

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)
)
 v.) Criminal No.: 3:00-CR-400-P
)
) Judge Jorge A. Solis
 MARTIN NEWS AGENCY, INC.; and)
 BENNETT T. MARTIN,)
) FILED: June 22, 2001
 Defendants.)

MEMORANDUM OF THE UNITED STATES
IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE
IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

I
INTRODUCTION

The United States moves the Court for an Order in advance of trial to specifically exclude any evidence, either documentary or testimonial (including cross or direct examination), or any argument by defense counsel to impeach any witness by introducing evidence of conviction of a crime beyond that which is permitted under Fed. R. Crim. P. 609. Here, the United States anticipates that defense counsel may seek to introduce into this trial, either through impeachment or testimonial or documentary evidence, a nolo contendere conviction in 1974 against Galveston News Agency, Inc. (“Galveston News”). Brian Weiner, one of the government’s trial witnesses, was an officer at Galveston News at the time of the conviction. This conviction involved a misdemeanor violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

Because of the highly prejudicial nature in injecting prior convictions into a trial, Rule 609 sets forth the limited circumstances under which evidence of conviction of a crime may be used to impeach a witness during trial. For the reasons discussed fully below, Rule 609 makes use of the

prior conviction of Galveston News inadmissible in this trial. Moreover, under Fed. R. Evid. 403, the United States submits that there is no other federal rule of evidence that would allow this type of impeachment testimony or argument to be introduced, because the prejudicial nature of such prior conviction evidence is so overwhelmed by the limited probative value of a nolo conviction from 27 years ago that involved a witness's company for conduct in another geographic market for an agreement that involved a completely different set of competitors.

Accordingly, the United States respectfully requests that its motion in limine excluding evidence or argument related to this prior conviction be granted.

II LEGAL ARGUMENT

A. FEDERAL RULE OF EVIDENCE 609

Fed. Rule of Evid. 609 (Impeachment by Evidence of Conviction of Crime) states in relevant part:

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused is convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . . ; and

(2) evidence that any witness is convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction . . . , unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party

with a fair opportunity to contest the use of such evidence.

Fed. R. Evid. 609 (emphasis added).

The United States will call Brian Weiner as a witness in its case-in-chief. Weiner worked for a company, Galveston News, that pled nolo contendere to a misdemeanor Sherman Act violation, 15 U.S.C. § 1, in 1974.¹ Though Weiner was a corporate officer of Galveston News, that company was owned by Weiner's father.

The plain language of Rule 609 makes the 1974 conviction against Galveston News not admissible at this trial. Indeed, because of the highly prejudicial nature of such evidence, Rule 609 sets forth the limited circumstances under which evidence of prior conviction of a crime may be introduced at all. First, prior convictions are admissible only when “**a witness . . . is convicted of a crime.**” Fed. R. Evid. 609 (emphasis added). Second, Rule 609 requires that the previous prosecution be for a felony. The Sherman Act, 15 U.S.C. § 1, did not become a felony statute until late December 1974. Therefore, the April 1974 conviction was for a misdemeanor and cannot be introduced. Third, the 1974 misdemeanor conviction of Galveston News was not a crime involving “dishonesty or fraud.”

By the phrase “dishonesty and false statement” the Conference means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or

¹ The case, styled United States v. Interstate Gopher News, Co. & Galveston News Agency, Inc., was filed in the Southern District of Texas on October 15, 1973. The defendants pled nolo contendere on March 4, 1974, and judgment was entered April 19, 1974. The 1974 Amendment to the Sherman Act, 15 U.S.C. § 1, made a violation of that statute a felony. Pub. L.93-528 was signed by President Ford on December 23, 1974.

falsification bearing on the accused's propensity to testify truthfully.

H.R.Conf.Rep. No. 1597, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S.C.C.A.N. pp. 7051, 7098, 7103.

Fourth, the misdemeanor conviction is 27 years old. Rule 609(b) states that if a felony conviction is over 10 years old, it is inadmissible “unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” There are no such extraordinary circumstances here that would favor introduction of the prosecution. The conduct prosecuted 27 years ago involved a different geographic market than that charged in this Indictment and also involved a completely different set of co-conspirators and competitors. As the Fifth Circuit stated in United States v. Cathey, 591 F.2d 268 (5th Cir. 1979), “the legislative history [of Rule 609] makes clear that ‘convictions over 10 years old will be admitted very rarely and only in exceptional circumstances.’” (quoting Sen.Rep. No. 1277, 93d Cong. 2d Sess. 4, reprinted in 1974 U.S.C.C.A.N. pp. 7051, 7062). See also United States v. Bibbs, 564 F.2d 1165, 1170 (5th Cir. 1977), cert. denied, 435 U.S. 1007 (1978) (“Congress intended that trial judges be extremely cautious in admitting evidence of remote convictions.”). Further, the Cathey Court emphasized,

... this court's conclusion in Mills v. Estelle, 552 F.2d 119, 120 (5th Cir.), Cert. denied, 434 U.S. 871, 89 S.Ct. 214, 54 L.Ed.2d 149 (1977), that 609(b) establishes a presumption **against** the use of more than 10-year-old convictions. The court's conclusion is supported by both the language of the Rule as well as the legislative history. Rule 609(b) makes over-age convictions inadmissible unless the court makes the required finding of probative value. **The general rule, therefore, is inadmissibility.** Moreover, in the Senate Report on the Rules of Evidence, the

Senate noted that “convictions over ten years old generally do not have much probative value.”

Id. (emphasis added) (quoting Sen.Rep. No. 1277, 93d Cong. 2d Sess. 4, reprinted in 1974 U.S.C.C.A.N. pp. 7051, 7061). See also United States v. Acosta, 763 F.2d 671, 693 (5th Cir. 1985) (same).

Assuming arguendo that Brian Weiner had plead guilty 27 years ago rather than Galveston News, and assuming further that that conviction was for a felony, that conviction would be inadmissible under Rule 609. Given this hypothetical, if Brian Weiner could not be impeached at this trial for his own conviction of 27 years ago, he certainly cannot be impeached at this trial under Rule 609 based on the misdemeanor conviction of Galveston News. Accordingly, the prior conviction of Galveston News is inadmissible.

B. FEDERAL RULE OF EVIDENCE 403

Moreover, in addition to Rule 609 barring the use of the Galveston News conviction at this trial, the United States submits that there is no federal rule of evidence that would permit Brian Weiner to be impeached at trial for the conviction of Galveston News, or any basis for defense counsel or any other witness to raise this prior conviction during the course of this trial. All federal rules of evidence are subject to Rule 403, which excludes even relevant evidence where the probative value is substantially outweighed by prejudice. Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

Thus, even if the argument could be made that under some other federal rule of evidence this 27-year-old conviction against Galveston News is somehow relevant in the prosecution of Bennett T. Martin and Martin News Agency, Inc., under Rule 403 its prejudicial effect far outweighs any slight probative value this ancient prosecution may have. Indeed, such evidence or argument will serve only to confuse or mislead the jury. Here, at best, the Galveston News conviction has only slight probative value, while it has a high likelihood of confusing issues and misleading the jury. If allowed to be introduced, it will result in a trial within a trial, as the merits of a 27-year old conviction take center stage over the charged conspiracy. In a word, defense counsel will use the Galveston News conviction to smear Brian Weiner and put him on trial for a conviction that is not his. Accordingly, the slight probative value of the Galveston News conviction is overwhelmed by the prejudicial nature of the prior conviction and should be inadmissible during the course of this trial.

III
CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court grant its motion in limine and exclude from the trial any attempt by defense counsel to introduce any evidence, either documentary or testimonial (including cross or direct examination), or any argument, to impeach Brian Weiner or any other witness by introducing evidence of the prior conviction of Galveston News.

Respectfully Submitted,

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