

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1322

Yorie Von Kahl,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of North Dakota.
United States of America,	*	
	*	
Appellee.	*	

Submitted: December 11, 2000

Filed: March 9, 2001

Before LOKEN, HEANEY and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

Yorie Von Kahl appeals the district court's¹ denial of his 28 U.S.C. § 2255 motion without conducting an evidentiary hearing. We affirm.

¹The Honorable John B. Jones, United States District Judge for the District of North Dakota.

FACTUAL BACKGROUND

Defendant Scott William Faul and co-defendant Yorie Kahl were convicted of two counts of second degree murder in connection with the February 13, 1983 deaths of United States Marshal Kenneth Muir and Deputy United States Marshal Robert Chesire near Medina, North Dakota. Judge Paul Benson sentenced Faul to concurrent life sentences for the second degree murder convictions, as well as additional terms for the remaining convictions. Faul's convictions were affirmed on appeal. United States v. Faul, 748 F.2d 1204, 1207 (8th Cir. 1984).

The subsequent appellate history is complex. Faul's initial 2255 motion was filed on April 24, 1997, in Civil No. A3-97-57 (hereafter "Faul I"). This case was assigned to John B. Jones, Senior District Court Judge for the District of South Dakota. Judge Jones denied several of Faul's claims and ordered the United States to respond to the remaining claims, which the government did on July 1, 1997.

While this 2255 motion was pending, Faul discharged his attorneys, and the motion was held in abeyance pending the appearance of new counsel or by Faul appearing pro se. Faul then filed an Application for a Writ of Habeas Corpus with the Honorable Donald P. Lay, then Chief Judge of the Eighth Circuit. Judge Lay ordered the new petition be treated as one under 28 U.S.C. § 2255, and transferred the matter to the District of North Dakota. This new motion was filed on March 25, 1999 as Civil No. A3-99-41 (hereafter "Faul II"). Faul subsequently moved to supplement his 2255 motion with additional material. Judge Jones was assigned to Faul II on April 16, 1999.

On May 3, 1999, Faul filed a motion in both Faul I and II wherein he sought a

11, 1999, Kahl filed a notice of appeal. Two days later, through a new attorney, Kahl filed a motion for leave to file out-of-time a motion for reconsideration and for an extension of time in which to file such a motion for reconsideration. On November 19, Kahl filed a motion to withdraw his November 11 notice of appeal, stating that the notice of appeal had been filed by his earlier attorney without his permission. Kahl supported his motion with a lengthy declaration recounting the difficulties he had had with his post-trial representation.

On December 8, Kahl filed a fifty-page document styled a “Motion for Rehearing of Court’s Memorandum, Opinion and Order Filed March 31, 1997,” which contained extensive argument and cited new evidence in support of the claims the district court had summarily dismissed. Also on December 8, Kahl filed a thirty-one-page “Motion for Reconsideration of Court’s October 12, 1999 Order Denying Yorie Kahl’s § 2255 Motion,” in which he argued the claims the district court had rejected in its October 1999 order, and requested that the court consider two new issues: (1) counsel’s failure to object to a jury instruction, and (2) the government’s failure to disclose the existence of two additional All Points Bulletins (APBs) issued on the day of the shoot-out that would have corroborated Kahl’s self-defense theory.

On December 13, Kahl filed a second notice of appeal. In a December 23 order, the district court denied Kahl’s pending motions. The court observed that Kahl’s initial notice of appeal divested the lower court of jurisdiction, and it thus lacked jurisdiction to reconsider its earlier rulings. Nevertheless, the court added that even if it had the power to do so, it would not grant Kahl’s motions for reconsideration, as Kahl’s § 2255 motion had been pending for some three years, giving him ample time to muster his evidence and arguments.

Kahl appeals. He has briefed a number of the issues he attempted to present to the district court by motions for reconsideration, and has abandoned several of the issues contained in his amended § 2255 motion.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 2, 2016

Decided May 9, 2017

No. 16-7033

YORIE VON KAHL,
PLAINTIFF-APPELLEE

v.

BUREAU OF NATIONAL AFFAIRS, INC.,
DEFENDANT-APPELLANT

Consolidated with 16-7034

Appeals from the United States District Court
for the District of Columbia
(No. 1:09-cv-00635)

Laura R. Handman argued the cause for defendant-appellant/cross-appellee. With her on the briefs were *Lisa B. Zycherman* and *Jay Ward Brown*.

Kevin T. Baine, Thomas G. Hentoff, Nicholas G. Gamse, Charles D. Tobin, Jonathan Hart, Jonathan Donnellan, Kristina Findikyan, David McCraw, Kurt Wimmer, Bruce D. Brown, and Gregg P. Leslie were on the brief for *amici curiae* Coalition of Media Organizations in support of defendant-appellant/cross-appellee.

Evidence 606(b) (upon inquiry into validity of verdict, juror may testify only on issue of outside influences or extraneous information).

Although we disagree with the district court that Rule 606(b) necessarily bars Kahl from using juror testimony to establish juror bias from pretrial media exposure, cf. Brofford v. Marshall, 751 F.2d 845, 853-54 (6th Cir. 1985), we nevertheless reject Kahl's effort to piece together a showing of juror bias using fragments of double hearsay. At best, Kahl's submissions present stale innuendo insufficient to persuade us that the district court abused its discretion in denying Kahl's motion without conducting an evidentiary hearing.

D. Improper Juror Contact

Kahl contends his due process rights were violated by improper contact between the jury and a deputy marshal who was both a victim and a trial witness. Kahl also argues that counsel was ineffective for failing to raise the issue on appeal. During the trial, the jury was sequestered in the care of the United States Marshals Service. In 1993, Shauna Faul, the wife of codefendant Scott Faul, signed an affidavit in which she attested to seeing Wigglesworth "with members of the jury sitting on [the Kahl trial] getting into a van with softball equipment." (Appellant's App. at 61.) Kahl further complains that the district court, upon being apprized of the contact, resolved the issue without calling witnesses and without transcribing the in-chambers proceedings.

In a criminal case, contact or communication with a juror during a trial about the matter pending before the jury is presumptively prejudicial. See Remmer v. United States, 347 U.S. 227, 229 (1954). "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Id. According to the affidavit of Ralph A. Vinje, trial counsel for codefendant David Broer, the defense raised the issue before the district court in chambers. Although Vinje did

Magazine, 736 F.3d 528, 534 (D.C. Cir. 2013) (quoting *Keogh*, 365 F.2d at 968).

Kahl argues that BNA's report and clarification are false because they attribute certain sentencing statements to the sentencing judge, rather than to the prosecutor. But falsity alone does not equate to actual malice. And Kahl has offered insufficient evidence, direct or circumstantial, that any BNA employees had actual malice – that is, that any BNA employee actually knew that the prosecutor made those statements or recklessly disregarded whether the statements were made by the prosecutor rather than by the judge.

To begin with, the BNA author and her supervisor both stated that they believed that the initial BNA report was true when it identified the sentencing judge as the author of those statements. And the supervisor who prepared the clarification stated that he believed that the clarification was true. Of course, actual malice “rarely is admitted.” *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 927 (2d Cir. 1987). Kahl therefore advances two arguments to support an inference of actual malice.

First, Kahl says that he presented sufficient evidence that BNA's initial report was made with actual malice. We disagree.

The BNA report includes a summary of the sentencing judge's “ruling.” The BNA report indicates that the sentencing judge stated that Kahl lacked contrition and believed the murders were justified. Of course, we now know that it was the prosecutor, not the judge, who actually made those statements at sentencing about Kahl's lack of contrition and belief that the murders were justified. But BNA's mistake – suggesting that statements were made by the judge