

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 3-95CR-294-R
	)	
v.	)	Filed: 3/11/96
	)	
MRS. BAIRD'S BAKERIES, INC.	)	Violation: 15 U.S.C. § 1
	)	
	)	
Defendant.	)	

**Government's Response to Motion of Defendant  
Mrs. Baird's Bakeries, Inc. for Judgment of Acquittal and Memorandum In Support**

The government hereby responds to Mrs. Baird's Bakeries, Inc.'s post trial motion for a judgment of acquittal. Following its conviction of the price fixing conspiracy charged in Count One of the Indictment, Mrs. Baird's challenges the sufficiency of the evidence to support the jury's guilty verdict and asks that this court substitute a judgment of acquittal for the jury's verdict. For all the reasons supporting the Court's denial of Mrs. Baird's previous motions for judgment of acquittal, this motion too should be denied.

Essentially, the defendant argues that the government failed to introduce sufficient evidence to prove an agreement between Mrs. Baird's Bakeries and Flowers-Sunbeam to fix, raise, or maintain prices for bread and bread products sold in east Texas as charged in Count One of the Indictment. In support of its argument, defendant complains that, rather than introducing traditional evidence of hard core price fixing activities, the government relied on the sworn testimony of Stanley Oler, a long time employee of the defendant and admitted participant in the charged price fixing conspiracy. In addition, defendant points the Court to a laundry list of

factors which defendant claims the government did not prove. The defendant also provides a lengthy summary of Mr. Oler's testimony which either characterizes Mr. Oler's testimony in the light most favorable to defendant's assertion of innocence or simply mischaracterizes the testimony. Because defendant's arguments and characterization of the evidence ignores both the proper legal standard for evaluating a defendant's motion for judgment of acquittal and mischaracterizes the factual content of Stanley Oler's testimony, its motion should be denied.

### **The Legal Standard**

When a defendant claims that the evidence was insufficient to support its conviction, the Court must determine whether, in viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt. United States v. Pofal, 990 F.2d 1456, 1467 (5th Cir. 1993), cert. denied. 114 S. Ct. 266, (1993). Essentially, the question is whether a reasonable jury could find the defendant guilty beyond a reasonable doubt. United States v. Arzola-Amaya, 867 F.2d 1504, 1511 (5th Cir. 1989), cert. denied. 493 U.S. 933 (1989). In evaluating the evidence, all inferences from the evidence must be viewed as supporting the verdict. United States v. Okoronkwo, 46 F.3d 426, 430 (5th Cir. 1995), cert. denied. 116 S.Ct. 107, (1995). In addition, the Court must accept all credibility choices that tend to support the jury's verdict. Pofal, 990 F.2d at 1467; Okoronkwo, 46 F.3d at 430 ("the jury is entitled to believe a witness unless the testimony is so incredible that it defies physical laws.") Juries are free to use their common sense and apply common knowledge, observation and experience gained in the ordinary affairs of life when giving effect to the inferences that may be reasonably

drawn from the evidence, United States v. Heath, 970 F.2d 1397, 1402 (5th Cir. 1992), cert. denied. 507 U.S. 1004 (1993). The trial court, however, may not substitute its own subjective interpretation of the evidence for that of the jury. United States v. Varkonyi, 611 F.2d 84, 85 (5th Cir. 1980), cert. denied. 446 U.S. 945 (1980).

### **The Evidence Viewed in the Light Most Favorable to the Verdict**

The testimony of Stanley Oler, especially when viewed in the light most favorable to the verdict, provided the jury with substantial evidence that Mrs. Baird's Bakeries, through both Stanley Oler and Carroll Baird, engaged in a lengthy price fixing conspiracy with employees of the Flowers-Sunbeam Bakery located in Tyler, Texas. Oler, a confessed participant in the conspiracy, provided the jury with sufficient evidence to find the following facts, beyond a reasonable doubt:

1. On a regular and continuing basis from 1986 until 1992, (Tr. I-177, Tr. II-421),<sup>1</sup> Stanley Oler, on behalf of Mrs. Baird's Bakeries, Inc., would engage in discussions concerning the future price of bread and bread products in east Texas with Steve Green, the President of Flowers' Tyler Bakery. (Tr. I-177, Tr. II-222, Tr. II-416).

2. Typically, the pricing conversations between Oler and Green occurred after Flowers had announced a proposed price increase, but prior to the time the proposed prices were to become effective. Oler's conversations with Green occurred both over the telephone (Tr. I-175) and in face-to-face meetings at local restaurants. (Tr. I-185).

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<sup>1</sup>All transcript references are to the final, official transcript prepared by Joseph D. Hendrick, Deputy Official Court Reporter.

3. In each of these discussions, Flowers proposed price increases for bread and bread products in east Texas were provided to Oler. (Tr. I-187, Tr. II-422). After the exchange of proposed prices, Green asked Oler for Mrs. Baird's response to the proposed price increases. (Tr. I-175).

4. Following his discussion with Green, Oler would relay both the proposed price increases and Flowers' request for a response to Carroll Baird. (Tr. I-176, Tr. I-186, Tr. II-222). Carroll Baird was aware of the fact and the nature of Oler's contacts with Steve Green. (Tr. I-177).

5. After considering the price increases proposed by Flowers, Carroll Baird would tell Oler whether Mrs. Baird's intended to match the price increases proposed by Flowers and, with Carroll's knowledge, Oler would relay that answer to Steve Green. (Tr. I-177, Tr. I-189, Tr. II-223).

6. If Carroll Baird's response was that Mrs. Baird's would not go along with the price increase proposed by Flowers, Flowers would rescind its proposed price increase prior to the effective date of the proposed price increase. (Tr. I-178, Tr. I-179, Tr. II-223, Tr. II-417).

7. If Carroll Baird's answer was that Mrs. Baird's would honor or accept the price increase proposed by Flowers, Oler would relay that message to Steve Green and Flowers would allow its proposed price increase to become effective. Mrs. Baird's would simultaneously issue a price list with increased prices identically matching those proposed by Flowers for most bread and bread products sold in east Texas. (Tr. I-178, Tr. I-179, Tr. I-180, Tr. I-190).

8. While most of the pricing discussions were initiated by Flowers, on at least two occasions Mrs. Baird's, through Carroll Baird and Oler, attempted to initiate a price increase

affecting bread products sold in east Texas. In one instance Mrs. Baird's was successful in obtaining a coordinated price increase (Tr. I-183) and in one instance was unsuccessful in obtaining Flowers agreement and forced to rescind its price increase. (Tr. II-225).

9. This pattern and continuing course of conduct involving pricing discussions between Stanley Oler and representatives of Flowers-Sunbeam concerning proposed price increases for bread and bread products sold in east Texas occurred from 1986 until 1992. (Tr. I-177).

10. Executives representing Mrs. Baird's engaged in price fixing discussions with competitors prior to 1986 (Tr. I-197, Tr. I-198, Tr. II-392-394, Tr. II-424) and after 1992. (Tr. II-232, Tr. II-233, Tr. II-357).

The testimony of Stanley Oler, without more, proved an agreement between Mrs. Baird's and Flowers to coordinate bread prices in east Texas. Oler's testimony of many pricing discussions between competitors between 1986 and 1992, followed by a positive or negative response to a competitor's proposed price increase, followed thereafter by action in accordance with the response, either rescission or mutual increase, describes a classic per se price fixing violation. See United States v. Foley, 598 F.2d 1323, 1331 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980). Oler's testimony and the reasonable inferences which can be drawn from it leads to the inescapable conclusion that the defendant engaged in a long-term price fixing conspiracy in east Texas with Flowers-Sunbeam.

### **Defendant's Argument**

The defendant argues that the conduct described by Stanley Oler, even when viewed in

the light most favorable to the government, does not constitute an unlawful price fixing agreement. Rather, the defendant argues, the conduct of Carroll Baird and Stanley Oler amounts to nothing more than a lawful exchange of pricing information. In support, defendant cites numerous cases, mostly civil, which proclaim the unremarkable legal proposition that the mere exchange of price information, without more, is not necessarily illegal. The defendant then appears to make the remarkable argument that, in order to sustain a conviction in this case, the government must prove that the defendant's conduct actually had the desired anticompetitive affect. The defendant's arguments are not supported by either the law or the facts.

First, defendant's argument ignores the very clear testimony of Stanley Oler that his and Carroll Baird's conduct on behalf of Mrs. Baird's Bakeries, Inc. went beyond the mere exchange of publicly available price information. Unlike the cases cited by defendant, the evidence showed that additional action was both requested and expected after the exchange of prospective prices. As Oler unequivocally testified, Steve Green, on behalf of Flowers-Sunbeam asked Oler for Mrs. Baird's response after providing the price increases proposed by Flowers. Following the exchange of prices, and inquiry concerning Baird's response, Oler would relay the prices and message to Carroll Baird who would then send Mrs. Baird's response back to Flowers through Mr. Oler and Mr. Green. A positive or negative response clearly was asked for and expected. Flowers then acted on the response, either maintaining its current prices if Baird's was unwilling to agree to an increase, or allowing its announced price increase to become effective knowing that Mrs. Baird's would announce and implement identical price increases. Even the reluctant Mr. Oler had to agree that this series of events constituted an agreement to fix prices. (Tr. II-419). Therefore, defendant's argument that Oler's and Carroll Baird's conduct amounted to

nothing more than the innocent exchange of publicly available pricing information is squarely refuted by the evidence.

Defendants legal arguments are based completely on the premise that Oler's and Carroll Baird's conduct amounted to nothing more than a legal price exchange. Because defendants factual assertions are unsupported, and in fact refuted, by the evidence, its legal arguments collapse. Because the jury was presented with substantial evidence that the defendant entered into a price fixing conspiracy with Flowers-Sunbeam, the government was not required to offer additional proof that the agreement achieved its objective and produced anticompetitive affects. United States v. Sacony-Vacuum Oil Company, 310 U.S. 150, 218-223, 60 Ct. 811, 842-44 (1940); United States v. Cargo Service Stations, Inc. 657 F.2d 676, 683-84 (5th Cir. Sept. 1981), cert. denied. 455 U.S. 1017, (1982); United States v. All Star Industries, 962 F.2d 465, 475 n. 21 (5th Cir. 1992).

Lastly, defendant argues that, because there is insufficient evidence to conclude that the defendant engaged in a price fixing conspiracy at any time between 1977 and 1993, the government failed to demonstrate the existence of a price fixing conspiracy that continued into the statutory period. Again, the evidence presented to the jury refutes defendant's contention. First, on several occasions Stanley Oler admitted that the conversations with Steve Green of Flowers which resulted in the coordination of bread prices in east Texas continued at least into 1992. (Tr. I-177, Tr. II-421). Indeed, there was evidence that indicated continuing contact after 1992 between employees of Mrs. Baird's Bakery, specifically Byron Baird and Carroll Baird, and Flowers for the purpose of coordinating bread prices in east Texas. (Tr. II-232, Tr. II-357). In addition, the tape recording introduced during

Oler's redirect examination clearly supported a finding that the price fixing conspiracy continued into late 1992. Indeed, defense counsel during his questioning of Mr. Oler concerning this tape recording identified it as having been made in November 1992. (Tr. II-432). Oler's testimony that collusive contacts continued into 1992, in conjunction with the inferences which could reasonably be drawn from his tape recorded conversation in November 1992 with Steve Green, provides substantial evidence to support the jury's conclusion that the charged price fixing conspiracy continued into the statutory period.

### **Conclusion**

The defendant's challenge to the sufficiency of the evidence supporting the jury's guilty verdict on Count One of the Indictment depends on its assertion that the conduct described by Stanley Oler constitutes nothing more than the innocent exchange of publicly available price information. A review of the evidence, viewed in a light most favorable to the verdict, strongly refutes defendant's contention. Rather, the conduct described by Stanley

Oler conforms to a classic price-fixing arrangement. While defendant's reference to Greenhaw v. Lubbock County Beverage Association, 721 F.2d 1019 (5th Cir. 1983) is misplaced in this case, that court did make an observation which seems appropriate here:

"In sum, though distinguishing between competitors exchanging price lists and competitors fixing a price may entail abstract line drawing, the distinction does not require unusual training to perceive. One facilitates and the other stifles competition. We think these jurors knew the difference."

Greenhaw, 721 F.2d at 1031.

We agree.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF TEXAS**  
**DALLAS DIVISION**

<b>UNITED STATES OF AMERICA</b>	)	<b>Criminal No. 3-95CR-294-R</b>
	)	
<b>v.</b>	)	<b>Filed:</b>
	)	
<b>MRS. BAIRD'S BAKERIES, INC. and</b>	)	<b>Violation: 15 U.S.C. § 1</b>
<b>FLOYD CARROLL BAIRD,</b>	)	
	)	
<b>Defendants.</b>	)	

**ORDER**

The Court, having considered the Government's Response to Motion of Defendant Mrs. Baird's Bakeries, Inc. for Judgment of Acquittal and Memorandum In Support hereby finds that the motion should be denied in its entirety.

IT IS SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 1996.

\_\_\_\_\_  
JERRY BUCHMEYER, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

**CERTIFICATE OF SERVICE**

This is to certify that true and correct copies of the foregoing Government's Response to Motion of Defendant Mrs. Baird's Bakeries, Inc. for Judgment of Acquittal and Memorandum In Support were mailed via Federal Express on the 11th day of March 1996, to

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