

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

UNITED STATES OF AMERICA

v.

RANDALL AUSTIN

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CRIMINAL NO. 03-682

MEMORANDUM AND ORDER

Tucker, J.

October14, 2005

Presently before this Court is Defendant's Motion for a New Trial (Doc. 37). For the reasons set forth below, upon consideration of Defendant's Motion and the Government's Response (Doc. 43), this Court will deny Defendant's Motion for New Trial.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2002, members of the Yeadon Borough Police Department and the Philadelphia Police Department obtained a search warrant for 2408-A Alfred Avenue in Yeadon, Pennsylvania. The Philadelphia Police also had an arrest warrant for Defendant, Randall Austin ("Austin"), in connection with an unrelated narcotics and firearms case and had received information that he was staying at this location. The police entered the apartment that morning at approximately 9:30 a.m. They went to the bedroom and found Austin asleep in the bed. Directly next to Austin, on top of the night stand, was a .45 caliber Springfield Armory, Compact model, semiautomatic pistol, loaded with seven rounds of ammunition. The serial numbers had been filed off of the gun just above the trigger. The police confiscated the weapon and arrested Austin on the Philadelphia warrant and also for his possession of the firearm.

Austin was prohibited from possessing a firearm because he had four prior felony convictions for manufacture or delivery of controlled substances. The Government charged Austin, in a one

count indictment, with Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Austin faced trial from May 10 through May 13, 2004. On May 13, 2004, a jury convicted Austin of possession of a firearm by a convicted felon.

During the trial, Yeadon Police Sergeant David Splain (“ Splain”) appeared as a witness for the Government. Defense counsel cross-examined Splain about, among other things, a property receipt for the firearm at issue in the case. The Government entered one copy of the receipt as Government Exhibit G-2 (“Exhibit G-2”). Exhibit G-2 was different from the receipt the Government provided to Austin during discovery. According to Austin, he first learned about the Government’s receipt at trial. Austin entered the receipt he received during discovery into evidence as Defense Exhibit D-2 (“Exhibit D-2”). On cross-examination, Splain told the jury that Exhibit D-2 was a preliminary draft of the document and that the final document, which the Government entered as Exhibit G-2, was on file with the District Court of Yeadon Borough. Subsequent to the guilty verdict, Austin’s attorney determined that a copy of Exhibit G-2 was not on file with the state court. As a result of that discovery, Austin now brings this motion for a new trial.

DISCUSSION

Defendant Austin moves this Court to grant a new trial pursuant to FED. R. CRIM. P. 33 (“Rule 33”). Rule 33 provides that “the court may vacate any judgment and grant a new trial if the interest of justice so requires.” FED. R. CRIM. P. 33. Specifically, Austin asks this Court to grant a new trial based on his discovery of new evidence. A court may grant a new trial based on the discovery of new evidence if: (a) the evidence was discovered since trial, (b) the court may infer diligence on the part of the movant, (c) the new evidence is not merely cumulative or impeaching, (d) the new evidence is material, and (e) the newly discovered evidence would probably produce an

acquittal. *U. S. v. Saada*, 212 F.3d 210, 216 (3d Cir. 2000). A criminal defendant has a heavy burden in meeting these requirements. *Id.* Furthermore, a defendant must meet all of the requirements in order for the Court to grant the motion for a new trial. *See Saada*, 212 F.3d at 218. Because Austin fails to meet these elements, the Court will deny his Motion for a New Trial.

A. Newly Discovered Evidence

Initially, Austin fails to meet the threshold requirement that he produce newly discovered evidence for the Court's consideration. Austin argues that the "absence of the property receipt from [the] state court criminal file" and the existence of "two versions" of that receipt should be considered new evidence for Rule 33 purposes. Def.'s Mem. at 1. According to Austin, because neither he nor his trial counsel knew about the two receipts or Splain's testimony regarding the receipts, he should be given a second opportunity to defend himself against the firearm possession charges. *Id.* at 2-3. The Government disagrees, and reasons that because both Exhibit G-2 and Exhibit D-2 were known to Austin at trial, they cannot be considered new evidence. Gov't Mem. at 4-5.

Austin has not produced new evidence for this Court to consider. To establish that the evidence at issue is indeed newly discovered, Austin must show that it was not known to him at trial. *Jasin*, 280 F. 3d at 362. Evidence known to a defendant but simply unavailable at trial is not considered new evidence under Rule 33. *Id.* It is clear from the record that Austin knew about the existence of the two receipts during trial. The parties agree that the Government gave Defense counsel a copy of Exhibit G-2 once it discovered he did not have it. *See* Def. Mem. at 3; Gov't Mem. at 4. Not only is it clear that Austin knew about both receipts, his counsel sought to use this discovery to his advantage in his defense. At trial, Defense counsel cross-examined Splain on the

existence of both receipts and attacked the police's record keeping. (Trial Tr. vol. 3, 28-36, May 12, 2004.) During closing argument, defense counsel continued to criticize the police department's record keeping and even suggested that Splain had fabricated the information in Exhibit G-2. (Trial Tr. 83-85.) Austin cannot credibly argue that he was unaware of the two receipts when the evidence is so clearly to the contrary. The failure of Austin to produce new evidence is reason alone to deny his motion. *See U. S. v. Jasin*, 280 F. 3d 355 (3d Cir. 2002) (affirming a district court's decision to deny a new trial under Rule 33 because the defendant did not establish that the evidence in the case was newly discovered). However, as detailed below, Austin has not meet the other requirements for a new trial under Rule 33.

B. Cumulative or Impeaching Evidence

Austin also fails to make a showing that the evidence is not merely cumulative or offered for impeachment purposes. Austin's evidence is cumulative because it address issues already raised at trial. Austin argues that he would offer evidence of the absence of a receipt to show that the police failed to maintain the proper chain of custody. Def.'s Mem. at 4. According to Austin, the evidence will not be cumulative because actual possession was not something he argued at trial. *Id.* However, the record shows that Austin has already attacked the reliability of the police investigation. As stated above, Defense counsel did cross examine the Government witness and did argue in his closing that the police made many mistakes in the handling of the evidence. (Trial Tr. 28-36.) Austin's "new" argument looks remarkably similar to the case his counsel presented at trial. The evidence, if offered, would definitely be cumulative.

Similarly, Austin fails to establish that the evidence will not be used for impeachment purposes. Austin reasons that the connection between his possession of the firearm and the absence

of any record of its discovery on that date is probative to the issue of chain of custody. Def.’s Mem. at 4. The Court finds this argument disingenuous. Counsel seeks to question the chain of custody not to offer evidence on the issue of possession but to impeach the credibility of the officers offering the chain of custody evidence. Evidence is merely impeaching if there is no “exculpatory connection” between the evidence and the charges against the defendant. *See Saada*, 212 F. 3d at 216. Evidence creates an exculpatory connection if it supports an inference that the defendant is innocent of the charges. *Id.* Austin cannot make this connection with the evidence before this Court because issues with the police’s record keeping do not make it less likely that Austin was found in possession of a firearm. The only material purpose for which the absence of a receipt could be offered is to impeach Spain and counsel was given that opportunity at trial. Consequently, he fails to meet the standard for this requirement.¹

C. Likelihood of Acquittal

Finally, Austin fails to show that a new trial would likely result in his acquittal. In reviewing the probability of acquittal, this Court must determine whether the independent evidence would be sufficient to sustain Austin’s conviction. *See, U.S. v. Adams*, 759 F.2d 1108 (3d Cir. 1985).² The independent evidence leads the Court to conclude that Austin has no likelihood of acquittal in a new trial. Austin argues that the jury would have questioned the actual discovery of the firearm if they

¹Austin has failed to meet the Rule 33 standard for materiality as well. Here, Austin argues that the existence of two receipts is material to the issue of whether he knowingly possessed a firearm because Splain “invoked the auspices of the District Court of Yeadon” at trial to bolster his testimony regarding the genuineness of Exhibit G-2. Def.’s Mem. at 5. This argument fails for the same reasons as stated above. Austin’s argument does not highlight a material issue but can only be used to impeach Splain.

² The Court notes that Austin partially misstates the standard for probability of acquittal in the Third Circuit. Austin writes that this Court must “consider whether the newly discovered evidence would raise a reasonable doubt.” Def.’s Mem. at 5. This is not the standard. In *Saada*, the Third Circuit made it clear that district courts must look to the independent evidence and determine whether it could justify a conviction. 212 F. 3d at 217 fn 6.

had learned that police officers failed to properly record its evidence. Def.'s Mem. at 6. This questioning, he reasons, could lead to reasonable doubt, therefore requiring a new trial. *Id.* Again the Court is not persuaded by Austin's reasoning. It is clear that the independent evidence in this case would sustain Austin's conviction. At trial, Austin stipulated that he was a convicted felon at the time of his arrest. (Trial Tr. vol. 1, 16, May 10, 2004.) The Government presented testimony that the police found the firearm in the possession of Austin while executing the warrant for his arrest. (Trial Tr. vol 2, 28-30, 59-65, May 11, 2004.) The Government also presented expert testimony establishing an interstate nexus with the firearm. (Trial Tr. vol 2, 91-101, May 11, 2004.) This evidence is sufficient to sustain Austin's conviction.

Even if the Court were to apply the standard cited by Austin and consider Exhibit G-2 and Exhibit D-2, there would still not be a likelihood that a new trial would result in an acquittal because the jury has *already considered* this evidence. Defense counsel made the same arguments at trial that he submits in his brief and was unsuccessful. At trial, Defense counsel questioned the firearm's chain of custody during his cross examination of Splain. (*See* Trial Tr. vol. 3, 28-37, May 12, 2004.) The jury examined both documents during trial. (Trial Tr. 37.) The jury also had the opportunity to consider counsel's closing argument regarding the significance of the two different documents. (Trial Tr. 82-87.) Specifically, Defense counsel highlighted his cross examination of Splain, by using poster sized documents of Exhibit G-2 and Exhibit D-2. (Trial Tr. 84-85.) After weighing all of that evidence, the jury rejected counsel's theory and convicted Austin. Defense counsel's argument was unpersuasive then, and the Court has no reason to believe that the result would be any different a second time. Austin's Motion is denied.

CONCLUSION

After reviewing the parties' submissions and the record, this Court finds that Defendant Austin has failed to meet the requirements for a new trial under FED. R. CRIM. P. 33. Austin does not present the Court with any newly discovered evidence. Austin's evidence is cumulative and could only be used to impeach Sergeant Splain, the Government's witness. It is also unlikely that a new trial would result in Austin's acquittal. Consequently, Austin's Motion for a New Trial is denied. An appropriate order follows.

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ORDER

AND NOW, on this 14th day of October, 2005, upon consideration of Defendant Randall Austin's Motion for a New Trial (Doc. 37) and the Government's Response in Opposition (Doc. 43),

IT IS HEREBY ORDERED AND DECREED that Defendant's Motion is **DENIED**.

BY THE COURT:

/S/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.