

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CURTIS SWAYZE,

Defendant.

No. CR02-60 LRR

**ORDER**

***I. INTRODUCTION***

This matter comes before the Court pursuant to Defendant's Motion for a New Trial (docket number 87). The Court held a hearing on the Motion on September 25, 2003. Assistant United States Attorney Teresa Baumann represented the government. Defendant was personally present and represented by his attorney, Alfred Willett.

***II. ANALYSIS***

***A. Factual Background***

On December 20, 2001, Sergeant Bean and Officer Kolder conducted a bar check at the Cognac Club in Cedar Rapids, Iowa. As part of the bar check, Sergeant Bean checked the men's restroom and Officer Kolder checked the women's restroom for illegal activities. When Sergeant Bean tried to open the door to the men's restroom, Eldridge Prince prevented the door from opening more than six to eight inches and then he slammed the door shut. Sergeant Bean yelled at Prince to open the door. When Prince did not open the door, Sergeant Bean called for Officer Kolder to help him. Once the officers were able to get into the restroom, Sergeant Bean and Officer Kolder saw Defendant Curtis Swayze ("Swayze") was also in the restroom.

Sergeant Bean testified it appeared Swayze put something in his mouth. Sergeant Bean ordered Swayze to open his mouth. At that point, Swayze attempted to push past the officers to exit the restroom. The officers grabbed Swayze and tried to force him to the

ground. When Swayze was partially on the ground, he turned toward the toilet, stuck his arm into the bottom of the toilet and later tried to flush the toilet. After Swayze was handcuffed, Sergeant Bean found a baggie of powder cocaine floating in the toilet water. Sergeant Bean testified he had worked as an investigator in narcotic trafficking. From his experience, he determined the quantity in the baggie appeared to be approximately one-quarter gram, which is a user amount of cocaine. When the baggie of crack cocaine was retrieved from the toilet by Officer Kolder, chewed gum was stuck to the baggie. The presence of the gum indicated to Sergeant Bean the baggie had been in someone's mouth. During Sergeant Bean's search of Swayze, he found \$1,288 in cash in Swayze's pocket. Sergeant Bean testified finding a large quantity of cash on someone is an indicator of drug trafficking. He also testified Prince left the restroom while the officers were trying to get Swayze under control, but before Prince left, he did not see Prince put anything in his mouth, try to flush anything down the toilet, or have any physical contact with the toilet.

Officer Kolder testified she recognized Swayze when she entered the restroom because she was familiar with him from previous bar checks and a friend of hers is related to Swayze. Swayze's mouth appeared to be bulging and when Swayze attempted to speak, his words were muffled. Officer Kolder heard Sergeant Bean tell Swayze to open his mouth. Swayze then attempted to push past the officers to exit the restroom. The officers grabbed Swayze and tried to move him to the floor. When Swayze was on his hands and knees, Swayze turned around so he faced the toilet, wrenched his right arm from Officer Kolder's grip, and stuck his hand all the way down into the hole of the toilet two to three times, although she did not observe anything in his hand. Officer Kolder testified Swayze tried to flush the toilet twice but she prevented him from flushing and then she removed a baggie of crack cocaine from the toilet bowl.

Sergeant Hansen testified the five smaller baggies in a larger baggie found in the toilet weighed a total of three grams and the other baggie weighed twelve grams.

Officer Robinson, the case agent, testified regarding the laboratory reports of the

substances retrieved. He testified he had extensive training in drug investigations and has helped investigate over 100 narcotics cases in three years. Just under half of those cases involved crack cocaine and roughly 10% involved powder cocaine. He testified cash is the predominant method of payment for drugs. Officer Robinson testified the self-authenticated laboratory reports indicated the substances contained in the baggies were crack cocaine and powder cocaine. Specifically, the five smaller baggies contained powder cocaine and the other baggie contained 26 rocks of crack cocaine. He testified 10.72 grams of crack cocaine is a quantity more consistent with drug sellers than drug users and drug users usually purchase under a gram at a time. Based on his training and experience, Officer Robinson testified drug traffickers sometimes conceal or destroy drugs during contact with law enforcement by swallowing the drugs, putting the drugs in their mouths, trying to flush the drugs down the toilet, concealing the drugs in the buttocks or down their pants, or hiding the drugs in hidden compartments in clothing or vehicles.

Larry Simpson testified he talked to Swayze about Swayze's case on November 18, 2002, before Simpson began cooperating with the government. He testified Swayze told him the government had "nothing on him" and detailed the events of December 20, 2001. During the conversation, Swayze told Simpson the drugs recovered from the toilet were his and the drugs were crack cocaine and powder cocaine. Simpson testified he believed the incident at the Cognac Club occurred eight months prior to their November 18, 2002 conversation. Finally, Simpson testified he had no other knowledge of the case from any source other than Swayze's statements to him.

Swayze offered through Sergeant Bean and Officer Robinson evidence he had recently withdrawn a large quantity of cash<sup>1</sup> from his bank account in anticipation of Christmas. Swayze also offered the testimony of Kevin Johnson and Deon Harris, whose sole purpose in testifying was to impeach Simpson's credibility.

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<sup>1</sup>Swayze presented evidence he withdrew \$1,700 from his bank account on December 3, 2001 and \$300 on December 20, 2001.

Johnson testified he was housed in the same cellblock as Simpson and Swayze in October 2002. Simpson had told Johnson he would testify for the government in Swayze's case. Johnson testified that on an unknown date in October 2002, he observed Simpson reading Swayze's legal mail while Swayze was in the shower. Johnson testified Swayze never discussed his case with Johnson and Johnson never observed Swayze discuss the case with Simpson. Johnson moved out of the cell block in November of 2002.

Harris testified he was housed with Simpson and Swayze in December 2002. At some time while the three were housed together, Harris observed Simpson reading Swayze's legal mail. Simpson told Harris he would help the government after reading Swayze's papers and Swayze telling Simpson and Harris about his case, and Simpson encouraged Harris to assist the government as well. Simpson told Harris his motivation in testifying for the government was to receive a sentence reduction. Simpson told Harris his information was false and he made up the story. The Court instructed the jury that Harris was called solely to impeach Simpson's credibility.

### ***B. Procedural Background***

On August 21, 2002, Swayze was indicted on one count of possessing with the intent to distribute crack cocaine on December 20, 2001, and one count of possessing with the intent to distribute cocaine on December 20, 2001. His jury trial was held January 7-8, 2003, after which the jury unanimously found Swayze guilty on both counts. Swayze moved for a directed verdict at the close of the government's case. On January 15, 2003, Swayze filed motions for acquittal and for a new trial on the basis no one saw him with bundles of cocaine in his mouth and it would have been impossible for the bundles to fit in his mouth. Judge Ortrie Smith, who presided over the trial, denied the motions on July 28, 2003. On September 18, 2003, Swayze filed the instant Motion for a New Trial based on Kevin Johnson's polygraph answers given in regard to another case on March 25, 2003. In support of his Motion, Swayze argues newly discovered evidence in the form of Kevin Johnson's polygraph examination proves Larry Simpson perjured himself at Swayze's trial. He argues

because the evidence is not cumulative or impeaching evidence, Simpson's testimony should be ignored. Without Simpson's damaging testimony, Swayze claims he likely would have been acquitted.

The government responds the results of a polygraph examination are not admissible in court so Simpson's perjury could not be proven. The government also claims Johnson's and Simpson's dates do not line up, so Simpson may have told the truth, and even if Simpson did lie, the evidence is cumulative and impeaching evidence that the jury could weigh in its decision.

### ***C. Standard of Review***

Federal Rule of Civil Procedure 33 provides, in pertinent part, that a court "on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." Fed. R. Crim. Proc. 33. Under Rule 33, district courts are granted broad discretion in considering motions for a new trial. *United States v. Wilkins*, 139 F.3d 603, 604 (8th Cir. 1998). A district court may "weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002) (quoting *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992)). However, unless the district court "ultimately determines that a miscarriage of justice will occur, the jury's verdict must be allowed to stand." *Id.* (citing *United States v. Lacey*, 219 F.3d 779, 783 (8th Cir. 2000)); see also *Ortega v. United States*, 270 F.3d 540, 547 (8th Cir. 2001) (noting that a district court may grant a new trial under Rule 33 "only if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred.").

The Eighth Circuit Court of Appeals has noted that district courts enjoy more latitude in granting new trials under Rule 33 than in granting motions for acquittal under Rule 29. *Campos*, 306 F.3d at 579. However, "[m]otions for new trials based on the weight of the evidence are generally disfavored," and therefore district courts should exercise their Rule 33 authority "sparingly and with caution." *Id.*; see also *United States v. Lincoln*, 630 F.2d

1313, 1319 (8th Cir. 1980) (“This authority [to grant a new trial] should be exercised sparingly and with caution . . . .”); 3 *Federal Practice and Procedure* § 553, at 248 (2d ed. 1982) (Granting a new trial under Rule 33 is an unusual remedy that is reserved for “exceptional cases in which the evidence preponderates heavily against the verdict.”).

#### ***D. Weight of the Evidence***

In his Motion for New Trial, Swayze alleges a witness, Larry Simpson, lied when he testified all he knew about Defendant’s case he learned from Swayze. Defendant contends without Simpson’s testimony, he likely would have been acquitted. In support of his Motion, Swayze argues the preliminary polygraph test answers given by Kevin Johnson regarding Simpson prove Simpson was lying. Specifically, the questions Johnson answered during his polygraph examination relevant to this case are:

- (1) Did Swayze ask you to provide any type of false testimony about this incident? Answer: No, sir.
- (2) Did you see Larry Simpson reading Swayze’s mail? Answer: Yes, sir.
- (3) Since you have been cooperating with the Feds, have you lied to them about anything? Answer: No, sir.

Sergeant Choate of the Cedar Rapids Police Department, the officer who administered the polygraph examination, testified at the hearing he has given 200 polygraph examinations in the last five years. Sergeant Choate opined Johnson answered the three questions truthfully.

Swayze claims he does not want the polygraph results admitted in a new proceeding. Instead, he argues Simpson should not be allowed to testify if Swayze receives a new trial. Swayze infers the only reason Simpson knew about Swayze’s case was from reading Swayze’s legal mail. Swayze argues without Simpson’s testimony, there will not be enough evidence to convict him. In response to Swayze’s arguments, the government asserts that it presented ample evidence at trial from which the jury could have found, beyond a reasonable doubt, Swayze was guilty of possessing with the intent to distribute crack

cocaine and cocaine. It argues even if Simpson did lie, Simpson's testimony was merely cumulative and impeaching. The government further argues that the interests of justice do not require that a new trial be granted in this case.

The Court finds no proof Simpson lied during his testimony. The polygraph questions presented to Johnson regarding Swayze's case were part of a pretest on the polygraph designed to gauge a person's responses before asking the intended polygraph questions. There is no proof one way or the other Johnson was truthful in the pretest because there was nothing by which to gauge the truthfulness of his answers. Furthermore, the reliability of polygraph evidence has long been considered suspect and polygraph results are inadmissible in the courts of the Eighth Circuit. See *United States v. Iron Cloud*, 171 F.3d 587, 591 (8th Cir. 1999) ("The mere fact that a test has been used for along time does not make it reliable. The same argument could be made for polygraph tests, which clearly are not admissible in this circuit."); *United States v. Williams*, 95 F.3d 723, 728-730 (8th Cir.1996) (affirming denial of admission of polygraph into evidence).

Nor does the mere fact Johnson and Simpson testified differently mean Simpson lied. The time frames to which Johnson and Simpson testified differ. Johnson testified he was housed in a cellblock with Swayze and Simpson during October 2002. He testified during that month, on some unknown date, he observed Simpson reading Swayze's legal mail while Swayze was in the shower. Johnson further testified he moved out of the cellblock in November 2002. Simpson testified Swayze discussed his case with Simpson on November 18, 2002. He remembered the date because he had an appointment to meet with his newly-appointed counsel. Johnson may have moved out of the cellblock prior to the time Simpson and Swayze discussed Swayze's case. This suggestion is bolstered by the fact Harris testified Swayze had discussed Swayze's case with Simpson and Harris in December 2002 when Harris was housed in the cellblock with them.

Assuming, *arguendo*, Simpson did lie at trial, the Court finds the jury had the opportunity to weigh Simpson's testimony against the cross-examination by defense counsel

regarding his truthfulness and against Johnson's and Harris's impeaching testimony to determine whether Simpson's testimony was truthful. Evidence of Johnson's pretest polygraph answer that Simpson was lying is merely cumulative impeachment evidence to the evidence presented at trial.

### **III. CONCLUSION**

The evidence presented at trial does not preponderate against the verdict to a sufficient degree that the Court concludes a miscarriage of justice occurred.

**IT IS THEREFORE ORDERED** Defendant's Motion for a New Trial (docket no. 87) is DENIED.

**DATED** this 18th day of November, 2003.

  
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LINDA R. READE  
JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA