

MANDATE

EDNY (Brooklyn)
05-CR-104
N. Gershon

07-0224-cr
2008 JUL 12 AM 9:38
USA v. Siraj

U.S. COURT OF APPEALS
EASTERN DISTRICT
OF NEW YORK

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Daniel Patrick Moynihan
3 United States Courthouse, 500 Pearl Street, in the City of
4 New York, on the 9th day of July, two thousand eight.

5
6 PRESENT: HON. DENNIS JACOBS,
7 Chief Judge,
8 HON. CHESTER J. STRAUB,
9 Circuit Judge,
10 HON. BARBARA S. JONES,
11 District Judge.*



12 -----X

13
14 UNITED STATES OF AMERICA,
15 Appellee,

16
17 -v.-

07-0224-cr

18
19 SHAHAWAR MATIN SIRAJ,
20 Defendant-Appellant.
21 -----X

* The Honorable Barbara S. Jones, of the United States District Court for the Southern District of New York, sitting by designation.

ISSUED AS MANDATE: 10/27/08

1 **FOR APPELLEE:**

MARSHALL L. MILLER (David C. James and Todd Harrison, on the brief), Assistant United States Attorneys for Benton J. Campbell, United States Attorney, Eastern District of New York, Brooklyn, NY.

8 **FOR DEFENDANT-APPELLANT:** ROBERT J. BOYLE, New York, NY.

10 Appeal from a judgment of conviction entered by the
11 United States District Court for the Eastern District of New
12 York (Gershon, J.).

14 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
15 **AND DECREED** that the judgment of the district court be
16 **AFFIRMED.**

18 Shahawar Matin Siraj ("Matin") appeals from a judgment
19 of conviction entered on January 18, 2007 by the United
20 States District Court for the Eastern District of New York
21 (Gershon, J.) for various crimes arising out of a conspiracy
22 to bomb the Herald Square subway station in midtown
23 Manhattan. We assume the parties' familiarity with the
24 underlying facts, the procedural history, and the issues on
25 appeal.

27 **[A] Sufficiency of the Evidence**

28 Matin mounted an entrapment defense: Once a defendant
29 shows that the government induced him to commit the crime by
30 a preponderance of the evidence, see United States v. Brand,
31 467 F.3d 179, 189 (2d Cir. 2006), cert. denied, 127 S. Ct.
32 2150 (2007), the burden shifts to the government to prove
33 beyond a reasonable doubt that the defendant was predisposed
34 to commit the crime. See Jacobson v. United States, 503
35 U.S. 540, 548-49 (1992). Matin contends that he met his
36 burden to prove government inducement, and that the
37 government failed to shoulder its burden on predisposition.

39 A defendant challenging the sufficiency of trial
40 evidence "bears a heavy burden," and we must "view the
41 evidence presented in the light most favorable to the
42 government and . . . draw all reasonable inferences in its
43 favor." United States v. Giovanelli, 464 F.3d 346, 349 (2d
44

1 Cir. 2006), cert. denied, 128 S. Ct. 206 (2007) (internal
2 quotation marks and citation omitted). The jury charge on
3 entrapment erroneously instructed that the burden shifts to
4 the government to show predisposition upon a showing of "any
5 credible evidence" of inducement. See Brand, 467 F.3d at
6 189 (holding that the defendant's burden is to show
7 inducement by a preponderance of the evidence). Even so, a
8 rational jury could find that Matin failed to carry his
9 burden. Matin's only evidence of inducement was his own
10 testimony. And that testimony was contradicted by the
11 testimony of a cooperating witness and the case agent. The
12 government further undermined Matin's credibility by
13 demonstrating that he had lied under oath. We therefore
14 conclude that the evidence sufficed to convict Matin.

15
16 **[B] Admissibility of Opinion Evidence**

17 Matin challenges admission of testimony opining as to
18 the meaning of Matin's recorded statements. Matin contends
19 that the opinions given by the cooperating witness related
20 to unambiguous statements, which the jury was fully equipped
21 to interpret without the aid of opinion testimony. See Fed.
22 R. Evid. 701 (requiring that nonexpert opinion testimony be
23 "helpful to a clear understanding of the witness' testimony
24 or the determination of a fact in issue"). Even if we
25 assumed (as we do not) that the statements were unhelpful,
26 we would determine any error to be harmless, since Matin has
27 provided us no compelling reason to believe that his
28 substantial rights were affected.

29
30 **[C] Admissibility of Other Evidence**

31 Matin challenges as an abuse of discretion, see United
32 States v. Quinones, 511 F.3d 289, 307 (2d Cir. 2007), the
33 admission of certain evidence that he argues was more
34 prejudicial than probative, see Fed. R. Evid. 403.

35
36 **Evidence that the cooperating witness had provided**
37 **other useful information.** After Matin suggested that the
38 cooperating witness had felt pressured to entrap Matin
39 because the cooperator had failed to produce sufficient
40 useful intelligence to justify his police salary, the
41 government presented evidence to show that the witness had
42 in fact provided useful intelligence. That intelligence
43 concerned people the government had reason to believe were
44 aligned with terrorist groups. We reject Matin's contention

1 that the district court abused its discretion in admitting
2 the evidence: The evidence was highly relevant to rebut
3 Matin's attack on the credibility of the cooperating
4 witness; and the district court mitigated the risk of unfair
5 prejudice with a limiting instruction.
6

7 **Books.** Matin challenges the admission of two books
8 purchased from the Islamic bookstore where he worked (one at
9 Matin's personal recommendation). The district court acted
10 within its sound discretion in admitting the books. To the
11 extent Matin recommended the books, they were relevant to
12 show predisposition; and to the extent the books were for
13 sale in the shop where Matin worked, they tended to rebut
14 Matin's assertion that the cooperating witness first exposed
15 him to radical Islam and violent jihad. It was no abuse of
16 discretion to conclude that the books' probative value
17 outweighed the risk of unfair prejudice.
18

19 **Testimony regarding videotape.** The district court
20 properly admitted testimony regarding a videotape Matin had
21 given to the cooperating witness and several other people.
22 The testimony was relevant to the question of inducement
23 because it showed that Matin was already well acquainted
24 with the type of violent and graphic material he claims the
25 cooperating witness used to entrap him.
26

27 **[D] Sentencing**

28 Matin challenges his sentence as procedurally and
29 substantively unreasonable.
30

31 **Procedural reasonableness.** A sentencing court must:
32 (1) determine the Sentencing Guidelines range, then (2)
33 consider the Guidelines range, along with the other factors
34 listed in 18 U.S.C. § 3553(a). See Gall v. United States,
35 128 S. Ct. 586, 596-97 (2007). Matin argues that the
36 sentencing court improperly (1) enhanced his offense level
37 for obstruction of justice under U.S.S.G. § 3C1.1, and (2)
38 failed to reduce his offense level for acceptance of
39 responsibility under U.S.S.G. § 3E1.1. We reject both
40 contentions.
41

42 **Obstruction of justice.** In imposing the obstruction of
43 justice enhancement, the district court properly relied on
44 its finding that Matin had committed perjury at both his

1 suppression hearing and trial. See United States v. Fiore,
2 381 F.3d 89, 94 (2d Cir. 2004). A review of the record
3 confirms that the finding of such perjury was not clearly
4 erroneous.

5
6 Acceptance of responsibility. The district judge
7 denied a downward Guidelines adjustment for acceptance of
8 responsibility, see U.S.S.G. § 3E1.1, based on what she
9 found to be Matin's "vigorous and false" disclaimers of
10 guilt. The district court's characterization of Matin's
11 disclaimers is not erroneous; the finding that Matin had not
12 accepted responsibility was therefore not "without
13 foundation," United States v. Hirsch, 239 F.3d 221, 226 (2d
14 Cir. 2001) (internal quotation marks omitted). See also
15 U.S.S.G. § 3E1.1 n.1(a) (2008) ("[A] defendant who falsely
16 denies, or frivolously contests, relevant conduct that the
17 court determines to be true has acted in a manner
18 inconsistent with acceptance of responsibility.").

19
20 **Substantive Reasonableness**

21 "Reasonableness review does not entail the substitution
22 of our judgment for that of the sentencing judge. Rather,
23 the standard is akin to review for abuse of discretion."
24 United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006).
25 Although we do not presume that a Guidelines sentence is
26 reasonable, we have recognized that "in the overwhelming
27 majority of cases, a Guidelines sentence will fall
28 comfortably within the broad range of sentences that would
29 be reasonable in the particular circumstances." Id.; cf.
30 Rita v. United States, 127 S. Ct. 2456, 2464-65 (2007).
31 Having considered Matin's arguments, we see no good reason
32 to believe that Matin's sentence, which was at the bottom of
33 the Guidelines range, was unreasonable. As Matin
34 necessarily concedes, "[t]here is no doubt that the offense
35 was an extremely serious one."

36
37 **[E] Conclusion**

38 In an accompanying opinion issued today, we reject
39 Matin's contention that the government violated Federal Rule
40 of Criminal Procedure 16 by failing to release portions of
41 police records containing the substance of his oral
42 statements to an undercover police officer. We have
43 considered Matin's remaining arguments and find them to be
44 without merit. For the foregoing reasons, and for the

1 reasons discussed in the accompanying opinion, the judgment
2 of the district court is **AFFIRMED**.

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FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By: *Franklin Perry*

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by *M. Keller*
DEPUTY CLERK