

13-0443-cr (L)
United States v. Malachowski

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 9th day of September, two thousand fifteen.

5
6 **PRESENT: RALPH K. WINTER,**
7 **JOHN M. WALKER, JR.,**
8 **DENNIS JACOBS,**
9 Circuit Judges.

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11 - - - - -X

12 **UNITED STATES OF AMERICA,**
13 Appellee,

14
15 **-v.-** **13-0443 (Lead)**
16 **14-0226 (Con)**

17 **MARCEL MALACHOWSKI,**
18 Defendant-Appellant.

19 - - - - -X

21 **FOR APPELLANT:** ROBIN C. SMITH, LAW OFFICE OF
22 ROBIN C. SMITH, San Rafael,
23 California.

24
25 **FOR APPELLEE:** PAUL D. SILVER (with Carl G.
26 Eurenus on the brief), for
27 Richard S. Hartunian, United
28 States Attorney for the Northern

1 District of New York, Albany,
2 New York.
3

4 Appeal from a judgment of the United States District
5 Court for the Northern District of New York (Hurd, J.).
6

7 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
8 **AND DECREED** that the judgment of the district court be
9 **AFFIRMED.**

10
11 Marcel Malachowski appeals from the judgment of the
12 United States District Court for the Northern District of
13 New York (Hurd, J.), denying his motions for a new trial
14 pursuant to Rule 33 of the Federal Rules of Criminal
15 Procedure.¹ We assume the parties' familiarity with the
16 underlying facts, the procedural history, and the issues
17 presented for review.
18

19 Malachowski's underlying convictions are for possession
20 of machine guns, possession of firearm silencers, illegal
21 entry and reentry, and being an illegal alien in possession
22 of firearms. See United States v. Malachowski, 415 F. App'x
23 307, 309 (2d Cir. 2011). Malachowski raises four grounds
24 for appeal: (i) the district court erred in finding that his
25 Rule 33 submissions were untimely; (ii) the district court
26 misapplied Brady v. Maryland, 373 U.S. 83 (1963) and Giglio
27 v. United States, 405 U.S. 150 (1972) to relevant evidence;
28 (iii) the district court incorrectly held that testimony
29 elicited by the government was not perjurious; and (iv)
30 Malachowski's status as an American Indian born in Canada
31 precludes his conviction on counts three, four, five and
32 six. We review "challenges to a district court's denial of
33 a Rule 33 motion for an abuse of discretion and accept the
34 district court's factual findings unless they are clearly
35 erroneous." United States v. McCourty, 562 F.3d 458, 475
36 (2d Cir. 2009) (internal quotation marks omitted).
37
38
39

¹ Malachowski separately appealed the sentence he received based on the role he played in a continuing criminal enterprise to import and distribute marijuana. Oral argument with respect to this appeal, United States v. Cook et al., No. 14-0203, was heard in tandem with the present case.

1 **Timeliness.**
2

3 Malachowski's Rule 33 motions alleging newly discovered
4 evidence were filed more than three years after the entry of
5 a guilty verdict against him.² The late filing was not
6 excused by routine mistakes his counsel made. See Pioneer
7 Inv. Serv's Co. v. Brunswick Ass's Ltd. P'Ship, 507 U.S.
8 380, 397 (1993) ("[T]he Court of Appeals in this case erred
9 in not attributing to respondents the fault of their
10 counsel"); Silivanch v. Celebrity Cruises, Inc., 333 F.3d
11 355, 369 (2d Cir. 2003) ("The excusable neglect standard can
12 never be met by a showing of inability or refusal to read
13 and comprehend the plain language of the federal rules . . .
14 . Counsel's lack of familiarity with federal procedure is
15 not an acceptable excuse.") (internal quotation marks
16 omitted). The district court therefore did not abuse its
17 discretion in deeming Malachowski's Rule 33 motions
18 untimely.
19

20 Malachowski argues that the district court was required
21 to *sua sponte* construe Malachowski's Rule 33 motions as
22 motions brought pursuant to 28 U.S.C. § 2255. This argument
23 attempts an end-run around the time bar in Rule 33. See
24 Adams v. United States, 155 F.3d 582, 584 (2d Cir. 1998)
25 ("[D]istrict courts should not recharacterize a motion
26 purportedly made under some other rule as a motion made
27 under § 2255 unless . . . the court finds that . . . the
28 motion should be considered as made under § 2255 because of
29 the nature of the relief sought, and offers the movant the
30 opportunity to withdraw the motion rather than have it so
31 recharacterized."). Untimeliness, by itself, is a
32 sufficient basis for affirming the district court's
33 judgment.
34

35 **Brady & Giglio Claims.**
36

37 The district court did not abuse its discretion in
38 concluding that any allegedly withheld evidence pertaining
39 to government witness Hank Cook was cumulative of
40 impeachment evidence that was presented at trial.
41 Government Appendix ("G.A.") 99-104, 119, 137. Moreover, it

² In relevant part, Rule 33 of the Federal Rules of Criminal Procedure states: "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty."

1 is unlikely that the requested evidence would have affected
2 the result. See United States v. Spinelli, 551 F.3d 159,
3 164 (2d Cir. 2008) (“[U]ndisclosed information is deemed
4 material so as to justify a retrial only if there is a
5 reasonable probability that, had [it] been disclosed to the
6 defense, the result of the proceeding would have been
7 different.”) (internal quotation marks omitted). To the
8 extent the government withheld statements by Cook outside
9 the scope of his impeachment, they were immaterial to the
10 conviction at issue in this appeal and cannot form the basis
11 for either a Brady or Giglio violation. A. 373 (report
12 detailing conversations between Cook and Malachowski
13 concerning Malachowski’s involvement in “smuggl[ing] loads
14 of [m]arijuana”). Malachowski’s contentions in his
15 supplemental pro se brief that statements from Patrick
16 Johnson and Owen Peters should have been provided to him in
17 advance of trial are similarly meritless, as neither
18 individual had information relevant to Malachowski’s gun-
19 related charges. See United States v. Malachowski, No.
20 5:08-cr-701 (Apr. 23, 2009) (Doc. 140).

21
22 **Perjury.**

23
24 Malachowski has provided no basis to disturb the
25 district court’s holding that a supervisory dismissal of the
26 indictment was not warranted. Our previous decision in
27 Malachowski, 415 F. App’x at 310-11, forecloses
28 Malachowski’s arguments that the trial evidence did not
29 support a possession charge, and there is no other ground in
30 the record for concluding that false testimony was provided
31 to the grand jury or during trial. A. 44. Malachowski has
32 therefore clearly fallen short of satisfying his
33 considerable burden. See United States v. Bari, 750 F.2d
34 1169, 1176 (2d Cir. 1984) (“[D]ismissal is warranted only
35 where the prosecutor’s conduct amounts to a knowing or
36 reckless misleading of the grand jury as to an essential
37 fact.”). And the district court acted well within its
38 discretion in refusing to appoint a forensic audio expert
39 *sua sponte* in response to Malachowski’s motions, because all
40 of the relevant recordings were available to Malachowski at
41 the time of his trial, or could have been uncovered had
42 Malachowski exercised due diligence. See United States v.
43 Morse, 166 F.3d 1202, 1998 WL 907008 at *1 (2d Cir. 1998)
44 (noting that the defendant “did not meet his burden of
45 proving that the expert was reasonably necessary”) (internal
46 quotation marks omitted).

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3 **Native American Status.**
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5 Malachowski invokes 8 U.S.C. § 1359, which allows
6 American Indians born in Canada to freely cross the borders
7 of the United States, and contends that he was wrongfully
8 convicted of counts three, four, five, and six. The statute
9 extends only "to persons who possess at least 50 per centum
10 of blood of the American Indian race," and we previously
11 expressed skepticism that Malachowski satisfied his burden
12 of proof on this point. See Malachowski, 415 F. App'x at
13 313 (noting the "dearth of evidence respecting
14 [Malachowski's] ancestry"). Neither the immigration officer
15 assigned to Malachowski's case nor the ATF agent
16 investigating Malachowski unearthed evidence of his American
17 Indian heritage. G.A. 58, 146-47. And when Malachowski was
18 arrested by a border patrol agent and asked "Do you claim
19 any legal status in the United States?" Malachowski answered
20 "No." G.A. 54. During this encounter, Malachowski also did
21 not "claim any other citizenship or nationality." Id.
22 Malachowski has accordingly fallen short of prevailing on
23 this claim.³
24
25

³ Malachowski bore the burden of proof on this issue. See United States v. Curnew, 788 F.2d 1335, 1338 (8th Cir. 1986) ("[T]o establish a defense under section 1359, an individual must present some combination of evidence from which the finder of fact can reasonably conclude that the individual in fact possesses 50 per centum or more American Indian blood. Proof only that an individual possesses some unidentifiable degree of Indian blood without more will be insufficient."). The affidavit Malachowski obtained from his grandmother cannot be considered because Malachowski first proffered the affidavit on appeal after the United States filed its opening brief. See Puglisi v. Underhill Park Taxpayers Ass'n, 125 F.3d 844, 1997 WL 609212 at *2 (2d Cir. 1997) ("On appeal, Puglisi has submitted new documents and affidavits to bolster his claims. This evidence was not, however, presented to the district court, and we therefore may not consider it for the first time on appeal.").

1 For the foregoing reasons, and finding no merit in
2 Malachowski's other arguments, we hereby **AFFIRM** the judgment
3 of the district court.

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FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK


