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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA

No. CR 05-333-BR

v.

DAVID BACON,

Defendant.

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR
RECONSIDERATION OF OPINION
AND ORDER DENYING MOTION**

The United States of America, by Karin J. Immergut, United States Attorney for the District of Oregon, Thomas H. Edmonds, Assistant United States Attorney, and Amy Potter, Assistant United States Attorney, hereby responds to defendant's motion for reconsideration of opinion and order denying motion for new trial.

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CASE STATUS

This matter comes before the court on defendant's motion for reconsideration of opinion and order denying motion for new trial. The court issued an opinion and order denying defendant's motion for new trial on November 27, 2006, after receiving submissions from defendant in support of his motion, and the government's response. The government hereby responds to defendant's motion for reconsideration.

ARGUMENT

Defendant's motion for reconsideration is baseless and simply repeats arguments made in prior submissions. *See* Defendant's Motion for New Trial; Defendant's Reply to Government's Response to Defendant's Motion for New Trial. When not just repeating the arguments, defendant attempts to recategorize his arguments without any substantive basis.

Indeed, in recategorizing his arguments, defendant has now made allegations of prosecutorial misconduct, an allegation that was never made in the trial or in the previous briefings on this matter. These escalating attacks on government's counsel are without merit and the government respectfully requests a finding that there was no prosecutorial misconduct in this case.

As discussed below, each of the defendant's arguments below has been rejected and he has pointed to nothing new that warrants reconsideration. As such, his motion should be denied.

I. Starbucks Receipt

Defendant relabels his arguments concerning the Starbucks receipt by submitting that the government offered perjured testimony, and a supplementary argument that the court falsely opined that "the government disclosed and defense counsel saw the Starbucks receipt prior to

trial.” *See* Defendant’s motion at page 2.

First, defendant’s allegation that the government offered perjured testimony is simply baseless. A dispute in the evidence does not allow for the conclusion that the government offered perjured testimony. Moreover, the weight of the evidence in the trial, as the jury concluded, supported all government testimony, in refutation of evidence offered by the defense. The resort to allegations of perjury does not supplement or augment defendant’s prior arguments on the same set of facts.

Second, the court’s opinion was accurate in that (1) defense counsel had an opportunity to view and inspect all the evidence, which included the receipt, *see* court’s opinion at 4; and (2) the court properly found that the government disclosed the receipt during the trial, immediately after Agent McNall identified it, and in time for defendant to offer it as part of his case-in-chief, when defendant stipulated to admit the receipt into evidence at trial accompanied by an explanation that it was found in the living room of defendant’s residence during the September 1, 2005, search. *See id.*

II. The 4473 Form Dated July 24, 2005

The court’s opinion accurately finds that the 4473 form in issue was stipulated to as an exhibit, admitted in the trial, by defendant at the pretrial conference held before the trial. The court’s finding that defendant’s suggestion that the jury did not have a copy of the exhibit with the thumb prints as being baseless is correct. It is incomprehensible to the government to understand how defendant can assert a violation of any kind when the admission of exhibits occurred in open court, with full, unfettered opportunity for defendant’s counsel to view and see every single exhibit that went before the jury and was admitted as evidence in the trial.

Defendant suggests that there is something untoward about the distinction between photocopies provided in discovery and originals offered as exhibits during a trial—even contending it is prosecutorial misconduct. The original 4473s were available to defendant for inspection during the entire pendency of the trial. Defendant, himself, was the maker of the original 4473, which was admitted into evidence. It is beyond comprehension how defendant can suggest any violation, especially one as serious as prosecutorial misconduct. Furthermore, defendant has never made any cogent argument as to how he was prejudiced from receiving a fair trial on the basis that he neglected to examine Exhibit 13. The issue of Steven Bacon’s fingerprints has no credible bearing on when or how David Bacon made out the form 4473.

III. Tracing of the Ruger

In the motion for reconsideration, defendant simply repeats arguments already made to this court and does not provide any basis for the court to reconsider its opinion. The court properly found that defendant had not established that the government failed to produce tracing evidence or that the tracing evidence was exculpatory. Defendant still fails to concede that he adduced evidence concerning the tracing during cross-examination of Special Agent McNall during the trial.

IV. The Missing Documents About Scot Carrie

Defendant again repeats arguments about the “missing” Scot Carrie documents. The documents were sales documents related to Scot Carrie’s later trade of the gun he purchased from defendant at the Seaside Gun Show. These documents, like the 4473s from the Steven Bacon sale, were pre-admitted into evidence without objection. When defendant contended he had not received them later at trial, he was provided a copy. And he used it later during his cross

examination of Scot Carrie. Defendant cannot cry foul now because he failed to once again examine the exhibits that were admitted. But, most importantly, defendant cannot make any argument that his lack of these documents somehow prejudiced him from receiving a fair trial. These documents involve a sale that was checked through the OSP firearms Instacheck records, records defendant had, and the forms only confirm the information in the Instacheck records. There was no prejudice that resulted, even if defendant did not receive the records in advance.

V. Government's Closing Argument

Defendant also repeats his argument that the government's closing argument was "disreputable" because, according to him, the government "had no reason to ask the jury to speculate about who had acquired the 24, 2005 Starbucks receipt." Defendant's basis for this is twofold. He claims that the government knew that (1) only two people were sleeping at the house when the search warrant was executed (on August 31, 2005, a month after the receipt was issued) and (2) one of those people was David Bacon and the other was his mother, who defendant contends is infirm. This argument, which is no different than the one he made initially and which was rejected by this Court, is without merit. First, the mere fact that only two people were in the house on August 31st does not lead to the conclusion that a receipt found in the house from a month earlier had to belong to those two people. Second, defendant's mother testified at the suppression hearing and was not infirm. The Court's memory should be the same as the government's that Ms. Bacon moved about the courtroom no differently than all of the other healthy witnesses in the case. Third, it ignores the testimony of defendant's own witness, Steven Bacon, his brother, that the Eagle Creek address was his permanent address and where he stayed when he was not living with his wife. *See* 10/19/2006 Trial Tr. 18-19 (Cross examination of

Steven Bacon in which he describes Eagle Creek as his permanent address and states that he only spent two to three weeks of 2005 at the Hillsboro address where his wife lives). The government made an entirely reasonable argument during closing and nothing defendant has argued changes that.

CONCLUSION

Defendant's motion for reconsideration is the same argument simply recast. The type of attacks contained in the motion—from asserting that a government witness perjured himself to claiming the prosecutors committed misconduct—are serious. Making them without any reasonable basis is irresponsible. Defendant made his motion for a new trial and his arguments were rejected. Nothing has been offered in any of defendant's motions that supports overturning the jury's verdict in this matter. As a result, defendant's motion for reconsideration should be denied.

Dated this ___15th___ day of December 2006.

Respectfully submitted,

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s/Amy E. Potter
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