

United States District Court

Northern District Of California

Before The Honorable Charles R. Breyer

United States of America,)
)
 Plaintiff,)
)
 vs.)
)
 Edward Rosenthal,)
)
 Defendant.)
 _____)

NO. CR 02-0053 CRB

Jury Trial

San Francisco, California
Wednesday, May 30, 2007

Reporter's Transcript of Proceedings

Appearances:

For Plaintiff: Scott N. Schools
 United States Attorney
 450 Golden Gate Avenue, Box 36055
 San Francisco, California 94102
 By: George Bevan, Esquire
 Assistant United States Attorney

For Defendant: Pier 5 Law Offices
 506 Broadway
 San Francisco, California 94133
 By: Shari Greenberger, Esquire
 Robert Amparán, Esquire
 Omar Figueroa, Esquire

(Appearances continued on next page.)

Reported By: Sahar McVickar, RPR, CSR 12963
 Official Reporter, U.S. District Court
 for the Northern District of California

(Computerized Transcription by Eclipse)

Appearances, continued:

Also Present: Department of the Treasury
 IRS Special Agents:

Juan C. Saavedra
David Mateer
Justin Fletcher

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Wednesday, May 30, 2007

12:09 p.m.

P R O C E E D I N G S

(The following proceedings were heard
outside the presence of the jury:)

THE COURT: Okay, let the record reflect all the
parties -- maybe you should call the case.

THE CLERK: CR02-0053, United States of America
versus Edward Rosenthal.

Appearances, Counsel.

MR. BEVAN: George Bevan for the United States.

MR. AMPARÁN: Good afternoon.

Robert Amparán appearing on behalf of Ed Rosenthal.

MS. GREENBERGER: Shari Greenberger appearing on
behalf of Mr. Rosenthal.

THE COURT: The jury sent in the following note:

"On one of the counts we cannot agree. What do we
do? How can you advise us to resolve this, and what are the
consequences if we can't agree on this one count?"

Any thoughts as to how I should respond?

MR. BEVAN: Well, I think the last -- the last one
is probably the easiest, that if -- if they can't agree to one
count but they have a resolution on the other counts --

THE COURT: I thought -- sending a note and asking
them have you reached agreement on -- on all the other counts?

MR. AMPARÁN: Although the question does imply that

they have, Your Honor, I would indicate that in parentheses at the top they also say they need more of a question sheet. So I don't know.

THE COURT: I don't know either. That's right. That is why I ask them the question, to find out, have you reached agreement as to the other counts. As to all the other counts.

MR. BEVAN: That would be good.

MR. AMPARÁN: That's fine.

THE COURT: I should send out the note. With the agreement of the petitions parties that's what I will do.

The note will read:

"Have you reached a verdict as to all the other counts?" Or should I say as to all counts but one? All counts but one or other counts?

THE LAW CLERK: Other four counts.

THE COURT: Have you reached a verdict as to the other four counts -- reached verdicts, plural, verdicts, as to the other four counts. Yes? No? Okay.

"Have you reached verdicts as to the other four counts?"

Okay. You want to look at this? This is a great piece of paper.

Here, show it to them, Barbara.

(Counsel reviewing note.)

MR. BEVAN: Question mark.

THE COURT: Yeah, put a question mark.

Give it to them and let's just wait and see.

(Brief recess taken/proceedings resumed at
12:13 p.m.)

THE COURT: Okay, I've received a response, yes,
they have. So what do you want to do?

What does the Government want to do?

MR. BEVAN: Your Honor, I would suggest you bring
the jury and ask them -- tell them how long they have been
deliberating and ask them if they think any further
deliberation would be useful on that count.

THE COURT: I mean, I think you have a right to
that, but I have to question what the point is. If, in fact,
the four verdicts -- well, they can be different, but, I mean,
if -- they don't all have to be the same, obviously. They have
come to conclusions -- you are not going to retry the case,
right?

MR. BEVAN: I'm not answering Your Honor from that
standpoint.

THE COURT: But I'm trying to figure out -- we
would declare a mistrial -- well, I can't declare a mistrial as
to the other -- unless I go through this process, but if -- the
Government could dismiss the hung count.

MR. BEVAN: Well, what is your inclination, Your

Honor?

THE COURT: My inclination would be that we take the verdict on the four verdicts, and then the Government dismisses -- agrees to dismiss, whatever the outcome is agrees to dismiss the unresolved count. That just makes sense.

That's my suggestion. Of course, the Government doesn't necessarily follow my advice, but that is my suggestion. What's the point? We've gone on long enough. What's the point?

MR. BEVAN: I'm thinking about it.

THE COURT: No, but I don't see any point, that's my point.

MR. BEVAN: All right, I yield to that.

MR. AMPARÁN: Your Honor, I'm a little bit concerned -- not that I'm saying that as a defense lawyer I'm objecting to the Government dismissing a count against my client --

MR. BEVAN: I'm not moving to dismiss anything, I'm foregoing bringing the jury out to ask that question.

MR. AMPARÁN: Oh. I misunderstood.

THE COURT: Well, if I don't ask the question, and then my belief is that there is a question as to double jeopardy. So I actually think the practical thing is that the Government -- I can bring them out here if you want, that's one thing, but my advice is that the Government dismiss, whatever

the jury does as to the four counts the Government dismiss the unresolved count.

MR. BEVAN: Your Honor, I can't, no.

THE COURT: Okay. Then I'll bring them out and voir dire them.

MR. BEVAN: I just don't have the authority.

THE COURT: I'll bring them out. That's what I have to do.

Tell them to come out.

(Jury in at 12:20 p.m.)

THE COURT: Let the record reflect the parties are present.

Ladies and gentlemen of the jury, I received a note from your foreperson that you have arrived at an agreement as to four of the counts but not as to the fifth, and I'm not saying in any particular order. There is one that you haven't, four that you have. So I need to ask you some questions.

First, I'm going to ask the foreperson these questions, and depending on what his responses are, I need to ask each of you individually. And this is the procedure that we go through. So let me turn -- Mr. Bynum, you are the foreperson, right?

FOREPERSON BYNUM: Yes.

THE COURT: The first question I'm going to ask you: In your opinion, is the jury hopelessly deadlocked, now

referring to the count that you have been unable to arrive at a verdict on?

FOREPERSON BYNUM: Yes.

THE COURT: Okay.

Is there a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?

FOREPERSON BYNUM: Yes.

THE COURT: There is a reasonable probability?

FOREPERSON BYNUM: Yes.

THE COURT: Okay, then, I am going to send you back for further deliberation. Because if there is a reasonable probability, you are entitled to have further deliberations. It's if there isn't that I would then do something else. But if, in fact, you think you can, now, why don't you go back.

What I might do is ask you if there is anything further that the Court can provide you by way of guidance, you know, that can assist in that. If you want to discuss it amongst yourselves, you may do that as well. I'll stay around or keep everybody here for a few minutes. You can have a further discussion.

But I think you do understand that the procedure before declaring a mistrial as to the fifth count or -- the one you can't arrive at, I need to ask each individual juror whether there is a reasonable probability that you can reach a

unanimous verdict if you have further deliberations.

Okay, so with that, thank you very much. You may go back into the jury room. And let me know if there is anything else I can do to assist.

(Jury out at 12:23 p.m.)

THE COURT: Well, this the is why I'm out of the business of prediction.

I would like the parties to remain for the next 10, 15 minutes, or so, see what they have to say.

(Proceedings resumed at 1:17 p.m.)

THE COURT: Okay, let the record show all parties are present.

MR. BEVAN: Your Honor, after consultation with the United States Attorney, if, in fact, the jury is deadlocked on count 1, after you take the verdicts on the other counts, we are prepared to dismiss count 1.

THE COURT: I don't know which counts they are -- I don't know which counts, I can ask them that.

MR. BEVAN: We would ask.

THE COURT: I can ask them which counts they have arrived at.

MR. BEVAN: And if it's count 1, we are prepared to dismiss that and take the verdict on the other counts.

THE COURT: All right, that's fine.

So why don't I inquire "Would you please advise the

court as to which counts you are unable to arrive at an agreement," or "which count you have not yet arrived at an agreement."

MR. BEVAN: Were the -- after you take the verdict on the four, we would move to dismiss count 1.

THE COURT: Right, that's fine.

Okay. So to --

MR. BEVAN: As to Mr. Rosenthal. Mr. Hayes is still a fugitive.

THE COURT: I understand that.

(Judge steps off bench momentarily, retakes the bench.)

THE COURT: They've just come back.

MR. BEVAN: Oh.

(Jury in at 1:23 p.m.)

THE COURT: I've inquired of the jury as to which count there was no agreement on, and they have advised me it's count number 1, which was the count that appeared to be the count because of the notes.

So my understanding is that the Government, upon the return of the verdicts as to counts 2, 3, 4 and 5 will dismiss count 1.

MR. BEVAN: That's correct.

THE COURT: That's correct?

MR. BEVAN: That's correct.

THE COURT: As to this defendant?

MR. BEVAN: Yes.

THE COURT: Okay.

So bring in the jury. Tell them to bring the verdict form with them.

THE CLERK: Please be seated.

(Clerk confers with court.)

(Jury in at 1:30 p.m.)

THE COURT: Okay. Let the record reflect all parties are present.

Good afternoon again, ladies and gentlemen of the jury. I was advised that you have arrived at verdicts on all counts except count number 1, and therefore, would you hand the form of verdict to our clerk, Barbara.

(Judge reviews verdict.)

THE COURT: Okay, you may read the verdict. Start with count 2. Count 1 was no verdict.

THE CLERK: "Ladies and gentlemen of the jury, listen to your verdict as it will stand recorded.

"The United States of America versus Edward Rosenthal, CR02-0053: Count 2, using the space at 52 6th Street for the manufacture and distribution of marijuana: We the jury unanimously find the defendant, Ed Rosenthal not guilty of the charge of using the space at 52 6th Street for the manufacture and distribution of marijuana.

"Count 3, conspiracy with other persons in Oakland, California: We the jury unanimously find the defendant, Edward Rosenthal, guilty of the charge of conspiring with other persons in Oakland, California, to manufacture marijuana, possess marijuana with intent to distribute, distribute marijuana and use the locations of 1419 Mandela Parkway, Oakland, California, and 1626 East 22nd Street, Oakland, California, for the purpose of manufacturing and distributing marijuana.

"Count 4, manufacture of marijuana, possession of marijuana with intent to distribute and distribution of marijuana: We the jury unanimously find the defendant, Edward Rosenthal, guilty of the charge of manufacturing marijuana, possessing marijuana with intent to distribute and distributing marijuana.

"Count 5, using the building located at 1419 Mandela Parkway in Oakland, California, for the manufacture and distribution of marijuana: We the jury unanimously find the defendant, Edward Rosenthal, guilty of the charge of using the building located at 1419 Mandela Parkway in Oakland, California, for the manufacture and distribution of marijuana.

"Dated 30th May, 2007. Bobby C. Bynum, jury foreperson."

THE COURT: Does either side wish the jury polled?

MR. AMPARÁN: Yes, Your Honor.

THE COURT: Okay.

THE CLERK: Mr. Roger Spagnoli, are these your verdicts?

JUROR SPAGNOLI: Yes.

THE CLERK: Sadie Moneymaker, are these your verdicts?

JUROR MONEYMAKER: Yes.

THE CLERK: Linda M. Patrick, are these your verdicts?

JUROR PATRICK: Yes.

THE CLERK: Leticia P. Llagas, are these your verdicts?

JUROR LLAGAS: Yes.

THE CLERK: Da Lien Lee, are these your verdicts?

JUROR LEE: Yes.

THE CLERK: Elena Dewitt, are these your verdicts?

JUROR DEWITT: Yes.

THE CLERK: Bobby C. Bynum, are these your verdicts?

FOREPERSON BYNUM: Yes.

THE CLERK: Jon H. Noda, are these your verdicts?

JUROR NODA: Yes.

THE CLERK: Patricia A. Foreman, are these your verdicts?

JUROR FOREMAN: Yes.

THE CLERK: Glenda H. Morris, are these your

verdicts?

JUROR MORRIS: Yes.

THE CLERK: Maureen Duden, are these your verdicts?

JUROR DUDEN: Yes.

THE CLERK: Ellen Chen, are these your verdicts?

JUROR CHEN: Yes.

THE CLERK: The verdict is unanimous, Your Honor.

THE COURT: Okay, the verdicts may be entered and recorded.

Ladies and gentlemen, this completes your jury service. Let me express the appreciation of the Court, staff, for your jury service. It's never easy to be on a jury. It's very difficult to have to pass judgment, the Court recognizes that.

I will tell you that you have been an extraordinary conscientious jury, here all the time listening to the evidence. The Court certainly appreciates it. And now you are free, as I indicated before, to discuss the case with anyone, should you so choose, and you are free not to discuss it if you don't want to.

So I wanted to thank you on behalf of the Court. I'll have a few words inside the jury room if you'll wait for me there. And then you'll be free to go. So thank you very much. You are discharged.

(Jury out at 1:35 p.m.)

THE COURT: Okay, with respect to count number 1, does the Government have a motion?

MR. BEVAN: With respect to count 1, Your Honor, pursuant to my commitment to Your Honor before you brought the jury out, the United States would move to dismiss count 1 as to Mr. Rosenthal only at this time.

THE COURT: Okay, that motion is granted.

Now, we have two things, I guess, or maybe three to address. One is any motion for a new trial, that must be filed on or before June 6. And I also -- I don't know that sentencing is complicated in this case because the -- as I understand, the understanding is that the sentence -- the same sentence would be imposed, and that sentence has already been served. So I don't think it's complicated.

I wouldn't order a new Pre-Sentence Report, there is no purpose served in that. And I would impose sentence in accordance with the understanding that the Government entered into with the Court's agreement at the time of -- at earlier proceedings.

So I think what I would do, my druthers would be to put all of this over until June 6. If I look at the motion for a new trial, if one is filed, maybe I would require the motion for new trial to be filed on June 5th. If I look at it and I think that it needs some response, then I'll continue the hearing. Otherwise, it would be my view to rule on the motion

to dismiss on the 6th. And if I grant it -- well, if I'm inclined to grant it I'll ask for opposition. If I'm going to deny it, I'll deny it on the 6th and proceed to sentencing on the 6th and conclude the matter.

MR. BEVAN: What time would that be, Your Honor?

THE COURT: 2:15.

MR. BEVAN: That's fine.

THE COURT: I think the only -- then there is a Hyde Amendment motion, but I think that that is separate.

MR. BEVAN: And I communicated --

THE COURT: And that can be done later.

MR. BEVAN: That is our view. I've communicated that to Mr. Weill. It came up yesterday, and he is working on a response.

THE COURT: Okay. So when he files a response I'll set it -- there may be -- perhaps a reply will want to be filed, and then I'll set it for hearing or disposition without a hearing.

MR. BEVAN: That's fine.

THE COURT: Okay?

Thank you.

I think that concludes the proceedings. Thank you very much.

MR. BEVAN: Your Honor, in terms of bail, given the unusual -- I mean, Mr. Rosenthal has just been convicted on

drug offenses that require that he be remanded, but that statute clearly contemplates and is premised on a jail sentence being at issue, which it's not. So the United States for that reason is not making a motion that his bail status be changed in any way.

THE COURT: Okay. He'll continue on the same bail status through June 6th.

MR. BEVAN: Thank you, Your Honor.

THE COURT: Okay.

Anything further?

MR. BEVAN: None from the Government.

THE COURT: All right. Thank you very much.

(Proceedings adjourn/trial concludes at
1:40 p.m.)

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CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

Sahar McVickar, RPR, CSR No. 12963

May 30, 2007