

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 11-10415  
Non-Argument Calendar

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FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT NOVEMBER 14, 2011 JOHN LEY CLERK
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D.C. Docket No. 2:10-cr-00054-KOB-PWG-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LATOSHA SHURON MADISON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Alabama

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(November 14, 2011)

Before MARCUS, MARTIN and FAY, Circuit Judges.

PER CURIAM:

Latosha Madison appeals her conviction for assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2). On appeal, Madison argues

that the government violated her due process rights by destroying the 2001 and 2002 tax returns of her former clients, whose 2003 and 2004 returns she was charged with falsifying. She contends that the 2001/2002 returns were material to her defense, that no comparable evidence was available, and that the government acted in bad faith by destroying those documents. For the reasons stated below, we affirm.

I.

In 2005, the IRS commenced a tax fraud investigation into Madison and her tax preparation business. As part of the investigation, IRS agents interviewed Madison and many of her clients. One of the clients, T.W., told the agents that he had no knowledge about several deductions and exemptions contained in his 2004 tax return. In 2007, Madison retained an attorney to represent her, and in September 2009, before any indictment had been issued, Madison and her lawyer met with an Assistant U.S. Attorney and the investigating agents to discuss a possible plea agreement. During the meeting, Madison was allowed to review the memoranda of interviews conducted by the IRS agents with her former clients. Madison told the government that it would be difficult to prove that she had falsified her clients' returns, given that they had been filing the same way in the past. However, Madison did not request her clients' pre-2003 tax returns and did

not ask to preserve those returns, either at the meeting or at any time prior to the meeting.

In February 2010, a federal grand jury issued a 28-count indictment against Madison, charging her with entering false information on the 2003 or 2004 tax returns of her clients. The indictment listed a total of 17 taxpayers whose 2003 or 2004 returns were allegedly falsified. Count 21 of the indictment charged that Madison falsified the 2004 tax return of T.W. by claiming false charitable contributions, employee business expenses, and education credits.

Subsequently, Madison requested from the government, among other things, the 2001 and 2002 tax returns of the taxpayers listed in the indictment. The government responded that the 2001/2002 returns had been destroyed by the IRS in accordance with its record-keeping policy, which mandated destruction of tax returns six years after the end of the processing year. The government stated that only “transcripts” or summaries of these returns were currently available and that such transcripts contained some, but not all, of the information typically found in tax returns.

Madison filed a motion to dismiss the indictment, arguing that the government violated her due process rights by destroying the 2001/2002 returns, as those returns constituted exculpatory and impeachment evidence. She

contended, among other things, that the 2001/2002 returns would have shown that her clients had filed the same deductions and exemptions in 2001 and 2002 as they had in 2003 and 2004. At the hearing on the motion, the government stated that the 2001 tax returns were probably destroyed in January 2009, while the 2002 returns were likely destroyed in January 2010, approximately one month before Madison was indicted. The government also stated that it had not looked at the 2001/2002 returns of the taxpayers listed in the indictment. The government submitted a declaration of the lead investigating agent in Madison's case, who stated that, if he had reviewed any 2001/2002 returns during the investigation, he would have made these returns available to Madison.

The district court denied Madison's motion to dismiss. It found, in pertinent part, that the 2001/2002 returns had no apparent exculpatory value and that the government did not act in bad faith by destroying them. Afterwards, Madison entered into a plea agreement with the government and pleaded guilty to Count 21 of the indictment in return for the dismissal of all other counts. As part of the plea agreement, Madison expressly reserved her right to appeal the district court's denial of her motion to dismiss.

## II.

Whether the government's destruction of evidence resulted in a due process violation is a mixed question of law and fact. *United States v. Revolorio-Ramo*, 468 F.3d 771, 774 (11th Cir. 2006). We review the district court's legal conclusions *de novo* and its factual findings for clear error. *Id.*

To show a due process violation stemming from the government's destruction or loss of evidence, "the defendant must show that the evidence was likely to significantly contribute to [her] defense." *Id.* (quotation omitted). "To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *United States v. Brown*, 9 F.3d 907, 910 (11th Cir. 1993) (quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984)). If the destroyed evidence was not clearly exculpatory but only "potentially useful," a defendant must show that the government acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988); *Illinois v. Fisher*, 540 U.S. 544, 547-49, 124 S.Ct. 1200, 1202-03, 157 L.Ed.2d 1060 (2004).

As an initial matter, Madison was convicted only on Count 21 of the indictment, which charged her with falsifying the 2004 tax return of T.W. Accordingly, we review the alleged due process violation only with regard to that count.

Because, aside from Madison's allegations, nothing in the record indicates what T.W.'s 2001/2002 tax returns actually contained, those returns were not materially exculpatory, but at most "potentially useful." *See Youngblood*, 488 U.S. at 56 n.\*, 109 S.Ct. at 336 n.\* (stating that, where the government had failed to preserve or test semen samples found on the victim's clothing, the "possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality"). Therefore, Madison could only establish a due process violation if she showed that the government acted in bad faith in destroying the 2001/2002 tax returns. *See id.* at 57-58, 109 S.Ct. at 337.

Madison has failed to establish bad faith. Notwithstanding her arguments to the contrary, the destruction of the 2001/2002 returns conformed to the IRS's routine practice. *See Internal Revenue Manual ("IRM")* 1.15.29-1 ¶¶ 55(1)(a), 56(1)(b) (2005) (providing that tax returns should be destroyed "6 years after the end of the processing year unless needed for the Collection Statute Expiration

Date (CSED) Extract”); *see also* IRM 1.15.2.3(1)(a) (2010) (stating that individual tax returns are temporary records which become eligible for destruction after 6 years). Moreover, as stated above, there is no indication that the 2001/2002 returns actually contained any exculpatory information that could have been apparent to the government. *See Youngblood*, 488 U.S. at 56 n.\*, 109 S.Ct. at 336 n.\* (“The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.”).

At the September 2009 meeting, before the destruction of the 2002 returns, Madison may have signaled to the government that she would rely on her clients’ pre-2003 returns to establish her defense. However, Madison did not request the documents and did not ask to preserve them, either then or at any time prior to the meeting. Absent such requests, the government could have reasonably believed that the 2001/2002 returns did not actually contain anything of value or that Madison already possessed the relevant information from those returns, making it unnecessary to take any affirmative steps to prevent the routine destruction of these documents. Even if the government acted negligently in failing to heed Madison’s assertions and to immediately retrieve the 2002 returns, such negligent or incompetent behavior does not, by itself, establish bad faith. *See Revolorio-*

*Ramo*, 468 F.3d at 775 (concluding that no bad faith existed, even though government agents acted incompetently in trying unsuccessfully to preserve evidence); *Brown*, 9 F.3d at 910 (stating that the loss of evidence resulted at most from negligence, not bad faith).

Madison also cannot establish bad faith by the fact that the government filed the indictment several years after completing the investigation and shortly after the 2002 returns had been destroyed. Madison retained an attorney to represent her in 2007, long before the destruction of the 2001/2002 tax returns. Moreover, at the September 2009 meeting, the government gave Madison an opportunity to examine the statements of her former clients, which should have alerted Madison to the alleged importance of the 2002 returns. Thus, it is highly unlikely that the government wanted to prevent Madison from obtaining the 2001/2002 returns and for this purpose waited several years to file the indictment. In this light, the district court did not clearly err in finding that the government did not act in bad faith by destroying the 2001/2002 returns. Accordingly, Madison has failed to establish a due process violation, and we affirm the district court's denial of her motion to dismiss.

**AFFIRMED.**