

The Burger Court Opinion Writing Database

United States v. Lovasco

431 U.S. 783 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

7

CHAMBERS OF
THE CHIEF JUSTICE

May 18, 1977

RE: 75-1844 - United States v, Lovasco

Dear Thurgood:

I join.

Regards,

WRB

Mr. Justice Marshall

Copies to the Conference

4

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

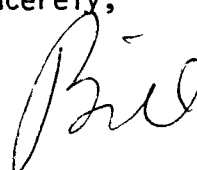
May 10, 1977

RE: No. 75-1844 United States v. Lovasco, Sr.

Dear Thurgood:

I agree.

Sincerely,



Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

(1)

CHAMBERS OF
JUSTICE POTTER STEWART

May 6, 1977

Re: No. 75-1844, United States v. Lovasco

Dear Thurgood,

I am glad to join your opinion for the
Court in this case.

Sincerely yours,

P.S.
/

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

(3)

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 9, 1977

Re: No. 75-1844 - United States v. Lovasco

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

Copies to Conference

MAY 8 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1844

United States, Petitioner,	}	On Writ of Certiorari to the United
<i>v.</i>		States Court of Appeals for the
Eugene Lovasco, Sr.		Eighth Circuit.

[May —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

We granted certiorari in this case to consider the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of an offense and the initiation of prosecution.

I

On March 6, 1975, respondent was indicted for possessing eight firearms stolen from the United States mail, and for dealing in firearms without a license. The offenses were alleged to have occurred between July 25 and August 31, 1973, more than 18 months before the indictment was filed. Respondent moved to dismiss the indictment due to the delay.

The District Court conducted a hearing on respondent's motion at which the respondent sought to prove that the delay was unnecessary and that it had prejudiced his defense. In an effort to establish the former proposition, respondent presented a Postal Inspector's report on his investigation that was prepared one month after the crimes were committed, and a stipulation concerning the post-report progress of the probe. The report stated, in brief, that within the first month of the investigation respondent had admitted to Government agents that he had possessed and then sold five of the stolen guns, and that the agents had developed strong

41, 8, 9

Footnotes renumbered after 12

MAY 13 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1844

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Supreme Court of the United States
Washington, D. C. 20543

5

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 11, 1977

Re: No. 75-1844 - United States v. Lovasco

Dear Thurgood:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

(2)

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 9, 1977

No. 75-1844 United States v. Lovasco

Dear Thurgood:

Please join me.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

6

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 17, 1977

Re: No. 75-1844 - United States v. Lovasco

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

Copies to the Conference

✓✓

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: 6/3/77

Recirculated: _____

75-1844 United States v. Lovasco

MR. JUSTICE STEVENS, dissenting.

If the record presented the question which the Court decides today, I would join its well reasoned opinion. I am unable to do so because I believe our review should be limited to the facts disclosed by the record developed in the District Court and the traditional scope of review we have exercised with regard to issues of fact.

After a thorough hearing on the respondent's motion to dismiss the indictment for prejudicial pre-indictment delay-- a hearing at which both sides were given every opportunity to submit evidence concerning the question--the District Court found that "[t]he Government's delay ha[d] not been explained or justified and [was] unnecessary and unreasonable." On appeal, the Court of Appeals concurred, noting that the District Court's determination was "supported by the evidence." 532 F.2d 59, 61 (CA8 1976). These concurrent findings of fact make it improper, in my judgment, for this Court to make its own determination that "the Government postponed action . . . to await the results of additional investigation," ante, at

Supreme Court of the United States

Memorandum

MEMORANDUM TO THE

Re No. 75-

Judge,

_____, 19____

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~~questioning~~
 concerning foot

This is the memo to the
 conference we discussed concern- 1
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 that should be attached when it is
 circulates.

case. The foot

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 370 (1967).

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 for rehearing

accurate. The opening paragraph of the argument in the Government's
 brief below recognized that the only issue before the court was a due
 process question, and the remainder of the brief treated that question on
 the merits. And even after the Court of Appeals issued its decision based
 squarely on the Due Process Clause, the Government did not even hint at
 the procedural issue in its petition for rehearing.

The Solicitor General makes two points. First, he

says that the Government had meant to say that the district

court's reliance on Rule 48(b) had "skewed" the briefing of

the substantive issue ^(i.e.) when preindictment delay violates

due process ^{but} but had not meant to suggest that the briefing

of the procedural issue ^(i.e., the timing of action on the motion to dismiss) had been similarly affected. In

the cited portions of the argument, however, the Assistant

Solicitor General repeatedly referred in the plural to the

MEMORANDUM TO THE CONFERENCE

Re No. 75-1844, United States v. Lovasco

I have received a letter from the Solicitor General
~~concerning~~ ^{questioning} footnote 7 of my opinion for the Court in this
 case. The footnote reads as follows:

On addition to challenging the Court of Appeals' holding on the constitutional issue, the United States argues that the District Court should have deferred action on the motion to dismiss until after trial, at which time it could have assessed any prejudice to the respondent in light of the events at trial. This argument, however, was not raised in the District Court or in the Court of Appeals. Absent exceptional circumstances, we will not review it here. See, e. g., *Durgan v. United States*, 274 U. S. 195, 200 (1927); *Neely v. Martin K. Eby Construction Co.*, 386 U. S. 317, 330 (1967).

At oral argument, the Government suggested that its failure to raise the procedural question in its brief in the Court of Appeals should be excused because the proceedings in that court were "skewed" by the fact that the District Court had based its dismissal solely on Fed. Rule Crim. Proc. 48 (b), and because the issue was raised by the Government in its petition for rehearing. Tr., at 7-8, 51. Neither of these factual assertions is accurate. The opening paragraph of the argument in the Government's brief below recognized that the only issue before the court was a due process question, and the remainder of the brief treated that question on the merits. And even after the Court of Appeals issued its decision based squarely on the Due Process Clause, the Government did not even hint at the procedural issue in its petition for rehearing.

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Office of the Solicitor General

Washington, D.C. 20530

July 25, 1977

RECEIVED

JUL 25 1977

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D. C. 20543

Dear Mr. Rodak:

I was troubled by the statements contained in footnote 7 of the Court's opinion in United States v. Lovasco, No. 75-1844, decided June 9, 1977. The possibility that an attorney from this office might have made inaccurate factual assertions to the Court has led me to examine the matter. As a result of that inquiry, I offer the following observations in the hope of clarifying the basis for the disputed statements--and of avoiding what I think would be unwarranted damage to the reputation both of this office and of the attorney involved.

The procedural question raised in the government's petition in Lovasco was: "Whether, barring exceptional circumstances, a district court should reserve ruling on a due process claim based upon pre-accusation delay until after trial, at which time the defendant's allegation of prejudice can be assessed in light of the evidence introduced at trial" (Pet. 2). In contending that that issue was properly before the Court, government counsel did state during oral argument that the government had raised the issue in its petition for rehearing in the court of appeals. My review has convinced me that that statement was accurate.

The government argued in the first paragraph of page 4 of its petition for rehearing in the court of appeals, a copy of which is attached, that "[c]onceding for the moment that the Government's delay in bringing the indictment was not properly justified it remains the defendant's burden to demonstrate that the delay--'caused substantial prejudice'" (emphasis in original;



-2-

quoting from United States v. Marion, 404 U.S. 307, 324). The petition then argued that, under Marion, such a determination cannot properly be made in advance of trial (Reh. Pet. 4-5):

As Judge Henley stated in his two dissenting opinions [United States v. Barket, 530 F. 2d 18 (C. A. 8), and Lovasco v. United States, 532 F. 2d 59 (C.A. 8)] the Supreme Court in Marion established that a proper determination of prejudice must be made at trial for any pre-trial determination of prejudice would be purely speculative. This reasoning is enhanced in the instant case where the District Court found materiality and prejudice without even being informed as to the nature of the testimony involved. The Fifth Amendment Due Process Clause insures the defendant's right to a fair and impartial trial. The burden on the Government remains proof beyond a reasonable doubt regardless of the alleged absent testimony. It is submitted that a proper determination of prejudice may only be made when the alleged prejudice is viewed in the context of the evidence produced at trial.

The government's brief in the Court simply elaborated upon the statement in the rehearing petition that "a proper determination of prejudice must be made at trial for any pre-trial determination of prejudice would be purely speculative"--or, as further stated in the rehearing petition, "a proper determination of prejudice may only be made when the alleged prejudice is viewed in the context of the evidence produced at trial."

The other statement by government counsel during oral argument to which the second paragraph of footnote 7 adverted was that the district court's reliance upon Rule 48(b) had "skewed" the initial phase of the proceedings in the court of appeals. This was meant to be in response to the assertion, made in respondent's brief and repeated at oral argument, that the government had not presented to the court of appeals the "substantive" issue presented by our certiorari petition--that an indictment should not be dismissed under the Due Process Clause because of pre-accusation delay

-3-

without proof that the delay was engaged in by the government to gain an unfair tactical advantage and that it caused consequent prejudice to the defendant. We regret that this statement--which was not meant to be addressed to the procedural issue considered in footnote 7--was worded in such a manner that it was fairly subject to the interpretation advanced in the Court's opinion.

I do not mean by these comments to challenge the Court's disposition of either of the questions raised in the government's petition in Lovasco. We are extremely concerned, however, lest the second paragraph of footnote 7 of the Court's opinion be interpreted widely as charging government counsel with misstating, in an unprofessional manner, pertinent portions of the record in the case. Such an interpretation, if not intended, would be an unfortunate reflection upon the reputation of this Office and of Mr. Rupp, the attorney who argued the case for the government.

I would appreciate your transmittal of this letter to Mr. Justice Marshall, the author of the Court's opinion, for his consideration.

Sincerely,

Wade H. McCree, Jr.

Wade H. McCree, Jr.
Solicitor General

cc: Louis Gilden, Esquire
722 Chestnut Street
St. Louis, Missouri 63101
(Counsel for respondent)

No. 75-1852

RECEIVED

JUL 25 1977

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant
v.
EUGENE LOVASCO, SR.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

PETITION BY UNITED STATES OF AMERICA FOR REHEARING,
WITH SUGGESTION FOR REHEARING EN BANC

DONALD J. STOHR
United States Attorney

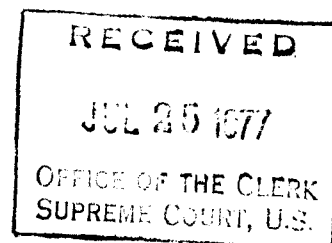
RICHARD E. COUGHLIN
Assistant United States Attorney
Room 414, 1114 Market Street
St. Louis, Missouri 63101



Office of the Solicitor General

Washington, D.C. 20530

July 25, 1977



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Clerk
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cc: Louis Gilden, Esquire
722 Chestnut Street
St. Louis, Missouri 63101
(Counsel for respondent)

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SUPREME COURT, U.S.

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FOR THE EIGHTH CIRCUIT

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PETITION BY UNITED STATES OF AMERICA FOR REHEARING,
WITH SUGGESTION FOR REHEARING EN BANC

DONALD J. STOHR
United States Attorney

RICHARD E. COUGHLIN
Assistant United States Attorney
Room 414, 1114 Market Street
St. Louis, Missouri 63101
