

UNITED STATES v. CARLSON
547 F.2d 1346 (8tfa Cir. 1976)

GIBSON, CHIEF JUDGE.

Defendants, Donald Carlson and Gary Hofstad, appeal their convictions on three counts of violating 21 U.S.C. § 841(a)(1) (1970). Carlson, Hofstad and their co-defendant, Wayne Dahl, were charged in a five-count indictment of participating in a cocaine distribution scheme. Count I of the indictment charged Carlson with distributing cocaine on July 25, 1975. Count H charged Dahl with distributing cocaine on August 8, 1975. All three defendants were charged in Count III with distributing cocaine on August 13, 1975, and in Count IV with possessing cocaine with intent to distribute on August 29, 1975. Finally, Count V charged Carlson, Hofstad and Dahl with conspiring to distribute cocaine from August 13, 1975, to August 29, 1975. Pursuant to pretrial motions for severance, the District Court severed Counts I and II and the case proceeded to trial on the remaining three counts. All three defendants were convicted upon a jury verdict on these counts. Carlson was sentenced to seven years on each count to run concurrently and Hofstad was given a four-year concurrent sentence on each count. Both were given a concurrent three-year special parole term on each count. Dahl did not appeal his conviction.

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The most crucial question raised on this appeal involves the propriety of admitting the grand jury testimony of James Tindall in evidence at trial. A recitation of the events leading up to the admission of this testimony is necessary to achieve a proper perspective of this issue.

Tindall testified before the grand jury which was investigating various narcotics violations involving Carlson and other individuals. Tindall stated to the grand jury that he had purchased cocaine from Carlson on two occasions in early August, 1975, and that some of this cocaine had in turn been distributed to Dahl. The Government's proof at trial inferentially showed that this cocaine received by Tindall was the same cocaine sold to Agent Nelson in the cocaine transaction of August 8, 1975. The Government intended to call Tindall as a witness at trial to testify in line with his grand jury testimony.

However, on March 15, 1975, the evening before the commencement of the trial in this case, Tindall advised a DBA agent, John O'Connor, that he did not desire to testify at trial because he feared reprisals. When Agent O'Connor questioned Tindall about specific threats, Tindall responded equivocally. O'Connor reminded Tindall of the grand jury testimony and told Tindall that even though Carlson was aware of that testimony Tindall had not suffered any harm from Carlson. Tindall stated: "Yes, I know, but if I don't testify at trial at least I'll have a chance. If I do, it will be over for me. " When Tindall continued to evade any questions as to the source of the threats. Agent O'Connor inquired: "Do you realize that in refusing to discuss this particular topic with me you are in essence confirming the fact that you received threats from Carlson?" Tindall responded: "I know. You have got the message." On the following day in the presence of Tindall's attorney, the Government verified that Tindall would not testify at trial. When asked if

he had deliberately lied to the Government, Tindall stated that he had always been truthful with the Government and before the grand jury. Further, in a conversation with Agent Nelson, Tindall said he did not want to discuss the reason for his not testifying. In response to Nelson's inquiry as to whether Tindall thought that Carlson would kill him if he were to testify, Tindall stated that "he did not want to have to find out."

The next day, March 17, 1975, Tindall was called as a witness at trial outside of the presence of the jury and he informed the court that he would refuse to testify on Fifth Amendment grounds. The prosecutor informed Tindall and the court that he had received authorization to grant Tindall use immunity from his trial testimony. After consulting with his attorney, Tindall again refused to testify, was held in contempt of court and was sentenced to six months imprisonment. The Government then offered in evidence the grand jury testimony of Tindall. The District Court heard testimony from DBA Agents O'Connor and Nelson to determine why Tindall refused to testify and whether the grand jury testimony should be admitted. After hearing evidence which was highly suggestive of threats and intimidating overtures directed toward Tindall by Carlson, the District Court concluded that the grand jury testimony should be admitted. The District Court also ruled that Carlson was a danger to witnesses in the case and revoked his bond. The court ruled that Tindall was "unavailable" as a witness and, in a post-trial hearing in which some conflicting evidence was heard on this subject, the court explicated this ruling: "Well, I am convinced ... as I said before that Mr. Carlson made Mr. Tindall unavailable for trial. I think this is clear."

At the outset we accept, based upon the District Court's findings and the evidence adduced in the trial court proceedings, that Tindall refused to testify because of threats directed against him by Carlson. From this premise, we proceed to determine whether Tindall's grand jury testimony was properly admitted in light of existing evidentiary and constitutional principles.

A. Law of Evidence. The District Court ruled that Tindall's grand jury testimony, which was clearly hearsay, was admissible pursuant to Fed. R. Ev. 804(b)(5). Rule 804 sets out those instances in which the hearsay statements of unavailable declarants may be admitted in evidence at trial. The rule prescribes four specific and traditional exceptions to the hearsay rule and then formulates a new "trustworthiness" exception in Rule 804(b)(5)....

Preliminarily, there can be no dispute that Tindall was in fact unavailable at the time he was called to testify at trial. Fed. R. Ev. 804(a)(2) provides that a declarant is "unavailable" if he "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so...." Here, Tindall's obstinate refusal to testify despite the granting of use immunity and a court order rendered him "unavailable".

The statement sought to be admitted under Rule 804(b)(5) must have "circumstantial guarantees of trustworthiness" equivalent to those inherent in the other four exceptions of Rule 804(b). In assessing the qualitative degree of trustworthiness of a particular statement, courts should inquire into the reliability of and necessity for the statement. There is a strong indication of reliability in Tindall's testimony. His statements were made under oath and any misrepresentation or deliberate falsehood might subject Tindall to the sanctions of perjury. Tindall was relating facts

surrounding a cocaine transaction in which he participated and of which he possessed firsthand knowledge; therefore, there was no reliance upon potentially erroneous secondary information and the possibility of faulty recollection was minimized. Moreover, Tindall never recanted his grand jury testimony or expressed any belated reservations as to its accuracy. Rather, he specifically stated at the time of trial that he told the truth to the grand jury. Tindall's testimony was not only reliable, but there was also a substantial need for it at trial since Tindall was unavailable at trial, and there were no other individuals to the Government's knowledge who could testify as to the Carlson-Tindall cocaine transaction.... Therefore, the District Court, which has a wide latitude of discretion in determining the trustworthiness of a statement, did not err in finding Tindall's testimony to be trustworthy within the meaning of Rule 804(b)(5).

To be admissible under Rule 804(b)(5), the statement must also be offered as evidence of a material fact. This element is satisfied in the present case. The Government was obligated to prove that Carlson intentionally participated in the distribution of cocaine and the conspiracy to distribute cocaine. Tindall's testimony implicated Carlson in a cocaine transaction occurring just six days before the cocaine transaction charged in the distribution count against Carlson and the commencement of the conspiratorial scheme charged in the conspiracy count. The Tindall testimony was relevant and material in that it showed intent, knowledge, a common plan or scheme and the absence of mistake or accident.

The requirement in Rule 804(b)(5) that the statement be more probative than any other evidence which could be procured through reasonable efforts is likewise satisfied here. Tindall's testimony was clearly material to the issues raised at trial and there is no indication in the record that the Government could have obtained the same or similar evidence involving the Carlson-Tindall transaction from another source. Furthermore, the interests of justice were advanced, as Rule 804(b)(5) mandates, by the admission in evidence of the Tindall testimony. The statements were made under oath and possessed a high degree of trustworthiness. To deprive the jury of the substance of this testimony merely because Carlson caused Tindall not to testify at trial would be antithetical to the truth-seeking function of our judicial system and would not serve the interests of justice.

Finally, Rule 804(b)(5) requires that notice be given to the adverse party prior to the trial or hearing to inform him that the hearsay statement will be used at trial. Undeniably, no such formal pretrial notice was given to Carlson in the present case. However, this notice requirement should not be an inflexible and imposing barrier to the admissibility of probative evidence when the peculiar circumstances of a case militate against its invocation. Here, Carlson was acutely aware of the substance of Tindall's damaging grand jury testimony. The Government was not informed until the eve of trial that Tindall might not testify and it was only when Tindall disobeyed a court order to testify and was held in contempt that the Government knew that Tindall would not testify at trial under any circumstances. The purpose of the notice requirement is to give the adverse party an adequate opportunity to prepare to contest the use of the statement. Carlson was supplied with copies of Tindall's grand jury testimony under the Jencks Act two days before the admission of the testimony in evidence. The Government advised Carlson of its intent to offer the testimony in evidence immediately after it became obvious that Tindall would not testify. Based upon this late and unexpected development that Tindall would not be available to testify at trial, it was excusable for the Government not to give formal pretrial

notice. Notice during trial is permissible on occasion. *United States v. Iaconetti*, 406 F. Supp. 554, 559-60 (E.D. N.Y. 1976), and Carlson could have sought a continuance if he felt that he was not prepared to rebut the Tindall testimony or contest its use at trial.... In any event, as the need for the grand jury testimony arose due to Carlson's own wrongdoing and as Carlson was provided a copy of the grand jury testimony two days before it was admitted at trial, Carlson was not prejudiced by the lack of any formal notice. We conclude that the District Court's admission of Tindall's grand jury testimony under Fed. R. Ev. 804(b)(5) was not an abuse of discretion. The judgments of conviction against Carlson and Hofstad are affirmed.