present newly discovered evidence which would likely result in his acquittal on these charges.

A. Wendy Rhodes= Testimony

Wendy Rhodes is the thirty-six year old former girlfriend of Brian Meserve and the mother of his son, Justin. She had a relationship with the Defendant when she was approximately sixteen years old, but that relationship ended a long time ago and she has been married to a different man for the last eleven years. Ms. Rhodes still cares for Brian Meserve as he is the father of her son. She also has a good relationship with her brother, John Nicholas.

Ms. Rhodes revealed that after the trial she had a brief conversation with her brother John and that he told her he did not remember anything about a gun involving Brian and himself. She further explained that during the time period when Brian lived in Maine prior to 1991, he and John were like brothers and they always used to borrow guns back and forth. The only conversation that she ever had with her brother concerning throwing a gun away occurred approximately ten years ago.

According to Ms. Rhodes approximately ten years ago John Nicholas told her that Brian had ruined a particular gun and that he (John) had thrown the gun away into a snowbank. She describes the shotgun in question as dark brown and appearing to be in ~~one~~ ^{one} piece. When she last saw this gun it was in her brother's possession. No evidence exists that would link this incident, if it occurred, to the facts of this case. Ms. Rhodes agreed that the gun she referenced in a letter which became the basis of the Defendant's Motion for a New Trial was indeed the gun thrown

away approximately ten years ago. She has no knowledge of any other gun which her brother threw away nor did he tell her after the trial that he had thrown a gun away.

B. Justin Meserve's Testimony

Justin Meserve testified that during the time period of August/September, 1997, he was living with his mother, stepfather, and uncle, John Nicholas. During this time period his uncle kept a sawed off shotgun on the wall in his bedroom. Mr. Nicholas never told Justin what ultimately happened to the shotgun nor did he ever tell him he was no longer in possession of it. Nicholas did tell Justin that he threw a piece of the shotgun barrel into Miles Brook in Winslow. Justin never saw the shotgun before it was sawed off. He described the shotgun that his uncle kept on the wall as a "big pistol". He did not know the gauge or serial number or color of the gun. Justin Meserve denied any further personal knowledge about the gun.

Justin Meserve was asked to examine Government Exhibit #28 which is a letter from Walter McKee, Defendant's prior counsel, to the Defendant wherein Mr. McKee recites that on December 9, 1999, Justin Meserve told him that John Nicholas had asked him to dispose of parts from a sawed off shotgun and that Justin was going to try to locate those parts. This letter was part of the Defendant's original submissions in support of his Motion for a New Trial based upon newly discovered evidence. When asked to review this exhibit, Justin indicated that the letter does not accurately recite what he told Walter McKee when he met with him. According to Justin's testimony John Nicholas never asked him to dispose any shotgun parts and Justin never went to the stream looking for parts.

The evidence further supports a finding that during the months after the robbery and prior to the Defendant's arrest, in January, 1999, the Defendant and Justin were in close contact and were both fugitives. Justin was AWOL from the Maine Youth Center and Defendant was sought on a

state court warrant. The two of them lived with a Gail Mason during this time period. After the Defendant was arrested Justin visited him at the Waldo County Jail on August 15, 1999, two months prior to the trial in this case. According to Justin he did not know the nature and extent of the charges against his father until after the verdict in this case and therefore never mentioned to anyone that in 1997 he had seen a sawed off shotgun on John Nicholas's bedroom wall.

Discussion

Pursuant to Rule 33, Federal Rules of Criminal Procedure, a motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilt. A motion for new trial on any other grounds may be made only within 7 days after the verdict or within any such further time as the court may fix during the 7-day period. A jury found Brian Meserve guilty on October 21, 1999. While awaiting sentence, on December 6, 1999, and January 11, 2000, Defendant wrote the presiding judge letters in which he complained about the performance of his court appointed attorney. On February 16, 2000, those letters were docketed by the clerk and treated as motions for appointment of new counsel and for a new trial. On February 29, 2000, a third letter from Defendant to the presiding judge dated February 19, 2000, was docketed as a second motion for a new trial.

Even if the earliest letter, dated December 6, 1999, is treated as a motion for a new trial filed as of the date of the letter, Defendant's request is not timely on his claims of ineffective assistance of counsel. The First Circuit and others have also made it clear that a claim of ineffective assistance of counsel is not newly discovered evidence within the meaning of Rule 33 when it was based on facts necessarily known to the defendant at the time of trial. *Lema*, 909 F.2d at 566; *United States v. Seago*, 930 F.2d 482, 488-490 (6th Cir. 1991). It is clear that Defendant's complaints concerning the failure to call witnesses who could impeach Holly Grant and his

complaints concerning other strategic trial decisions made by counsel are not allegations of newly discovered evidence as these complaints are based upon discovery and investigative reports obtained by Defendant prior to trial. This Court is therefore without jurisdiction to consider anything in these letter motions other than the allegations of newly discovered evidence. *United States v. Lema*, 909 F.2d 561, 565 (1st Cir. 1990); *United States v. Montilla-Rivera*, 115 F.3d 1060, 1065 (1st Cir. 1997).

In order to prevail on his motion for a new trial based upon newly discovered evidence, the defendant has the burden of establishing each component of a four-prong test. The motion will not be granted unless the Defendant establishes the following: (1) the evidence was unknown or unavailable to the defendant at the time of the trial; (2) the failure to learn of the evidence was not due to lack of diligence by the defendant; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon retrial of the defendant. *United States v. Angiulo*, 847 F.2d 956, 983-84 (1st Cir. 1988). Wendy Rhodes's testimony does not satisfy either prong three or four. The incident, occurring some ten years ago involving an unknown gun, has no demonstrable relevance to this case. Furthermore, her testimony partially corroborates the Government's witness in that she acknowledges that years ago the Defendant and John Nicholas did indeed exchange guns back and forth.

The testimony of Justin Meserve, which is highly suspect and lacks credibility, fails to satisfy either prongs two, three, or four. Defendant was in close contact with his son during the months prior to his arrest. Justin even came to visit him as he was awaiting trial on these very charges. There is no suggestion that Justin was unwilling to cooperate with his father in the preparation of a defense. Therefore if the Defendant had asked Justin if he had ever seen John

Nicholas possess a sawed off shotgun, presumably he would have received the same information which was disclosed at the hearing.

Justin's testimony did not establish that John Nicholas had sawed off the shotgun and asked Justin to dispose of the parts in a local stream. Nor did Justin's testimony establish that the sawed off shotgun that he allegedly saw on the wall of John Nicholas's bedroom in August/September, 1997, was the same shotgun as the one recovered in connection with the events of this robbery on April 24, 1998. At best Justin's testimony impeaches John Nicholas's implied assertion at trial that he had no weapons in his home. The evidence showed that police had searched the home and found twelve gauge shotgun shells in the home. Nicholas testified that he had no knowledge of the shells. (Trial Tr., Vol. I, p. 172). Even if the Defendant did establish that in 1997 John Nicholas had a sawed off shotgun in his home, that testimony would not be likely to result in an acquittal in this case, given both the eyewitness testimony and the accomplice testimony upon which the jury relied.

Conclusion

Based upon the foregoing, I recommend that no further evidentiary hearing be held and that the Defendant's Motion for a New Trial be **DENIED**.

Notice

A party may file objections to those specified portions of this report or proposed findings or recommended decision for which de novo review by the district court is sought, together with a supporting memorandum, within ten days after being served with a copy hereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: June 9, 2000.

CJACNS BANGOR

U.S. District Court
District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 99-CR-19-ALL

USA v. MESERVE

Filed: 04/13/99

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