

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCIS RAIA,

Defendant.

Criminal No.: 18-657 (WJM)

**BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL
ON BEHALF OF DEFENDANT, FRANCIS RAIA**

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PROCEDURAL POSTURE

On October 31, 2018, five days before the running of the statute of limitations, a grand jury for the District of New Jersey returned a one count indictment against Francis Raia ("Mr. Raia"). The indictment charged that Mr. Raia engaged in a conspiracy to violate the federal Travel Act, by participating in a plan to pay voters in a local Hoboken election, to vote for a slate of candidates, including Mr. Raia, and for a ballot question, via a vote by mail ballot. Mr. Raia entered a plea of not guilty.

The matter proceeded to trial. Jury selection and witness testimony commenced on June 17, 2019. At the close of the Government's case the Court denied Mr. Raia's motion for acquittal. After less than a full day of deliberation the jury returned a verdict of guilty on the one count indictment.

STATEMENT OF THE CASE

In 2013, Mr. Raia ran for Hoboken city council along with a slate of other candidates. In addition, Mr. Raia supported a ballot referendum that would allow certain landlords to reset the base rents on certain vacant rent-controlled units to the market rate. As part of the campaign, Mr. Raia employed a get out the vote strategy

that focused voters in the Hoboken Housing Authority, by soliciting their vote by mail vote. In addition, the campaign sought to enlist many of these same individuals to work on Election Day by publicizing the campaign, wearing t-shirts, and handing out campaign literature. These individuals would be paid \$50 for their work.

The Government's case against Mr. Raia accused that he enlisted confidants to approach voters in Hoboken Housing Authority Housing, and ordered that those confidants offer voters \$50 in exchange for the voter casting a mail in ballot for the candidates and questions Mr. Raia supported. The Government also alleged that in connection with this plan, Mr. Raia demanded that he be permitted to inspect the completed ballots before they were submitted to the Board of Elections, Mr. Raia engaged a middleman to process checks to these voters in order to conceal the payments, and had other individuals complete mandatory New Jersey Election Law Enforcement Commission ("ELEC") reports.

In order to prove its case, the Government presented testimony from three of the purported confidants, Matthew Calicchio ("Calicchio"), Michael Holmes ("Holmes"), and Freddie Frazier ("Frazier"). Additionally, the Government presented testimony from a handful of the voters who had allegedly been paid for their votes.

However, these witnesses were unreliable, contradictory, and often testifying pursuant to cooperation agreements with the government to avoid prosecution or severe sentences. Calicchio had entered a guilty plea to charges of vote buying in an election in 2015 as well as the 2013 election. He entered a cooperation agreement with the government and secretly recorded conversations with several investigative targets. But, no conversations were recorded with Mr. Raia. Similarly Holmes and Frazier were given non-prosecution agreements in exchange for their testimony. In fact, in the case of Frazier, the statements given to the Government were exculpatory of Mr. Raia, and exactly contrary to the testimony given and statements he made subsequent to being threatened with prosecution and given a non-prosecution agreement. The voter witnesses testified inconsistently as well. They testified that they had been given the publicity materials and just failed to distribute them, or that they did in fact do work for the campaign.

The Government supplemented its case by reliance on innuendo that the payments to campaign workers through a middleman were improper, or that the use of an unrelated individual to serve as committee chairman or complete ELEC reports was somehow sinister. None of these things were

improper or sinister and were, in fact, common in New Jersey local campaigns.

Ultimately, the Government failed to present credible evidence to substantiate the existence of any conspiracy. Rather, the Government argued through innuendo that Mr. Raia's actions make him appear guilty, when in fact none of those actions were improper or unusual.

ARGUMENT

POINT ONE

DEFENDANT MUST BE GRANTED A NEW TRIAL BECAUSE THE JURY'S VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

Rule 33 of the Federal Rules of Criminal Procedure provides this Court with authority to grant a new trial if it is required "in the interest of justice." FED.R.CRIM.P. 33. "District courts have broad discretion in passing upon motions for new trial." United States v. Wilkins, 139 F.3d 603, 604 (8th Cr. 1998). When deciding a motion for a new trial based upon a claim that the jury's verdict was against the weight of the evidence, a court does not view the evidence favorably to the Government, but instead it "exercises its own judgment in assessing the Government's case." United States v. Brennan, 326 F.3d 176, 189 (3d Cir. 2003). The Court said:

This Circuit has described a district court's consideration of a Fed. R. Crim. P. 33 motion for a new trial based on the 'weight of the evidence' as follows: A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that 'there is a serious danger that a miscarriage of justice has occurred--that is, that an innocent person has been convicted. Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case. (Internal citations omitted) Id. at 189.

As the Eighth Circuit has noted, "In assessing the defendant's right to a new trial, the court must weigh the evidence and in doing so evaluate for itself the credibility of the witnesses." United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980).

When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different from those raised by a motion for judgment of acquittal. The question is not whether the defendant should be acquitted outright, but only whether he should have a new trial. The district court need not view

the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury. Id. at 1319.

The interests of justice require a directed verdict of acquittal or a new trial because the guilty verdict against Mr. Raia was against the weight of the evidence.

The Government argues that Mr. Raia instructed his confidants to pay individuals \$50 in exchange for their votes, and that he directed that the completed ballots be returned to Mr. Raia's club for inspection prior to submission to the Board of Elections. The Government relied heavily on Calicchio, Holmes, and Frazier to make this case to the jury, but their testimony was too unreliable to form the basis of any case.

A. Calicchio's Testimony Regarding Mr. Raia's Actions Cannot Be Believed.

Calicchio's testimony regarding his interactions with Mr. Raia is not credible. Initially, when testifying before the grand jury, Calicchio did not even mention Mr. Raia or the 2013 campaign at all. His testimony only concerned the 2015 campaign. It was not until the Government offered Calicchio a plea deal that his breadth of knowledge expanded to include Mr. Raia and the workings of the 2013 campaign. Nevertheless, even Calicchio's testimony regarding the 2013 campaign is not credible.

On direct examination, Calicchio made several statements that were unsupported and contradicted by the testimony of the other government witnesses. Calicchio testified that he brought unsealed ballots to Frazier, and that he watched Frazier alter ballots. [1T:69:23-25; 1T:72:14-19]. However, Frazier never testified to these things. Frazier never altered a ballot and never testified that Calicchio had given him unopened ballots. Further, Calicchio testified inconsistently with respect to the involvement of Holmes in the campaign, unable to keep his story straight even over the span of two questions:

Q: Did you ever observe Mr. Holmes bring open ballots to campaign headquarters?

A: Yes.

Q: Now, specifically with respect to Mr. Holmes, did you ever see him bring any ballots open back to campaign headquarters?

A: No.

[2T:88:8-14]. Just within the span of two questions, Calicchio cannot be sure what he had previously said and what the Government is expecting him to say in this case. Even on relatively banal matters, like providing payment to a middleman, Calicchio's testimony is unsupported. Calicchio testified that he delivered checks to Ryan Yacco, the executive of the entity used to prepare the checks for campaign workers. [2T:96:3-6]. However, Yacco testified that he is "fairly certain" that he picked the check up directly from campaign headquarters. [3T:339:19 - 340:3]. Calicchio's memory and testimony was inconsistent and unreliable with respect to major issues and minor issues alike.

On cross examination Calicchio's unreliability became even more pronounced. At the outset of the cross-examination Calicchio began to lie regarding his role in the investigation:

Q: You never taped Mr. Raia, did you?

A: I did.

Q: When was that?

A: I don't remember the date.

Q: And where is that tape?

A: I don't know.

Q: Who did you give it to?

A: The agents.

[2T:107:12-19]. The Government confirmed that Calicchio never made any secret recordings of Mr. Raia. However, the salient point, is that Calicchio was willing to and did say whatever he thought was the right answer, rather than what the truth was. In addition to his untruthful testimony, Calicchio also confirmed that he was frequently untruthful in other areas of his life. He failed to file tax returns, failed to report income to the housing authority, and used his employer's credit card to take unauthorized trips around the country to watch wrestling matches. [2T:114:14-17; 2T:148:8-11].

Calicchio's unreliability pervades his testimony. Almost all of the details regarding his testimony of the 2013 campaign are uncorroborated, contradicted by others, or internally inconsistent. His testimony regarding Mr. Raia cannot be trusted and a conviction reliant on such testimony is against the weight of the evidence.

B. Holmes' Testimony Regarding Mr. Raia Cannot Be Believed

Holmes' testimony regarding Mr. Raia and the 2013 campaign is similarly not credible. While Holmes' direct testimony did inculcate Mr. Raia, it was procured pursuant to a non-prosecution agreement. Holmes' testimony also supported the Defense's assertions about the case, and contradicted the testimony of the Government's other witnesses. While Holmes testified that Mr. Raia directed him to offer voters money for votes, he also testified that he, in fact, saw fifty workers out for the campaign on Election Day. [3T:397:21]. Further, Holmes testified that he did tell the various voters that they were required to work and that he provided them with the campaign paraphernalia to use while working to get out the vote on and around Election Day. Holmes testified that he provided individuals with campaign t-shirts with the understanding that they would wear them on Election Day. [3T:410:20-22]. Holmes also gave the voters flyers to pass out. [3T:411:14-17]. Additionally, Holmes testified that he insisted the individuals must work in order to get paid:

Q: Some of the voters asked you if they actually had to work, and you told them yes, correct?

A: Correct.

Q: And you told the voters who said, "Do I have to work"" that you must work in order to get paid, correct?

A: Correct.

[3T:412:21 - 413:1]. Holmes' testimony confirmed the Defense's assertions that individuals were recruited and paid to work for the campaign, not that they were paid for their votes. At most, this additionally testimony is inconsistent with Holmes prior testimony that he had paid individuals for their votes and renders Holmes' testimony inconsistent and unreliable.

Further, Holmes' testimony contradicts Calicchio's testimony. When the Court asked if Holmes had ever see anyone change a vote on the ballot, Holmes responded that he had never seen such a thing. [3T:415:13-15]. This directly contradicts the testimony and further undercuts the Government's case. Because Holmes' testimony supports the Defense position and contradicts the Government's any conviction based on the testimony is against the weight of the evidence and a new trial is required.

C. Frazier's Testimony Regarding Mr. Raia Cannot Be Believed.

Similar to Holmes, Frazier's testimony supports the Defense's position and cannot serve as the basis for a

conviction. Frazier's initial statements to the Government were exculpatory of Mr. Raia. It was not until Frazier was threatened with prosecution and offered a non-prosecution agreement that he made any statements inculpatory of Mr. Raia. Further, as the Defense contends, Frazier's testimony confirmed that individuals were expected to work on or about Election Day. He testified that he would tell every voter that they would have to report on Election Day and pick up a t-shirt or some campaign literature to distribute. [3T:535:14-17]. He confirmed that workers were, in fact, given t-shirts, flyers, and signs. [3T:550:9-11; 3T:551:15]. Frazier also admitted that he told the FBI that residents in Hoboken were paid to work and he stated that "at that time, I believe I was [telling the truth]." [3T:544:22 - 545:18]. Additionally, Frazier confirmed in his first grand jury appearance that he testified that Mr. Raia did not direct anyone to offer voters \$50 for their votes. [3T:556:14-22]. These statements all undercut the Government's arguments and weigh against a guilty verdict.

Additionally, Frazier's testimony contradicted Calicchio's substantive testimony. Frazier did not testify that anyone altered ballots, as Calicchio claimed. [3T:538:7-25]. Further Frazier averred that all of the

ballots he received were sealed and either mailed or brought directly to the Board of Elections. [3T:534:17 - 535:2]. These statements substantially call into question the truth of Calicchio's statements and make both witnesses' testimony unreliable. Because the testimony of the witnesses was unreliable, contradictory, and often supported the Defense perspective of events, they cannot serve as the basis for a conviction and any conviction based on such testimony is against the weight of the evidence and a new trial must be ordered.

POINT TWO

A NEW TRIAL MUST BE ORDERED BECAUSE THE PROSECUTION MISCHARACTERIZED THE EVIDENCE IN A WAY THAT CREATED A SUBSTANTIAL POSSIBILITY THAT THE VERDICT WAS TAINTED.

Throughout the trial, and notably, in summation, the Government made allegations regarding whether votes were cast in favor of Mr. Raia and focused on several actions taken by Mr. Raia that were entirely normal actions for a candidate and political action committee to take and suggested that those actions were sinister, or somehow improper. This mischaracterization created a substantial possibility that the jury focused on incorrect information when reaching a verdict, and therefore the verdict must be vacated and a new trial ordered. Generally, a verdict must

be set aside, and a new trial ordered, when the Government's comments are so inflammatory or so mischaracterize the evidence that "it cannot be said with confidence that [the improper statements] did not taint the verdict." United States v. Carpenter, 405 F. Supp. 2d 85, 103 (D. Mass. 2005); see also United States v. Brodie, 268 F. Supp. 2d 420, 435 (E.D. Pa. 2003) (granting a new trial where the prosecutor's summation mischaracterized witness testimony and referred to defendant as a liar); United States v. Fullbright, Crim. No. 94-289, 1995 U.S. Dist. LEXIS 3077, at *7-8 (E.D. Pa. Mar. 14, 1995) (granting a new trial where the prosecutor's summation raised factors outside the scope of the charged conduct).

In Brodie the prosecution mischaracterized the evidence as showing that a defendant tore up receipts and suggested that another defendant had lied in testimony. Brodie, 405 F. Supp. 2d at 434. The court deemed that such references made it impossible to determine if the jury had rendered an impartial verdict. Id. In Fullbright, the government was prosecuting a former government employee who had made false worker's compensation claims. Fullbright, 1995 U.S. Dist. LEXIS 3077, at *1. In that case, the government, in summation, argued that the defendant's actions jeopardized the worker's compensation program as a

whole, and wasted taxpayer money. Id. at *2. The court granted a new trial, holding that such references to matters outside the scope of the charged conduct were only designed to inflame the passions of the jury. Id. at *8-9. In the present case the same issues arise. In summations the Government argued, not that its case had been proven, not that the evidence suggested that Mr. Raia had conspired to pay money to the voters that testified, but rather, the Government argued that it had proved vastly larger scale conduct. The Government argued that “[b]etween October and November of 2013, the defendant, Frank Raia, voted hundreds of times for himself and for a referendum that he supported.” [5T:761:3-5]. There is simply no evidence in the record that supports such a claim, and for whom any vote was cast is not an element of the charged offense. Calicchio, Holmes, and Frazier did not give any testimony regarding any specific individuals that they had paid, nor did they testify as to any number of voters that they had paid. The only testimony as to specific voters who were paid came from the five voters themselves. Yet, the Government pressed the issue, continuing on to argue that “95 percent of the people that the defendant paid through his campaign in 2013 received a vote-by-mail ballot. 378 people.” [5T:761:13-15]. The Government further argued

"[t]hose people received mail-in ballots because that's what they were paid for. They were paid for those ballots." [5T:761:17-19]. The Government goes beyond arguing the evidence, to arguing probability. There is no evidence in the record that all of the people who were paid and received mail-in-ballots were paid to vote. Rather, the Government sought to inflame the passions of the jury by making the alleged scheme seem much larger than the government had introduced evidence to prove. Additionally, in its summation, the Government spent a substantial amount of time addressing whether unsealed ballots were reviewed by the campaign prior to submission to the county. [5T:766:20-775:7]. How ballots were handled, and whether or not there were unsealed ballots received is not an element of the charged offenses, reference to it only serves to make the actual alleged criminal conduct appear more egregious and inflame the passions of the jury. These actions are the same that necessitated new trials in Brodie and Fullbright. The Government cannot so stretch and mischaracterize the evidence to inflame the jury in the hopes of a conviction. Such was the issue here. Accordingly, the conviction must be vacated and a new trial ordered.

CONCLUSION

Because the verdict was against the weight of the evidence, and because there is a substantial potential that the jury was inflamed by improper arguments in the Government's closing argument, the verdict must be vacated and the matter remanded for a new trial.

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Dated: August 8, 2019