

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 RICHARD NISSENBAUM : NO. 00-570-01

MEMORANDUM ORDER

Defendant was found guilty by a jury on nineteen counts of mail fraud in connection with his presentation of claims for insurance benefits under "own occupation" disability policies issued by Provident Life & Accident Insurance Company. The government claimed that defendant fraudulently misrepresented his occupational specialty as that of "trial attorney," fraudulently misrepresented the extent and physical effects of hearing and back conditions, and had fraudulently concealed his activity as a bookstore operator.

In assessing a motion for judgment of acquittal for insufficiency of the evidence, the court must view all of the evidence in a light most favorable to the government, draw all reasonable inferences and credibility determinations in favor of the verdict, and decide whether a jury rationally could have found guilt beyond a reasonable doubt. See U.S. v. Aguilar, 843 F.2d 155, 157 (3d Cir.), cert. denied, 488 U.S. 924 (1988); U.S. v. O'Keefe, 825 F.2d 314, 319 (11th Cir. 1987); U.S. v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987); U.S. v. Carson, 702 F.2d 351,

361 (2d Cir. 1983); U.S. v. Phifer, 400 F. Supp. 719, 724 (E.D. Pa. 1975), aff'd, 532 F.2d 748 (3d Cir. 1976).

A court may weigh the evidence and consider credibility when deciding a motion for a new trial on the ground that the verdict is contrary to the weight of the evidence, however, such a motion should be granted on this ground only where the weight of the evidence preponderates so heavily against the verdict that to allow it to stand would result in a miscarriage of justice. See U.S. v. Robertson, 110 F.3d 1113, 1118 (5th Cir. 1997); U.S. v. Martinez, 763 F.2d 1297, 1312-1313 (11th Cir. 1985); U.S. v. Clemons, 648 F. Supp. 1116, 1119 (W.D. Pa. 1987), aff'd, 843 F.2d 741 (3d Cir.), cert. denied, 488 U.S. (1988). "The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." Martinez, supra.

Although the court has reviewed and considered the record as a whole, it will not reiterate all of the testimony and other evidence herein. It will, however, endeavor to address defendant's principal contentions.

The court agrees with defendant that a lawyer may reasonably perceive himself to be a "trial attorney" even though he may actually try cases to verdict infrequently. To honestly represent oneself as a trial attorney, however, one must at least be ready and willing to proceed to trial if and as necessary to

resolve a client's case. There was evidence that defendant expressly forsook trial work in 1984, long before claiming to be disabled for such work, and did indeed desist thereafter. When cases proceeded to trial, defendant assigned or referred them to others. This evidence was highly credible. That defendant sat as second-chair in one trial in 1991 at the behest of referral counsel at which defendant did not actively participate in any way does not obviate the strong showing that he had voluntarily ceased to practice as a trial attorney.

The court agrees with defendant that there was no showing that "the duties of a bookstore worker" and "those of a trial attorney" are "identical." This, however, is beside the point. The government made so such contention. What the government demonstrated with the testimony of witnesses who observed defendant at the bookstore was that he did not exhibit the type of hearing or back impairment which would preclude work as a trial attorney, and certainly not as an attorney who renounced trial work and referred cases for trial to others. These witnesses were credible.

There was evidence, including visual evidence, of defendant engaging in activity from which someone with his claimed condition would reasonably be expected to refrain. There was considerable evidence that defendant was untruthful in telling a Provident representative that he was bedridden. There

was evidence that defendant was untruthful in telling Provident in 1994 that he had lost a case because of difficulty hearing in court.

A rational, and indeed the most reasonable, conclusion from the clear weight of the lay and medical evidence is that defendant had a moderate hearing loss in one ear and a back condition which interfered with his ability to work only rarely over the six year period of 1994 through 2000.

The court agrees with defendant that "a doctor who golfs every weekend" would not reasonably be characterized as engaging in the occupations of "both a doctor and a golfer." The court also agrees that the evidence shows defendant's bookstore was not profitable. The court cannot agree, however, that defendant owned and worked at this bookstore as a "hobby." That a business venture is unprofitable does not make it a hobby.

There was evidence that defendant worked many hours at the bookstore which he kept open seven days a week, hired employees to work there, maintained insurance for the business and paid business and employment taxes. The clear weight of the evidence shows that defendant's objective was to sell books to customers at a profit. Indeed, a videotaped interview presented by the defense shows that defendant thought there was a demand for his product and was seeking to attract customers through publicity. That defendant also professed thoroughly to enjoy his

involvement with the bookstore would not transform an occupation into a hobby. Many people enjoy their work.

Moreover, defendant's hours at the bookstore certainly comprised part of his daily activities. Yet, he omitted all information about his work at the bookstore when questioned directly by Provident about his daily activities.

A jury quite reasonable could have found that defendant voluntarily withdrew from trial work before the onset of his claimed disability; that he was able to perform the essential duties of a lawyer who refrains from trying cases, and indeed even of one who does; and, that he progressively withdrew from a law practice which had become increasingly unprofitable, and shifted his focus to his bookstore as a principal occupation.

Viewing the evidence in a light most favorable to the government, a jury quite rationally could conclude beyond a reasonable doubt that defendant knowingly misrepresented his occupational specialty and physical limitations, and concealed information about his operation of a bookstore, with the intent fraudulently to obtain disability insurance benefits for which he knew he did not qualify.

The court cannot scrupulously disagree with the determinations of credibility evidently made by the jury. It is true that Harold Kaufman, defendant's former law partner who gave particularly damaging testimony regarding the statement about

trial work in 1984, did seem to exude considerable personal hostility toward Mr. Nissenbaum. Defendant, however, acknowledged making this statement and uncontroverted evidence regarding defendant's practice in the following years substantiated his determination to avoid participation in trials. Testimony regarding the falsity of defendant's representation about losing a case due to a hearing problem came from his nephew who had no apparent animosity toward defendant. The court cannot conscientiously conclude that the weight of the evidence heavily preponderates against the verdict or that a miscarriage of justice will occur if it is not set aside.

ACCORDINGLY, this day of May, 2001, upon consideration of defendant's Motion for Judgment of Acquittal (Doc. #35-1) and alternative Motion for New Trial (Doc. #35-2), and the response of the government thereto, **IT IS HEREBY ORDERED** that said Motions are **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.