No. 75-2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, AND
U.S. ENERGY RESEARCH AND DEVELOPMENT
ADMINISTRATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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I N D E X

C I T A T I O N S

Cases:

Miscellaneous:

Cases chiefly relied upon are marked with an asterisk.

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by dismissing plaintiff's lawsuit, when plaintiff failed to avail himself of pretrial discovery to show that there were disputed issues of material fact remaining in the lawsuit.

2. Whether disputed issues of material fact exist requiring remand of plaintiff's Information Act lawsuit, where the sole allegation is that government agents perjured themselves when they filed affidavits showing that the documents requested do not exist.

all 7, 8 where they admit we did

STATEMENT OF THE CASE

This is an appeal from a judgment of the district court entered July 15, 1975, dismissing as moot plaintiff Weisberg's request for reports of certain tests conducted on evidence in the assassination of President John F. Kennedy. Weisberg has appealed, arguing that there remain issues of material fact as to whether all test results were supplied.

STATEMENT

In Weisberg v. Department of Justice, 160 U.S. App. D.C. 71, 489 F. 2d 1195 (1973), certiorari denied, 416 U.S. 993 (1974), this Court upheld the refusal of the Justice Department to disclose to Harold Weisberg the results of spectrographic analysis of certain evidence in the assassination of John F. Kennedy, as authorized by Exemption 7 of the Information Act. After Congress amended the statute in 1974,[1] Weisberg again requested disclosure of "final reports" of spectrographic analyses and other scientific tests from the Justice Department and the Energy Research and Development Agency, (formerly the Atomic Energy Commission) (App. 4). The amended FOIA went into effect on February 19, 1975. On that day, Weisberg filed the instant lawsuit seeking disclosure of the tests. On February 25, the Attorney General wrote to Mr. Weisberg to inform him that the material he was seeking would be made available to him (App. 62-63). In that

1/ P.L. 93-502, 88 Stat. 1563-64. The amendments legislatively overrule Weisberg, and the government has made no claim of exemption here.

letter, the Attorney General noted:

> There is, also, however, a great bulk of material which does not reasonably come within Mr. Weisberg's specifications of "final reports". The Bureau is willing to discuss with Mr. Weisberg the nature of these materials to ascertain whether he is interested in having access to them.

The meeting was held on March 14, 1975. Accounts of that meeting are contained in affidavits of Mr. Weisberg (App. 49-51) and Special Agent John W. Kilty, who also attended the meeting (App. 93-95). An agreement was reached as to the documents the FBI would supply. The materials subsequently were given to Mr. Weisberg (App. 96-97).

On May 2, 1975, defendants advised the district court that the case had been mooted by the production of all materials requested by the plaintiff (App. 36). Plaintiff argued that there had not been compliance with his request. At that time he served interrogatories on defendant (App. 30-35) which were apparently designed "to test the extent . . . of the defendants' noncompliance" (App. 154). Apparently accepting the advice of the FBI that the "final reports" sought by Mr. Weisberg do not exist in the form contemplated by Mr. Weisberg, counsel for Mr. Weisberg argued that there nonetheless remained test data which had been withheld (App. 153-159).

On May 13, 1975, FBI Special Agent John W. Kilty executed an affidavit in which he stated that he had attended the March 14, 1975 meeting with Mr. Weisberg, that the FBI had supplied all existing materials covered by Mr. Weisberg's request, and that

(App. 95):

> I have conducted a review of FBI files which would contain information that Mr. Weisberg has requested under the Freedom of Information Act. I have had compiled the materials which have been furnished to Mr. Weisberg through his attorney, Mr. Lesar. The FBI files to the best of my knowledge do not include any information requested by Mr. Weisberg other than the information made available to him.

Referring to the interrogatories filed by Weisberg, in which Weisberg requested, inter alia, a description of the tests conducted on the items of evidence pertaining to the Kennedy assassination (App. 31), Agent Kilty stated that (App. 95):

> the FBI Laboratory employed methods of elemental analysis namely neutron activation analysis and emission spectroscopy. Neutron activation analysis and emission spectroscopy were used to determine the elemental composition of the borders and edges of holes in clothing and metallic smears present on a windshield and a curbstone.

On May 21, 1975, another hearing was held in the district court. At that hearing, Mr. Lesar, Mr. Weisberg's attorney, objected to "the integrity of the Government's affidavit" (App. 170). He suggested a lack of good faith on the part of the government because Mr. Kilty rather than Special Agent Robert Frazier, who was present when the tests were conducted, or Marion Williams, who executed an affidavit in a prior case, executed the litigation affidavit (App. 170). After these objections were made known, the district court suggested to plaintiff's counsel that he meet with defendant's counsel to attempt to make his

objections in more concrete terms, so that the problems could be ironed out informally without resort to the formal processes of the court (App. 178-80). The district court refused to order the government to respond to Mr. Weisberg's interrogatories, which it found "oppressive" (App. 185).

The day after this hearing, Mr. Bertram Schur, Associate General Counsel of ERDA, filed an affidavit, in which he stated that, after a complete search, it was determined that the AEC had assisted the FBI in performing neutron activation analyses on paraffin casts from the hands and cheek of Lee Harvey Oswald and on bullet fragments (App. 99). He further stated that no report on the results of this analysis was prepared by AEC or its laboratory, and that "no other tests were performed by or for the AEC on behalf of the Warren Commission" (App. 99).

Mr. Weisberg thereupon filed, on June 2, 1975, an affidavit, apparently in an attempt to controvert the Kilty and Schur affidavits. In it, Weisberg made a number of allegations of dishonesty, perjury and bad faith against the government based upon his previous attempts to obtain information not connected with this case (App. 43-47). He then alleged that Agent Kilty's affidavit "is not a good faith affidavit" and that the FBI had not complied with his request for final reports of the spectrographic and neutron activation analyses (App. 48, emphasis in original). Weisberg further alleged that a spectrographic analysis of a piece of curbstone containing metal smears was not supplied him and that a laboratory report had been withheld (App. 51).

By interpreting a statement in a letter made by J. Edgar Hoover in 1964, and references to tests by counsel to the Warren Commission, he concluded that neutron activation analyses were done which were not supplied him (App. 52). He noted that he had not been given neutron activation analyses of any clothing (App. 53). His final charge was that the fact that Agent Kilty, rather than Agent Frazier, executed the affidavit "is a bad faith ploy to avoid an affidavit by anyone with personal knowledge of the materials relevant to my request." (App. 54). In the affidavit, Weisberg admitted that materials he had requested from the National Archives had been made available to him.

In response, Agent Kilty executed a second affidavit, which was attached as an exhibit to a motion to dismiss the lawsuit filed by the government (App. 107, 101). In the affidavit, Kilty dealt specifically with each of Weisberg's allegations. In response to the allegation that Weisberg had not been furnished with the spectrographic testing of the curbstone, Kilty noted that "the Laboratory work sheet which was previously furnished plaintiff and from which he quotes is the notes and results of this test" (App. 107). Agent Kilty further reiterated that contrary to plaintiff's allegations, the supposed "microscopic study" requested by plaintiff did not exist, and that the only neutron activation analysis prior to May 15, 1974, was conducted upon paraffin casts taken of Lee Harvey Oswald's hands and cheek. The affidavit further noted that the laboratory report allegedly not supplied Weisberg was a publicly available document, and that Weisberg had specifically requested that he not receive reports

already in the public domain. Finally, Kilty stated Weisberg was correct insofar that his previous affidavit was in error in stating that neutron aftivation analyses were performed on the clothing, windshield and curbstone. Only spectrographic analysis was employed on those items of evidence (App. 108-09).

Weisberg filed other affidavits on July 1 and 10. In them he reiterated a number of his contentions about the Kennedy assassination, but made no new charges or arguments opposing the government's contention that all documents had been supplied (App. 114-145).

On July 15, 1975, after hearing argument, the district court granted the motion to dismiss the lawsuit. The court ruled that the government had carried any burden it had to show that the documents did not exist by proferring the Kilty and Schur affidavits.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DISMISSED THIS LAWSUIT, WHERE PLAINTIFF DID NOT PURSUE DISCOVERY LIKELY TO SHOW WHETHER HIS CLAIM OF A DISPUTE AS TO MATERIAL FACT WAS VALID

This case presents the difficult and novel issue of how a court should determine the truth of the government's assertion that documents requested under the Freedom of Information Act do not exist. Where the allegation is that the search was conducted negligently, the problem is not quite so intractable, and the question turns on whether the district court abused its discretion in allowing, or restricting, the plaintiff's discovery opportunities. See, e.g. National Cable Television Ass'n. v. FCC, 156 U.S. App. D.C. 91, 479 F. 2d 183 (1973); Exxon Corp. v. Federal Trade

Commission, C.A.D.C. No. 74-1966, argued January 26, 1976. Here the problem is more difficult. Plaintiff has on numerous occasions accused the government of a deliberate refusal to acknowledge the existence of materials in its possession. No matter how much discovery the plaintiff is allowed, he can continue to make that charge. Plaintiff has already accused government employees of perjury in its litigation affidavits. If the government were required to respond to plaintiff's interrogatories, the issue would be advanced no further. As no further documents exist, our answers would continue to leave the plaintiff unsatisfied, and would, we are sure, merely provoke new charges of bad faith, deception and perjury.

Although the district court dismissed this action as moot, it relied upon affidavits outside the pleadings on review, and, consequently, this Court must treat the dismissal as though it were a grant of summary judgment in favor of the defendants. F.R.Civ.P. 12; Dorado v. Kerr, 454 F. 2d 892 (C.A. 9, 1972), certiorari denied 409 U.S. 934. It is of course an axiom that in opposing summary judgment, a party must do more than merely allege that the proponent's affidavits are incorrect. A showing of a bona fide question of material fact is essential. A party is not entitled to answers to interrogatories where the answers will not materially aid in establishing that there is a genuine dispute as to material facts within the meaning of F.R.Civ.P. 56(c). For example, in Washington v. Cameron, 133 U.S. App. D.C. 391, 411 F. 2d 705, 711 (1969), this Court reversed and remanded for further discovery, but noted as follows:

> This holding in no way supports the view that a mere request for answers to interrogatories will operate to bar the

> trial court from acting on a motion for summary judgment. It is incumbent upon the party seeking answers to demonstrate that his injury is directed toward establishing the "material facts" and that upon receipt of those answers he will be armed to defend against that motion. This holding does not support harassment tactics or requests for information that is equally accessible to both parties.

Applying the quoted principles to this case, we readily see that summary judgment was appropriate. Weisberg argues that the government must show that no tests other than those already disclosed were conducted, and that the government has not, because the persons who executed the litigation affidavits did not perform the tests.

But the plaintiff mistakes the government's burden. The FOIA requires that the government make a search of its records and produce all materials it finds, not that it explain why materials the requester expected to find do not exist. Thus the question is the adequacy of the search. Agent Kilty, who conducted the search, clearly is the proper person to execute the government's litigation affidavits. The question on appeal is not whether certain tests were conducted. It is whether there exist any documents in the FBI or ERDA files which confirm to the description in Weisberg's FOIA request.[2/] Agent Kilty

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2/ Obviously, if Weisberg could show that further tests were conducted, the government would be obliged to explain why no results were in its files, or at least show a diligent search for those specific test results. However, it not the government's burden to make an affirmative showing that it did not do something merely because an FOIA plaintiff alleges that if it did, there would exist a discoverable class of documents. Cf. NLRB v. Sears, Roebuck & Co. 421 U.S. 132, 161 (1975). In this case, this Court must decide whether the search was reasonable, not whether the FBI properly investigated President Kennedy's assassination.

This is not the same as giving all they learned of

and Mr. Schur have executed affidavits which attest to the fact that they have conducted a good faith and reasonable search of the relevant places information might be found. Plaintiff's only effort to controvert their affidavits consists of allegations that they lied in the litigation affidavits. We submit that this is insufficient as a matter of law, and that the district court properly granted summary judgment on the basis of the Kilty and Schur affidavits.

false. we provided proofs

Further, Weisberg's allegation that there is a government "cover-up" because Kilty and Schur executed the affidavits is demonstrably false. Weisberg had available the discovery devices of the Federal Rules of Civil Procedure. He has inexplicably chosen the one -- interrogatories -- least likely to result in his receiving what he alleges he wants -- an on the record assertion under oath, by the agents who conducted the tests, that no further test results exist. Depositions of the agents, whose names are known to Weisberg, would seem the appropriate course. Yet Weisberg never moved to take the depositions of any of the FBI agents who conducted the tests. Agents Gallagher and Frazier conducted the tests. Agent Williams filed an affidavit in 1970 concerning the tests. And it is clear that even if the FBI were now required to answer Weisberg's interrogatories, he would be no better off, because there remain no agents in the FBI with personal knowledge of the tests which were performed on the Kennedy assassination evidence. Agent Gallagher retired on January 3, 1975. Agents Frazier and Williams retired on April 11, 1975. All were in their late fifties and had served over 30 years in the Bureau. Thus Weisberg's interrogatories, which are addressed, as required, to a party in litigation

Judge told them to respond. Told us to tell them. I did, to Ryan

when it was timely There were - I did as the judge said

filed before April 11. Brack at this with Kelley's 4/10 letter

with him (see F.R.Civ.P. 33), would be answered by Agent Kilty, whose affidavits Weisberg claims are defective as not being based upon personal knowledge. Of course, because Gallagher, Frazier and Williams have retired, they are no more available to the government than they are to Weisberg. Thus, under the principles outlined by this Court in Washington v. Cameron, supra, it is Weisberg's obligation, not the government's, to come forward with any information in the possession of those persons which would bear on his claim that a material issue of fact exists in this case.[3/] did

II

WEISBERG HAS FAILED TO SHOW THE EXISTENCE OF ANY ISSUE OF MATERIAL FACT

In the preceding section of this brief, we showed that Weisberg did not even attempt pretrial discovery which might have shown whether his theories about a government cover-up had any basis in fact. We now show that the arguments he makes that material issues of fact concerning the question of whether the government complained with his FOIA request are entirely without merit.

Weisberg places his primary reliance on the fact that no FBI agent or ERDA employee with personal knowledge of the tests actually conducted has stated under oath that the reports

3/ In our view, any attempt by Weisberg to seek a remand for the purpose of taking depositions would come too late. It was never the government's duty to come forward with evidence from Gallagher, Williams or Frazier. While it is not clear from the record whether Weisberg knew of the retirements of Gallagher and Williams, it is clear that he was aware that Frazier, the Agent whose testimony Weisberg claims to covet most, had retired and would not be available to answer interrogatories (see App. 91). Weisberg's failure to notice Frazier's deposition is inexplicable, and certainly forecloses any argument based upon allegations that Frazier would contradict the Kilty and Schur affidavits. ?

This is to say he + Gallagher retired the same day to avoid more perjury.

Neither did Kilty. Frazier's sure they do — and will.

Weisberg seeks do not exist. (Br. 24). We carefully explained above that is not our burden to show this, but rather Weisberg's to show that any such tests were conducted. In any event, as there remains no one in the FBI or ERDA with the requisite personal knowledge, this information is as equally available to Weisberg as it is to the government. His failure even to attempt to produce such information to meet his burden forecloses this argument.

did

did

Weisberg also relies upon the fact that Agent Kilty submitted a second affidavit which corrected an error made in his first affidavit. Again, Weisberg has not seriously challenged Kilty's affidavits on their salient point -- that Kilty personally conducted a thorough search of the relevant FBI files and found no responsive matter. We concede an unfortunate mistake in Kilty's earlier assertion that neutron activation analysis was performed on items of evidence for which it was not. This mistake was noted at argument (App. 191), and the district court accepted the second litigation affidavit (App. 205).[4] This mistake, in an area of only marginal relevance, which has been corrected by the filing of a supplementary affidavit, is plainly insufficient to warrant a remand for further fruitless

see my affs. & OZ in court - proof says it was —

?

4/ Weisberg additionally notes that Mr. Schur wrote him in 1974, and stated in that letter that the AEC had conducted tests only on the paraffin casts of Oswald's hands and cheek. Schur later acknowledged that he had been misinformed, and that the AEC had also helped the FBI to test some bullet fragments (App. 67).

by the FBI

discovery. Kilty and Schur have first hand knowledge of the relevant files where test results Weisberg seeks would be located. They have submitted uncontradicted affidavits that those files contain no material responsive to Weisberg's request which has not been turned over to Weisberg. Understandable confusion in peripheral areas does not detract from the probity of these first hand affidavits.

Apparently much of the problem exists because Weisberg persists in believing that documents exist which plainly do not. For example, Agent Frazier testified to the Warren Commission that Agent Gallagher had conducted spectrographic analyses, that Gallagher reported to him, and that he had thereupon prepared and submitted a formal report (see Br. p. 17). Weisberg claims not to have received these reports. The claim is false. Frazier never stated that Gallagher had reported to him by means of a formal, typed report, and in fact Gallagher did not make any such formal report, as we have repeatedly told Mr. Weisberg. Further, Weisberg has received the only report made by Frazier. This is a lengthy report issued November 23, 1964, to the Dallas Police. Relevant portions have been made available to Weisberg. See item (2) referred to in the May 28, 1975 letter from GSA to Mr. Lesar, which details the items being turned over to Weisberg by GSA (App. 70). Further, Weisberg appears unable to interpret the material given him. Even when given the spectrographic analyses he requested, he has persisted in his assertions that there remain further analyses. (See e.g. App. 107, App. 140). But his confusion about what he already has is no excuse for his request for a remand.

This is to say they destroyed evidence

In short, Weisberg has been given everything he wants that the FBI has. As there are no further documents, a remand would be futile. Weisberg had an affirmative duty and ample opportunity to present the court with some probative evidence that there remains any doubt about the completeness of the disclosures made to him. Instead of attempting to perform his duty, he filed a stream of hysterical and scurrilous affidavits impugning the integrity of every government servant with whom he came into contact. The district court properly found that there were no further factual issues in the case, and properly dismissed the lawsuit.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted,

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JANUARY 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 1976, I served the foregoing brief upon counsel by causing copies to be mailed, postage prepaid, to:

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