

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

John Mikus v. United States

433 F.2d 719 (2d Cir. 1970) · No. No. 659, Docket 34079 · Decided November 6, 1970

SUMMARY

The United States Court of Appeals for the Second Circuit affirmed John Mikus's conviction for armed bank robbery. The court rejected challenges concerning juror impartiality, authentication of a bank-surveillance film, compelled courtroom identification, prosecutorial questioning about gun possession, testimony concerning an Immigration and Naturalization Service investigator's first meeting with Mikus, and the sufficiency of the evidence. The court held that no reversible error was shown and that substantial evidence supported the conviction.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Moore, Circuit Judge; Smith, Circuit Judge; Pollack, District Judge, sitting by designation
JURISDICTION	Federal
DECIDED	November 6, 1970
DOCKET	No. 659, Docket 34079
DISPOSITION	affirmed
PROCEDURAL POSTURE	Mikus appealed his jury conviction for armed bank robbery in the District of Connecticut, challenging the jury's impartiality, authentication of a motion picture, compelled courtroom identification, prosecutorial questioning concerning gun possession, testimony concerning his prior meeting with an Immigration and Naturalization Service investigator, and the sufficiency of the evidence.
STANDARD OF REVIEW	The court reviewed jury-impartiality findings for manifest prejudice, admission of the film for abuse of discretion, denial of the mistrial for abuse of discretion, and the sufficiency of the evidence for whether substantial evidence supported the conviction. Unpreserved error was considered under the plain-error framework of Federal Rule of Criminal Procedure 52(b).

PRECEDENTIAL VALUE	Published federal appellate opinion; precedential within the Second Circuit subject to subsequent authority.
PARTIES	John Mikus v. United States of America

TOPICS

jury selection evidence authentication sixth amendment fifth amendment

PRACTICE AREAS

criminal procedure evidence constitutional law appellate procedure

QUESTIONS PRESENTED

1. Whether the trial court deprived Mikus of an impartial jury by refusing to excuse three prospective jurors for cause.
2. Whether the bank-surveillance motion picture was adequately authenticated for admission into evidence.
3. Whether requiring Mikus to stand for identification and comparison violated the Fifth Amendment privilege against self-incrimination.
4. Whether the prosecutor's questions concerning Mikus's possession of a gun constituted reversible or plain error.
5. Whether testimony concerning an Immigration and Naturalization Service investigator's first meeting with Mikus warranted a mistrial.
6. Whether substantial evidence supported Mikus's armed-bank-robbery conviction.

HOLDINGS

1. The trial court did not err in refusing to excuse the three veniremen for cause because their occupational or familial relationships did not establish actual or manifest bias, and each stated an ability to be fair and impartial.
2. The bank teller's testimony adequately authenticated the motion picture film, and the trial court acted within its discretion in admitting it.
3. Requiring a defendant to stand during trial for purposes of identification and comparison produces non-testimonial, non-communicative evidence and does not violate the Fifth Amendment privilege against self-incrimination.
4. The court declined to review the prosecutor's allegedly improper questioning as plain error because Mikus failed to object contemporaneously, did not adequately argue the issue on appeal, and the evidence supporting conviction was ample without proof that he possessed a gun near the robbery.
5. The trial court properly denied a mistrial based on testimony that the INS investigator first met Mikus at a police station because the testimony was innocuous and unintentional and did not necessarily imply an arrest or criminal history.

6. Substantial evidence supported Mikus's conviction for armed bank robbery.

KEY QUOTATIONS

“What is material is what the rankest box camera amateur knows, namely that he 'gets' what he sees.” (¶ 20)

“such compulsion results in non-testimonial or non-communicative evidence given by a defendant which is not protected by the Fifth Amendment privilege against self-incrimination” (¶ 23)

“We find no error and affirm the judgment below.” (¶ 31)

FACTUAL BACKGROUND

A bank in Stamford, Connecticut, was robbed by two masked, armed men, one of whom had a heavy Slovak accent and carried an A & P grocery bag. A surveillance film recorded the robbery, and police later found the bag and ski masks in or near an abandoned stolen automobile; six fingerprints on the bag were identified as Mikus's. Additional evidence included Mikus's height, association with the codefendant, an allegedly false alibi, and testimony contradicting his account of his whereabouts.

PROCEDURAL HISTORY

A jury in the District of Connecticut convicted Mikus of armed bank robbery. The district court admitted the bank-surveillance film and denied Mikus's requests for relief, including a mistrial based on prosecutorial questioning and testimony by an Immigration and Naturalization Service investigator. The Second Circuit found no reversible error and affirmed the judgment.

DISPOSITION

affirmed

CASES CITED

- *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)
- *Reynolds v. United States*, 98 U.S. 145, 156 (1878)
- *Jackson v. United States*, 129 U.S.App.D.C. 392, 395 F.2d 615, 617-618 (1968)
- *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1 (3d Cir.), cert. denied, 355 U.S. 873 (1957)
- *Sims v. United States*, 132 U.S.App.D.C. 111, 405 F.2d 1381, 1384 n. 5 (1968) (per curiam)
- *United States v. Johnson*, 401 F.2d 746, 747 (2d Cir. 1968) (per curiam)
- *United States v. Wood*, 299 U.S. 123, 140 n. 9, 145-146 (1936)
- *Cavness v. United States*, 187 F.2d 719, 723 (9th Cir.), cert. denied, 341 U.S. 951 (1951)
- *Marshall v. United States*, 355 F.2d 999, 1009 (9th Cir.), cert. denied, 385 U.S. 815 (1966)
- *United States ex rel. Cooper v. Reincke*, 219 F.Supp. 733, 741 (D.Conn. 1963), aff'd, 333 F.2d 608 (2d Cir.), cert. denied, 379 U.S. 909 (1964)
- *United States v. Haynes*, 398 F.2d 980, 983-986 (2d Cir. 1968), cert. denied, 393 U.S. 1120 (1969)
- *United States v. Palumbo*, 401 F.2d 270, 275 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969)

- *Dennis v. United States*, 339 U.S. 162, 168, 171-172 (1950)
- *United States v. Hobbs*, 403 F.2d 977, 978-979 (6th Cir. 1968)
- *Kortz v. Guardian Life Ins. Co.*, 144 F.2d 676, 679 (10th Cir.), cert. denied, 323 U.S. 728 (1944)
- *States ex rel. Stovall v. Denno*, 355 F.2d 731, 736 (2d Cir. 1966) (en banc), aff'd, 388 U.S. 293 (1967)
- *Schmerber v. California*, 384 U.S. 757, 761, 764 (1966)
- *United States v. Indiviglio*, 352 F.2d 276, 279 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966)
- *United States v. Dichiarinte*, 385 F.2d 333, 337 (7th Cir. 1967)
- *United States v. Schwartz*, 398 F.2d 464, 470 (7th Cir. 1968), cert. denied sub nom. *Pyne v. United States*, 393 U.S. 1062 (1969)
- *United States v. Cioffi*, 242 F.2d 473, 476 (2d Cir.), cert. denied, 353 U.S. 975 (1957)
- *United States v. Smolin*, 182 F.2d 782, 783-786 (2d Cir. 1950)
- *United States v. Fabric Garment Co.*, 262 F.2d 631, 639 (2d Cir. 1958), cert. denied, 359 U.S. 989 (1959)