

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA)
)
 v.)
)
JOHN J. JOHNSON,)
)
)
 Defendant.)

Criminal No.: H-92-152

(filed 2/15/94)

MEMORANDUM OF LAW ON ADMISSIBILITY
OF TAPES AND TRANSCRIPTS

This memorandum of law is submitted in support of the government's offer of tapes and transcripts into evidence. The government respectfully submits that said exhibits are admissible and should be received into evidence.

I
RECORDED CONVERSATIONS ARE ADMISSIBLE
IN EVIDENCE IF RECORDED WITH THE PERMISSION
OF ONE OF THE PARTIES TO THE CONVERSATION

In a criminal prosecution, taped conversations between the defendant and another which were recorded without the defendant's knowledge or consent but with the consent of the other party are admissible and do not violate the defendant's Fourth and Fifth Amendment rights. United States v. White, 401 U.S. 745 (1971); Lopez v. United States, 373 U.S. 427 (1963); United States v. Caracci, 446 F.2d 173 (5th Cir.), cert. denied, 404 U.S. 881 (1971). The consent of one party to the conversation eliminates

any claim of illegality as to the recording per se even when the government had participated in the recording. United States v. Fanning, 477 F.2d 45 (5th Cir. 1973), cert. denied, 414 U.S. 1006 (1974). The Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa v. United States, 385 U.S. 293, 302 (1966). Where it is proper to testify about oral conversations, taped records of those conversations are admissible. Lopez, 373 U.S. at 387. See also United States v. Conroy, 589 F.2d 1258, 1264 (5th Cir.), cert. denied, 444 U.S. 831 (1979) ("If the informant may reveal the conversation at a later time, he may contemporaneously transmit it to third persons").

II
TAPE RECORDINGS OF CONVERSATIONS
ARE ADMISSIBLE ONCE THE GOVERNMENT
LAYS THE PROPER FOUNDATION

The controlling authority in this Circuit on the authentication of tapes is United States v. Biggins, 551 F.2d 64 (5th Cir. 1977). In Biggins, the Fifth Circuit held that the party introducing a tape into evidence has the burden of going forward with sufficient evidence to show the recording is an accurate reproduction of the conversation recorded. In a criminal trial, generally this will require the government to show: (1) the competency of the operator; (2) the fidelity of the recording equipment; (3) the absence of material deletions, additions, or alterations in the relevant part of the tape; and (4) the identification of the relevant speakers. Id. at 66. Although this is the preferred foundation, there are not strict particularized standards governing the admissibility of tapes since the purpose of the inquiry is to establish and ensure the

accuracy of the recording. United States v. Hughes, 658 F.2d 317, 322 (5th Cir. 1981), cert. denied, 455 U.S. 922 (1982); see also United States v. Stone, 960 F.2d 426, 436 (5th Cir. 1992) (the Biggins factors are not meant to require "formalistic adherence" at the expense of the trial judge's discretion). The trial judge has broad discretion to determining whether this burden has been satisfied, and his determination will not be disturbed absent extraordinary circumstances. Hughes, 658 F.2d at 323; Biggins, 551 F.2d at 66-67.

The first two requirements are satisfied by testimony from the person who recorded the conversation that he was familiar with the equipment and that it was in proper working order at the time of the recording.

Evidence sufficient to satisfy the accuracy element may be direct or circumstantial. United States v. Bright, 630 F.2d 804 (5th Cir. 1980); United States v. Haldeman, 559 F.2d 31, 107 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). Where, with respect to a tape recording of a conversation between a prosecution witness and the defendant, the witness identifies the voices on the tape and states that the conversation was the one he had conducted with the defendant at the time the recording was made, such testimony by the witness meets the requirements for authenticating or identifying the testimony as a condition precedent to its admission. United States v. Albert, 595 F.2d 283 (5th Cir.), cert. denied, 444 U.S. 963 (1979). See also United States v. Lance, 853 F.2d 1177 (5th Cir. 1988).

Furthermore, if the witness who is testifying was present at the time the conversation was recorded, identifies the tape and acknowledges its accuracy, the

recording is admissible even though the witness did not retain custody of the tape. United States v. Nace, 561 F.2d 763 (9th Cir. 1977).

All that is required is that a showing be made to the court that the recording has been preserved. Testimony that a tape recording has been in the continuous custody of the government since it was made and that no changes, additions or deletions were made to it is sufficient to show that the tape is accurate. United States v. Mendoza, 574 F.2d 1373 (5th Cir.), cert. denied, 439 U.S. 988 (1978).

Authenticity also may be shown by testimony by the witness who taped the conversation that he kept the tape for a period of time before turning it over to the government together with testimony from a government agent or attorney that the tape had been in his custody since it was given to him by the witness. United States v. Hykel, 461 F.2d 721 (3d Cir. 1972). An adequate chain of custody may be established by testimony from a government agent who had possession of the tape, thereby allaying any fears of tampering. United States v. Alston, 460 F.2d 48 (5th Cir.), cert. denied, 409 U.S. 871 (1972).

The fact that some unidentified person may have had access to a tape recording in the government's custody does not affect the reliability of the foundation evidence so as to preclude admission into evidence of the recording. Haldeman, 559 F.2d at 109. The government need not call every employee who may have had access to the tape. When the government's showing of continuity of possession of real evidence is reasonably adequate, and no evidence is offered by the defendant suggesting any laxity in the custodial procedures of the government or any reasons why the exhibit should be regarded as in any way untrustworthy, such evidence cannot be

deemed to have been improperly admitted on a theory of chain of custody. Robinson v. United States, 283 F.2d 508 (D.C. Cir.), cert. denied, 364 U.S. 919 (1960).

The possibility of alterations to the tape need not be eliminated absolutely, but only as a reasonable possibility. Moreover, the fact that a witness indicates he cannot be sure that certain statements were made on a particular date, rather than at some other time around that date, does not show that the tape recording, which intrinsically demonstrates that the conversation occurred on that date in question, was tampered with so as to preclude its admission into evidence. Haldeman, 559 F.2d at 109. See also United States v. Jacobs, 451 F.2d 530, 541-542 (5th Cir. 1971), cert. denied, 405 U.S. 955 (1972) ("It is self-evident that a tape recording would be more accurate than the recollection of a witness a year or more after the conversation had occurred").

In addition to the circumstances enumerated above, a tape of a recorded conversation also may be admitted when a witness has been attacked for recent fabrication of his testimony or improper motivation of his testimony, as a prior consistent statement used to rehabilitate that witness. Albert, 595 F.2d at 289.

III TRANSCRIPTS OF TAPED CONVERSATIONS ARE ADMISSIBLE

An authenticated transcript of a consensual tape recording is admissible to supplement the jury's hearing of the tape. United States v. Onori, 535 F.2d 938 (5th Cir. 1976). While the foundation for supplemental transcripts may be laid by having the person who made the transcript testify, the stenographer's testimony is unnecessary if

someone else who either heard the tape or participated in the conversation assumes that task. United States v. Rochan, 563 F.2d 1246 (5th Cir. 1977). Permitting the jury to have transcripts of tape recorded conversations between government witness and the defendant is not error on the basis that it amounts to prejudicial emphasis of the conversations. Fountain v. United States, 384 F.2d 624 (5th Cir. 1967), cert. denied, 390 U.S. 1005 (1968).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the government's Memorandum of Law on Admissibility of Tapes and Transcripts were sent via Federal Express this ___th day of February 1994, to

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