

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 1, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERICK GACHUHI WANJIKU,

Defendant - Appellant.

No. 25-6117
(D.C. No. 5:23-CR-00227-R-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **EID**, and **CARSON**, Circuit Judges.

Defendant Erick Gachuhi Wanjiku appeals the district court's denial of his pro se motion for a new trial. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

In 2019 Defendant, a lawful permanent resident at the time, pleaded guilty in Oklahoma state court to domestic assault and battery. After serving his state prison sentence, he was released to the custody of federal Immigration and Customs Enforcement (ICE). While being processed for removal proceedings, he physically

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

attacked two ICE officers, kicking one and biting another. He was indicted in the United States District Court for the Western District of Oklahoma on two counts of assaulting a federal officer in violation of 18 U.S.C. § 111(a)(1).¹ A jury convicted Defendant on both counts, and he was sentenced to 36 months' imprisonment.

After an unsuccessful pro se appeal of his conviction and sentence, *see United States v. Wanjiku*, No. 24-6010, 2024 WL 3634219, at *2 (10th Cir. Aug. 2, 2024), *cert. denied*, 145 S. Ct. 787 (2024), Defendant filed pro se motions for a new trial under Fed. R. Crim. P. 33, alleging newly discovered evidence. The evidence he relied on was that the judge in his prior state-court criminal proceeding had recently recused herself from his case.² He contended that because the recusal was at his request—but it was done without any response or objections to his allegations of bias—the fact of the recusal proved judicial bias and invalidated his state-court conviction.³ And because he claims that his state conviction laid the “foundation” for his federal charges, R., Vol. 1 at 233, he asserted that the evidence of state-court judicial bias would produce an acquittal on his federal charges. The district court

¹ Section 111(a)(1) is violated when a person “forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [federal officer or employee] while such officer or employee is engaged in or on account of the performance of official duties.”

² Defendant also filed a second motion, which requested a reduction of his sentence under 18 U.S.C. § 3582(c)(1). The district court denied the motion. Defendant does not challenge that denial on appeal.

³ Defendant concedes that he argued judicial bias to the Oklahoma Court of Criminal Appeals (OCCA), and that the OCCA affirmed his conviction finding no bias.

rejected this argument and denied his motion for a new trial, concluding that the recusal evidence was immaterial.

Under Fed. R. Crim. P. 33(a), a district court may vacate a judgment and grant a new trial “if the interest of justice so requires.” But “[a] motion for a new trial is not regarded with favor and should only be granted with great caution.” *United States v. Sinclair*, 109 F.3d 1527, 1531 (10th Cir. 1997). When a motion for new trial is based on newly discovered evidence, the defendant must show:

(1) the evidence was discovered after trial, (2) the failure to learn of the evidence was not caused by his own lack of diligence, (3) the new evidence is not merely impeaching, (4) the new evidence is material to the principal issues involved, and (5) the new evidence is of such a nature that in a new trial it would probably produce an acquittal.

United States v. Cordova, 25 F.4th 817, 827 (10th Cir. 2022) (per curiam) (brackets omitted).

We review the district court’s denial of a Rule 33 motion for abuse of discretion. *See Sinclair*, 109 F.3d at 1531. There was no such abuse here.

Defendant argues on appeal that if his state-court conviction is invalid, the agents processing him would not have been engaging in official duties under § 111(a)(1).⁴ But in *United States v. Young*, 614 F.2d 243 (10th Cir. 1980), we rejected that argument. In *Young* the defendant was prosecuted under 18 U.S.C. § 111 for assaulting an IRS agent who was serving a summons. He argued that because the

⁴ Because Defendant proceeds pro se, we liberally construe his filings but we do not act as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

service was invalid, the agent “was not about his official duties at the time of the assault.” *Id.* at 244. We rejected this argument because an officer is “engaged in . . . the performance of his official duties” under § 111 when “acting within the scope of what the agent is employed to do.” *Id.* (internal quotation marks omitted). “[A]n agent who has made an arrest does not lose his ‘official capacity,’ for the purpose of determining the applicability of 18 U.S.C. § 111, simply because the arrest be subsequently adjudged unlawful.” *Id.* Thus, we were not “concerned with whether the service of the IRS summons on Young constituted valid service” because “[e]ven assuming that such was not proper service, such fact would not mean that under 18 U.S.C. § 111, [the agent] was somehow acting *outside* his official duties.” *Id.*

As in *Young*, it is of no concern whether the state trial judge’s recusal is evidence proving Defendant’s state-court conviction invalid. Regardless of the validity of his state-court conviction, the ICE agents who processed Defendant after his detention, whom he kicked and bit, were undeniably acting within the scope of their employment. And the district court correctly determined that his new evidence was not material.

We **AFFIRM** the district court’s judgment and **GRANT** Defendant’s motion to proceed on appeal *in forma pauperis*.

Entered for the Court

Harris L Hartz
Circuit Judge