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States Court of Appeals  
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10-30-2002

## USA v. Nissenbaum

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No: 01-2599

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UNITED STATES OF AMERICA

v.

ROBERT M. NISSENBAUM,

Appellant

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Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Criminal Action No. 00-cr-00570)  
District Judge: Honorable Jay C. Waldman

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Submitted Under Third Circuit LAR 34.1(a)  
on June 13, 2002

Before: ROTH, RENDELL  
and ROSENN, Circuit Judges

(Opinion filed October 30, 2002)

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O P I N I O N

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ROTH, Circuit Judge:

This appeal follows a jury trial at which the appellant, Robert Nissenbaum, was convicted on 19 counts of mail fraud under 18 U.S.C. § 1341 and sentenced to 21 months in prison. Nissenbaum contends on appeal that (1) the District Court abused its discretion in declining to hold a hearing on Nissenbaum's pretrial motion to dismiss the indictment for prosecutorial misconduct, and (2) Nissenbaum is entitled to a new trial because the indictment was based on an allegedly legally invalid theory of mail fraud, which error was allegedly compounded by the instructions given to the jury.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We review a denial of a hearing on a pretrial motion for an abuse of discretion, see United States v. Voigt, 89 F.3d 1050, 1066-1068 (3d Cir.), cert. denied, 519 U.S. 1047 (1996), and review for plain error jury instructions to which no objection was preserved at trial. See United States v. Antico, 275 F.3d 245, 265 (3d Cir. 2001).

The facts of this case will not be recited here as they are well known to the parties.

Nissenbaum claims that the District Court abused its discretion in declining to hold a pretrial hearing on his allegation that the government investigation involved prosecutorial misconduct. He contends that the government acted impermissibly by allowing him to submit to a deposition without informing him that he was the subject of a criminal investigation.

A defendant seeking a hearing on the prosecutor's alleged investigative misconduct must make a prima facie showing of the alleged wrongdoing. See generally United States v. Armstrong, 517 U.S. 456, 463-468 (1996). Nissenbaum failed to demonstrate

unconstitutional conduct by the government. The District Court gave Nissenbaum the opportunity to renew his motion for a hearing by filing affidavits which would support his allegations of collusion. Nissenbaum failed, however, to effectively support these allegations. Thus, we hold that the District Court did not abuse its discretion in denying Nissenbaum's motion without a hearing.

Nissenbaum also alleges that he is entitled to a new trial because the indictment was based on a legally invalid theory of mail fraud<sup>1</sup> and that this error was compounded by the instructions given to the jury. He argues that the jury instruction was insufficient because it permitted the jury to find concealment if it found Nissenbaum had stated "half-truths, or failed to disclose facts." He urges instead that we should hold that a duty to disclose is required in order for nondisclosure to fall within the scope of the mail fraud statute. The indictment against Nissenbaum charged, however, that he made communications which included material omissions or at best, half-truths. Thus, the allegations against Nissenbaum were more than a simple failure to disclose. Mail fraud "must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive . . . ." United States v. Pearlstein, 576 F.2d 531, 535 (3d Cir. 1978). Such "'fraudulent representations' [under § 1341] may be effected by deceitful statements of half-truths or the concealment of material facts . . . ." United States v. Olatunji, 872 F.2d 1161, 1167 (3d

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<sup>1</sup>Nissenbaum did not raise this objection in the District Court and thus we can construe the indictment liberally in favor of validity. See United States v. Cefaratti, 221 F.3d 502, 507 (3d Cir. 2000).

Cir. 1989) (quoting United States v. Allen, 554 F.2d 398, 410 (10<sup>th</sup> Cir.1977)).

Nissenbaum made false statements concealing material facts to Provident in describing his daily routine and he failed to make any reference to the bookstore he owned. We conclude that the indictment properly charged false statements and material misrepresentations and omissions. Thus, it did not rest on an invalid theory. Further, the District Court properly charged the jury on the elements of a fraudulent scheme; indeed, it did so along the lines suggested by Nissenbaum.

For the aforementioned reasons, we will affirm the order of judgment of the District Court.

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TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Jane R. Roth  
Circuit Judge