

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-006471-001 DT

03/18/2009

HONORABLE ROBERT L. GOTTSFIELD

CLERK OF THE COURT
C. Hernden
Deputy

STATE OF ARIZONA

PATRICK W ZINICOLA

v.

GEORGE IKNADOSIAN (001)

THOMAS M BAKER

VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

10:30 a.m.

State's Attorney:	Patrick Zinicola
Defendant's Attorney:	Thomas Baker
Defendant:	Present
Court Reporter:	Kim McAndrews

This is the time set for hearing on defense motion for reconsideration, a Rule 20 motion and the reurging of the defense motion to sever.

Argument is presented.

The Court has determined that a transcript of the proceedings is a reasonable and necessary expense for the operation of the Court. The cost of the transcript will be paid for by the Maricopa County Superior Court.

IT IS ORDERED taking the defense motion to reconsider, defense Rule 20 motion and defense renewed motion to sever under advisement.

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11:40 a.m. Court stands at recess.

11:45 a.m. Court reconvenes with respective counsel and defendant's presence is waived.

Court Reporter, Kim McAndrews, is present.

Court and counsel discuss case issues.

11:48 a.m. Matter concludes.

LATER...

After further consideration the court now grants the Rule 20 motion of the defense basically for reasons as argued by the defense.

The state's case is based upon testimony of individuals who falsified question 11a on ATF Form 4473, i.e. that they were the actual purchaser of the firearms when they were not. The court agrees with the defense that for such falsity to amount to a fraudulent scheme or artifice (all 21 counts are admittedly dependant on an alleged violation of state statute A.R.S. § 13-2310, fraudulent schemes and artifices) the falsification has to be a material misrepresentation. In order to be material, the falsification has to have resulted in an unlawful or prohibited person obtaining the weapons rather than the misrepresenting signatory answering question 11a. [18 U.S.C. § 922(a)(6) and (d)(1-9) as well as 27 C.F.R. § 478.99 (c)(1-9)].

There is no proof whatsoever that any prohibited possessor ended up with the firearms. To be sure the state produced witnesses who were claimed to be "straw" purchasers. But, as noted by the Ninth Circuit [United States v. Moore, 109 F.3d 1456 (9th Cir. 1997), cert. denied, 522 U.S. 836)] the straw man doctrine means that a person violates 18 U.S.C. § 922 (a)(6) (the statute passed by Congress noted above) "by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables the ineligible principal to obtain a firearm." There was no testimony in this case that lawful purchasers bought for an unlawful one. See also United States v. Polk, 118 F.3d 286 (5th Cir. 1997), cert. denied, 522 U.S. 988, also cited by the defense, which is in agreement with the reasoning of Moore and holding that a prosecution under 18 U.S.C. 922 (a)(6) fails where there is no evidence that the true purchaser could not lawfully purchase a firearm directly. The purpose of the above statute is thus to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, incompetency or any other reason listed in 18 U.S.C. § 922 (a)(6) and (d) 1-9 as well as 27 C.F.R. § 478.99 (c)(1-9).

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The state's argument that this is not a prosecution under a federal statute but a state prosecution under A.R.S. § 13-2310, fraudulent schemes and artifices, and so a different rule applies, while at first blush appealing, is unavailing in the court's view. As argued by the defense, the fraudulent schemes and artifice, the falsity of question 11(a), has to be material and it is not material unless it has resulted in an unlawful person ending up with the guns, which has not been proven.

The state's argument that the instant fraudulent scheme and artifice prosecution is really based on 18 U.S.C. § 924 (a)(1)(A), which only requires a showing of a false statement and not the additional evidence that an unlawful person ended up with the guns, as required under 18 U.S.C. § 922 (a)(6), is rejected by the court. The state can not point to one case, federal or state, on which this court can rely, which permits a conviction based solely on a false statement being made on A.T.F. Form 4473, section 11(a) under the circumstances here presented.

To be sure a dealer can undoubtedly be prosecuted for knowingly permitting a false statement on A.T.F. Form 4473. Thus under 18, U.S.C. 924 (a)(3) the dealer who makes a false representation with respect to the records he is mandated to keep by law can be prosecuted for a misdemeanor. That is not the present prosecution.

The court also adds that contrary to the testimony by the ATF Compliance Investigator at the trial there was no evidence that any real purchaser was a fugitive from justice, which if true would be evidence that a prohibited possessor actually received the guns. Pursuant to 27 C.F.R. § 478.11 a fugitive from justice is defined as someone who has fled a state to avoid prosecution or leaves a state to avoid testifying in a criminal proceeding and there has been no testimony of the same in this trial.

It is further Ordered denying defendant's renewed motion to sever and defendant's motion to reconsider the court's prior ruling with respect to the admission of statements made in Counts 18-21 in the trial of Counts 1-17, for reasons as previously stated by the court.

The state is requested to contact the division clerk to make arrangements to pick up the weapons.