UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Marvin Lustiger v. United States

386 F.2d 132 (9th Cir. 1967) · No. No. 20967 · Decided March 4, 1968

SUMMARY

The Ninth Circuit affirmed Marvin Lustiger’s convictions on seventeen counts of mail fraud arising from the marketing and sale of rural subdivision lots in Mohave County, Arizona. The court held that the evidence supported finding an intentional scheme to defraud based on misleading advertising and concealment of material facts concerning water, access, utilities, development, and location. The court also rejected challenges involving a postal mail watch, grand-jury proceedings, the First Amendment, evidentiary rulings, the indictment, and effective assistance of counsel.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Hamley, Circuit Judge; Chambers, Circuit Judge; Ely, Circuit Judge
JURISDICTION	Federal
DECIDED	March 4, 1968
DOCKET	No. 20967
DISPOSITION	affirmed
PROCEDURAL POSTURE	Lustiger appealed from a nonjury federal criminal trial in which the district court convicted him on seventeen remaining counts of mail fraud after dismissing two counts.
STANDARD OF REVIEW	On sufficiency review, the evidence and reasonable inferences were viewed in the light most favorable to the Government. Evidentiary rulings were reviewed for abuse of discretion. Claims of ineffective assistance based on facts outside the appellate record were not resolved on direct appeal and were left for the district court under Federal Rule of Criminal Procedure 33.
PRECEDENTIAL VALUE	published precedential federal appellate opinion
PARTIES	Marvin Lustiger v. United States of America

TOPICS

criminal procedure · evidence · fourth amendment · search and seizure · appellate procedure

PRACTICE AREAS

criminal law · criminal procedure · evidence · constitutional law · appellate procedure

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support convictions for devising a scheme to defraud under the mail fraud statute.
2. Whether the postal inspector's non-delaying copying of information appearing on the outside of mail violated the Fourth Amendment, 18 U.S.C. § 1703, or postal regulations.
3. Whether alleged irregularities in grand-jury attendance and voting required disclosure of grand-jury minutes or dismissal of the indictment.
4. Whether the indictment impermissibly relied on protected speech or otherwise failed to state an offense or was duplicitous.
5. Whether the district court abused its discretion by excluding evidence concerning competing subdividers, the Bureau of Land Management, and industry custom.
6. Whether the conviction had to be reversed for ineffective assistance of trial counsel when the asserted facts were outside the appellate record.

HOLDINGS

1. The evidence was sufficient to support the finding that Lustiger intentionally engaged in a scheme to defraud and used the mails in executing that scheme.
2. Postal inspectors may copy information appearing on the outside of sealed mail when the mail is not substantially delayed; such a mail watch does not violate the Fourth Amendment, 18 U.S.C. § 1703, or the cited postal regulation.
3. The alleged grand-jury attendance and voting irregularities would not require dismissal because more than a quorum attended all sessions and was present when the indictment was voted.
4. The indictment did not charge constitutionally protected speech merely because it quoted promotional statements; the statements were alleged and proved as parts of a fraudulent scheme and were considered in context.
5. The district court did not abuse its discretion by excluding collateral evidence about competing subdividers, Bureau of Land Management activities, or industry advertising customs.
6. The Ninth Circuit would not decide the ineffective-assistance claim on the existing direct-appeal record because it depended on facts outside that record; Lustiger was left to seek relief under Rule 33 in the district court.

KEY QUOTATIONS

> *"While the statements in the advertising materials may not have been literally false, taken as a whole they were fraudulently misleading and deceptive."* (¶ 20)

> *“If a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, the fact that there is no misrepresentation of a single existing fact is immaterial.”* (¶ 32)

> *“It was for the trial court, as the fact-finder, to determine whether there was a scheme or artifice to defraud within the meaning of 18 U.S.C. 1341.”* (¶ 56)

FACTUAL BACKGROUND

Lustiger controlled Lake Mead Land and Water Company, which acquired and marketed scattered parcels in Mohave County, Arizona, as a development called Lake Mead City. The company advertised the property through brochures, maps, photographs, and mail solicitations that portrayed water, access, utilities, community development, and investment prospects more favorably than the underlying conditions warranted. Although the company used refund and exchange policies, the evidence showed that many parcels lacked practical access to water, roads, utilities, markers, or community improvements, and that the promotional materials concealed or misleadingly presented those facts.

PROCEDURAL HISTORY

A grand jury returned a nineteen-count indictment under 18 U.S.C. § 1341; counts IX and X were dismissed. After a bench trial, the district court convicted Lustiger on the remaining seventeen counts. The Ninth Circuit rejected his challenges to the sufficiency of the evidence, a postal mail watch, grand-jury proceedings, the indictment, evidentiary rulings, pretrial motions, and effectiveness of counsel, and affirmed.

DISPOSITION

affirmed

CASES CITED

- Kaplan v. United States, 329 F.2d 561 (9th Cir. 1964)
- Ballard v. United States, 138 F.2d 540, 545 (9th Cir. 1943)
- Cacy v. United States, 298 F.2d 227, 229 (9th Cir. 1962)
- Williams v. United States, 368 F.2d 972, 975 (10th Cir. 1966)
- Gusow v. United States, 347 F.2d 755, 756 (10th Cir. 1965)
- United States v. Sylvanus, 192 F.2d 96, 105 (7th Cir. 1951)
- Ex parte Jackson, 96 U.S. 727 (1878)
- Oliver v. United States, 239 F.2d 818, 820-821 (8th Cir. 1956)
- Weeks v. United States, 232 U.S. 383 (1914)
- Canaday v. United States, 354 F.2d 849, 856 (8th Cir. 1965)
- United States v. Costello, 255 F.2d 876, 881 (2d Cir. 1958)
- United States v. Schwartz, 283 F.2d 107 (3d Cir. 1960)
- United States ex rel. McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944)
- Lemon v. United States, 278 F.2d 369, 373 (9th Cir. 1960)

- Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1938)
- Irwin v. United States, 338 F.2d 770, 773 (9th Cir. 1964)
- Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)
- Kreuter v. United States, 218 F.2d 532, 535 (5th Cir. 1955)
- Silverman v. United States, 213 F.2d 405, 407 (5th Cir. 1954)
- United States v. Brandt, 196 F.2d 653, 657 (2d Cir. 1952)
- United States v. Sprengel, 103 F.2d 876, 881 (3d Cir. 1939)
- Silkworth v. United States, 10 F.2d 711, 720-721 (2d Cir. 1925)
- United States v. Hofmann, 353 F.2d 188, 191 (10th Cir. 1965)