No. 07-1381

United States Court of Appeals
For The Seventh Circuit

United States,
Plaintiff-Appellee,

v.

Chris Beaver,
Defendant-Appellant

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 06-61-CR-1-3
The Honorable Chief Judge Larry J. McKinney

Reply Brief of
Defendant-Appellant, Chris Beaver

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Oral Argument Requested

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 07-1381

Short Caption: United States v. Chris Beaver

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R.A.P. 26.1 by completing #3):

Chris Anthony Beaver, Defendant-Appellant

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

McNabb Associates, P.C.
Lockwood, Williams & Happe

(3) If the party or amicus is a corporation:

I) Identify all its parent corporations, if any; and

N/A

II) List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: _____

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3. Issue Three Restated: Whether There Was Sufficient Evidence to Support a Conviction.

SUMMARY OF ARGUMENT RESTATED

Appellant, Chris Beaver, argues three issues in this appeal. First, Mr. Beaver argues that his false statements to Special Agent Neil Freeman were not material as a matter of law because they 1) were not capable of influencing Mr. Freeman's investigation, and—somewhat related—2) they were corrected almost immediately. Second, Mr. Beaver argues that, to the extent a conspiracy to fix prices existed, Mr. Beaver did not join that conspiracy. Finally, Mr. Beaver argues that there was insufficient evidence to sustain a conviction on either count one or count three of the indictment.

ARGUMENT

ISSUE ONE RESTATED: The False Statements Uttered by Chris Beaver Were Not Material as a Matter of Law.

Mr. Beaver submits that his argument as to Issue One stands as stated in his Principal Brief.

ISSUE TWO RESTATED: Participation in a Conspiracy in Violation of 15 U.S.C. § 1 Was Not Proven Beyond a Reasonable Doubt

The United States argues that "there was no reason to attend [the October 2003 horse barn meeting] other than to learn about and participate in the conspiracy," citing Allyn Beaver's testimony that "he sent Chris Beaver to the meeting because he suspected that his company may have become involved in price fixing." (Govt. Reply at 45) Putting aside, for a moment, the fact that Allyn Beaver testified quite a bit differently, any price-fixing behavior that existed at that time would have to be imputed to Ricky Beaver rather than Chris Beaver, due to the fact that Chris Beaver was not present at any previous meetings.

To return to what Allyn Beaver actually said during his testimony, however, it is not clear that Allyn Beaver "suspected that his company may have become involved in price fixing." (Govt. Reply at 45). What Allyn Beaver actually said was that he had knowledge that Rick Beaver was "communicating with [Beaver Material's] competition," and that he did not "want Rick talking to the competition" because "[t]here was no reason for him to." (Tr. Vol. III page 544) Allyn Beaver, however, while concerned, never said that he believed that Beaver Materials had become involved in price fixing. There are plenty of reasons for Allyn Beaver to be concerned about a member of one's company communicating with the competition that have nothing to do with price fixing. He could be concerned that Rick Beaver was divulging trade secrets. He could be concerned that Rick Beaver could be telling the competition about profits, which could give the competition an unfair advantage. He could be concerned that Rick Beaver might have been offering to sell Beaver Materials to a competitor. These are all purely theoretical reasons, just as the United States' insinuation that Allyn Beaver was concerned that

his company had entered into a price fixing conspiracy. Indeed, the concerns about divulging trade secrets or information about the inner-workings of Beaver Materials is probably more in line with Allyn Beaver's fears, because he stated that he did not like Rick Beaver communicating with the competition because he did not "know what he would tell them." (Tr. Vol. III page 544)

Furthermore, there are plenty of reasons to attend the meeting, other than to "participate in the conspiracy." These reasons, like the suggestion that the only reason to attend such a meeting is to get involved in a conspiracy to fix prices, are purely hypothetical. One can attend a meeting to discover what sort of behavior is going on in the industry. One can attend a meeting to discover what sorts of working relationships exist among the competition. Therefore, to say that there is no reason other than to engage in a conspiracy to fix prices is incorrect.

The United States argues that "presence or a single act will suffice if circumstances show that the act was intended to advance the ends of the conspiracy." (Govt. Reply at 44, citing United States v. Crowder, 36 F.3d 691, 695 (7th Cir. 1994)). In Crowder,

however, the defendant had more than a slight connection; she "not only was present during all phases of the transaction, but actively participated in the culmination of the sale" and she sought to purchase a significant amount of drugs. Crowder, 36 F.3d at 695-96. Chris Beaver was certainly not present during all phases of any price-fixing conspiracy that may have existed, and there was no evidence presented that he took any single act intended to advance the ends of such a conspiracy. While the United States argues that a conspiracy conviction can be upheld "when the circumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him," (Govt. Reply at 45, citing United States v. Molina, 443 F.3d 824, 828 (11th Cir. 2006)), it is hardly so obvious that Chris Beaver's presence at the horse barn meeting was for the purpose of engaging in a conspiracy to fix prices. The facts of Molina, a drug conspiracy case, for example, showed that "[a]gents discovered, in [defendant's] closet, a garbage bag that contained the bulk of the nearly $300,000 seized from [his] residence." Molina, 443 F.3d at

829. Such evidence was properly seen as a circumstance which is so obvious that knowledge of its character can fairly be attributed to him. The Eleventh Circuit, however, has shown a number of times that there are times when mere presence is simply insufficient. For example, in another drug conspiracy case, it was insufficient evidence that "[t]he defendant regularly hosted parties attended by drug users and suppliers, frequently consumed cocaine, helped a conspirator purchaser a one-eighth ounce for their joint personal use, and gave a small amount of cocaine to a house guest." United States v. Villegas, 911 F.2d 623, 629 (11th Cir. 1990) citing United States v. Hardy, 895 F.2d 1331, 1334-35 (11th Cir. 1990). In another case, it was insufficient evidence when a defendant was seen in a hotel parking lot near a red van, when a co-defendant arrived in a blue van; the two met two other individuals—one of whom produced a bag—and all four went into the hotel lounge, after which the defendant was arrested in possession of a bag containing a pistol. Id., 911 F.2d at 629. citing United States v. Sullivan, 763 F.2d 1215, 1219 (11th Cir. 1985). In yet another drug conspiracy case, it was insufficient evidence

"that the defendant was found hiding in a closet, clothed in pants and a shirt, in a bedroom of a house where off-loading of marijuana was taking place." Id., 911 F.2d at 630, citing United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983).

Other Circuits, too, have cases involving far more circumstantial evidence than that seen in Chris Beaver's case, where the evidence was deemed to be insufficient due to mere presence. For example, in a Second Circuit case involving a Hobbs Act conspiracy, it was determined that it was insufficient evidence to show a defendant's presence in a Jeep along with telephone records during the robbery of an undercover DEA agent. United States v. Santos, 449 F.3d 93, 104 (2d Cir. 2005) ("Even though a conviction can rely on circumstantial evidence, 'suspicious circumstances' are not enough to sustain a conviction."). A Fifth Circuit case involving a drug conspiracy determined that it was insufficient evidence where an individual was present "at various times and places [which] coincided to a remarkable extent with that of the conspirators and of the cocaine ultimately seized." United States v. Maltos, 985 F.2d 743, 747 (5th Cir. 1992). In a

First Circuit case involving a drug conspiracy, it was insufficient evidence where an individual allowed conspirators to use his apartment as a base of operations. United States v. Morillo, 158 F.3d 18, 25-26 (1st Cir. 1998).

There is a larger point at issue, however, and that is the apparent diminution of the Sherman Antitrust Act. So far this term, the Supreme Court of the United States has ruled on two cases which directly address the Act, and in both cases, the Act has taken a beating. The first case, Credit Suisse v. Billing, 127 S. Ct. 2383, ___ U.S. ___, 2007 U.S. LEXIS 7724 (2007), determined that a conflict between the Sherman Antitrust Act and rules promulgated by the SEC would be resolved in favor of the SEC 's rules, even when regulatory statutes are silent as to whether antitrust rules have been precluded. Billing, 127 S. Ct. at __, 2007 U.S. LEXIS 7724 at *13. The second case, Leegin Creative Leather Products, Inc. v. PSKS, Inc., ___ S. Ct. ___, ___ U.S. ___, 2007 U.S. LEXIS 8668 (2007), held that the hundred-year-old rule that vertical price-fixing agreements are *per se* illegal is no longer the case. Leegin 2007 U.S. LEXIS 8668 at *20-

21. Leegin, for example, states that "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tends to restrict competition and decrease output.'" Id., 2007 U.S. LEXIS 8668 at *31. *Stare decisis*, the Supreme Court has concluded, "does not compel [its] continued adherence to the *per se* rule against vertical price restraints," mainly because it is now considered inappropriate due to the "widespread agreement that resale price maintenance can have precompetitive effects." Id., 2007 U.S. LEXIS 8668 at *41. While it is acknowledged that Leegin affirms the notion that horizontal cartels—so long as they decrease output or reduce competition in order to increase price—are still *per se* illegal, id., 2007 U.S. LEXIS 8668 at *29-30, it is clear that reason is becoming more important. In Mr. Beaver's case, it is not clear that he joined any conspiracy to restrain trade, and it is clearly unreasonable to convict him when the only overt acts shown were acts which actually had precompetitive effects.

ISSUE THREE RESTATED: There was Insufficient Evidence to Support a Conviction on Counts One and Three of the Indictment.

Mr. Beaver submits that the arguments in his principal brief and in Issue Two, *supra*, satisfactorily address the sufficiency of the evidence and need no further elaboration.

CONCLUSION

If this Honorable Court concludes that Chris Beaver's false statements were not material as a matter of law, it is respectfully requested that his conviction on count three of the indictment be vacated and his case be remanded to the District Court for further proceedings.

If this Honorable Court concludes that it was not proven beyond a reasonable doubt that Chris Beaver joined a conspiracy to fix prices, it is respectfully requested that his conviction on count one of the indictment be vacated and his case be remanded to the District Court for further proceedings.

If this Honorable Court concludes that there was insufficient evidence to support Chris Beaver's conviction, it is respectfully requested that his conviction on count one of the indictment be vacated and his case be remanded to the District Court for further proceedings.

Respectively submitted,

_____

Christopher M. Choate
Attorney for Appellant
Chris Beaver

Dated: July 5, 2007

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,876 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in size 14 Century font.

Christopher M. Choate
Attorney for Appellant
Chris Beaver

Dated: July 5, 2007

CERTIFICATE OF SERVICE

I, Christopher M. Choate, certify that today, July 5, 2007 a "proof or final" copy of the brief for appellant, was served upon Assistant United States Attorney Steven J. Mintz, Department of Justice, Antitrust Division, 950 Pennsylvania Avenue N.W., Washington, DC 20530.

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