

United States Courts
Southern District of Texas
ENTERED

JAN 28 2005

Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	CR. NO. H-03-363
	§	
DANIEL BAYLY	§	
DAN O. BOYLE	§	
JAMES A. BROWN	§	
WILLIAM R. FUHS	§	
ROBERT S. FURST	§	

ORDER

At the close of the evidence offered by the Government, and again at the close of all of the evidence, Defendants each moved for judgments of acquittal, and the Court reserved decision on the motions at the time they were made. See FED. R. CRIM. P. 29. The Jury returned its verdict on November 3, 2004. All Defendants except Sheila Kahaneck, who the Jury found was not guilty on all counts, and Dan O. Boyle, have filed renewed Motions for Judgment of Acquittal. The five Defendants as to whom guilty verdicts were returned have also filed Motions for New Trial. Additionally, Defendants James A. Brown and Robert S. Furst have filed Motions challenging the sentencing phase of the trial and supplemental verdict returned by the Jury.¹ The Government has filed a consolidated response to Defendants' Rule 29 and Rule 33 motions,

¹ Defendant Brown requests a judgment of acquittal or, in the alternative, a new trial on sentencing, and Defendant Furst requests that the Court set aside the Jury's findings on the sentencing enhancements.

and Defendants Bayly, Brown, Furst, and Fuhs have replied to the Government's response.

A post-verdict motion for judgment of acquittal is judged by the same standard as a motion for judgment of acquittal at the close of the government's evidence or at the close of all of the evidence. The Court is required to consider "if the evidence is insufficient to sustain a conviction." United States v. Burns, 597 F.2d 939, 941 (5th Cir. 1979).

The late distinguished scholar Charles Alan Wright succinctly described the separate standards that apply to a motion for judgment of acquittal and a motion for new trial, and his text is republished (with the addition of three words) in the current edition of Federal Practice and Procedure:

On a motion for judgment of acquittal, the court is required to approach the evidence from a standpoint most favorable to the government, and to assume the truth of the evidence offered by the prosecution. If on this basis there is substantial evidence justifying an inference of guilt, the motion for acquittal must be denied.

On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.

It has been said in older cases that on such a motion the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial on this ground should be invoked only

in exceptional cases in which the evidence preponderates heavily against the verdict.

3 WRIGHT, KING & KLEIN, FEDERAL PRACTICE AND PROCEDURE § 553 (3d Ed. 2004) (footnotes with citations omitted).

After having carefully considered separately with respect to each of Defendants Bayly, Boyle, Brown, Fuhs, and Furst, both sets of motions for acquittal (made at the close of evidence offered by the Government, and again at the close of all of the evidence), on the basis of the evidence at the time the ruling in each instance was reserved, and having considered the post-verdict motions for judgment of acquittal filed by Defendants Bayly, Brown, Fuhs, and Furst, it is

ORDERED that each of the motions for judgment of acquittal made by Defendants Bayly, Boyle, Brown, Fuhs, and Furst is DENIED. In so holding, the Court concludes that there is substantial evidence justifying an inference of guilt with respect to each of these Defendants with respect to the counts of conviction. See FED. R. CRIM. P. 29.

This was a strongly contested trial in which both sides and all parties were very well represented. Both the Government and all Defendants skillfully elicited favorable testimony and forcefully argued reasonable inferences that could be drawn from the evidence that were favorable to their side of the case. Their arguments and the instant submissions reflect again outstanding

advocacy on behalf of all parties. After having weighed the evidence received at trial and considered the credibility of the witnesses, and after having carefully considered the arguments presently submitted, the Court concludes that this is not one of those exceptional cases in which the evidence preponderates heavily against the verdicts or persuades the Court that a miscarriage of justice has resulted. In sum, the interests of justice do not require a new trial. FED. R. CRIM. P. 33. Accordingly, it is

ORDERED that the Motions for New Trial or Alternative Motions for New Trial filed by Defendants Bayly, Boyle, Brown, Fuhs, and Furst, are in all things DENIED.


United States v. Booker, ___ S. Ct. ___, 2005 WL 50108 (2005), holds that the United States Sentencing Guidelines are not mandatory but only advisory. Therefore, the sentencing phase of the trial and supplemental verdict returned by the Jury before Booker was decided, were superfluous and the supplemental verdict is not binding upon the Court or upon the recommendations to be made by the Probation Office on how the advisory Guidelines might apply in this case. Accordingly, the motions challenging the sentencing phase of the trial and supplemental verdict will be DENIED as moot. Based on the foregoing, it is

ORDERED that Defendant Bayly's Motion for Post-Verdict Judgment of Acquittal (Document No. 637) and Motion for New Trial (Document No. 638), are both DENIED; Defendant Brown's Post-Trial

Motion for Judgment of Acquittal (Document No. 645),² and Motion for New Trial (Document No. 43), are both DENIED, and Defendant Brown's Post-Trial Motion Pursuant to Rules 29 and 33 and Joinder in Motions all in Connection with the Second Phase of Trial (Document No. 644), is DENIED as moot; Defendant Furst's Motion for Judgment of Acquittal or, in the Alternative, to Vacate the Judgment of Conviction and Order a New Trial (Document No. 641) is in all things DENIED, and Motion to Set Aside the Sentencing Enhancements (Document No. 642) is DENIED as moot; Defendant Boyle's Motion for New Trial (Document No. 642)³ is DENIED; and Defendant Fuhs's Renewed Motion for Judgment of Acquittal (Document No. 639) and Motion for a New Trial (Document No. 640), are both DENIED.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 27TH day of January, 2005.


EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

² Defendant Brown also moves to join in Post-Trial Rule 29 Motions submitted by Co-Defendants, which is GRANTED. The adopted motions themselves are DENIED.

³ This motion also requests to adopt Co-Defendants' Motions for a New Trial, which is GRANTED, although the adopted motions themselves are DENIED.