Duerson

APPENDIX

A - E

NOT RECOMMENDED FOR PUBLICATION

No. 22-6051

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
RICHARD C. DUERSON,	)	KENTUCKY
	)	
Defendant-Appellant.	)	

ORDER

Before: BATCHELDER, GIBBONS, and MURPHY, Circuit Judges.

Richard C. Duerson, proceeding pro se, appeals the district court's denial of his motion for a new trial, filed pursuant to Federal Rule of Criminal Procedure 33. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because the district court did not abuse its discretion in denying Duerson's motion, we affirm.

On the evening of March 2, 2019, police officers in Richmond, Kentucky, executed a search warrant for Duerson's apartment and recovered approximately 73 grams of methamphetamine, 23 grams of cocaine, bottles of inositol (a cutting agent), $10,470 in cash, and several firearms. *United States v. McFarland*, Nos. 20-5310/5587, 2021 WL 7367157, at *1 (6th Cir. Oct. 4, 2021), *cert. denied*, 142 S. Ct. 1459 (2022). The officers also found 661 suspected ecstasy pills in the shape of the "Superman" shield and imprinted with the Superman "S" that were later proven to contain 204 grams of methamphetamine. *Id.*

While confined in the county jail and awaiting trial, Duerson made several recorded telephone calls to his co-defendant, Jennifer McFarland. *Id.* In one of the calls, Duerson asked

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McFarland to retrieve some of his personal belongings from his apartment because he was being evicted by his landlord. *Id.* During this conversation, Duerson mentioned either a "gray safe" or a "gray vase." *Id.* at *1, *5.

Officer Daniel Toth, the lead investigator, listened to the calls between Duerson and McFarland and eventually obtained a warrant to search McFarland's apartment. *Id.* at *1. During the search, officers recovered 701 grams of cocaine, 315 grams of methamphetamine, 95 of the same "Superman" pills that were found in Duerson's apartment, Dormin sleeping tablets (another cutting agent), cash, firearms, ammunition, and many of Duerson's possessions, including his wallet, keys, and mail. *Id.* Many of these items were in a gray safe found in McFarland's closet. *Id.*

A federal grand jury indicted McFarland and Duerson for conspiring to distribute methamphetamine and cocaine and on individual counts of possessing with intent to distribute methamphetamine and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. An additional charge against Duerson for possessing with intent to distribute fentanyl was later dismissed on the government's motion. After a joint jury trial, McFarland and Duerson were convicted on all counts. The court sentenced Duerson to a total term of 200 months' imprisonment and 10 years of supervised release.

In his unsuccessful appeal, Duerson asserted that there was insufficient evidence to support the conspiracy conviction, arguing, among other things, that the recorded jail call did not prove a conspiracy because he and McFarland discussed a gray "vase" during the call, not a gray "safe." We rejected this claim, finding that the evidence "was sufficient, at a minimum, for the jury to find that McFarland and Duerson had a tacit agreement that she would store drugs in her apartment for him." *McFarland*, 2021 WL 7367157, at *5. With respect to Duerson's "vase" versus "safe" argument, we noted, "The jury listened to the tapes of Duerson and McFarland's telephone conversations and was in the best position to determine whether they discussed a safe or whether, as Duerson contends, they discussed a vase." *Id.* We also explained that, aside from the jail call, there was other evidence in the record that supported the conspiracy conviction, including the

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presence of the same "Superman" pills in both apartments, which served as a "fingerprint" connecting the two residences, and the amounts of drugs recovered from both apartments, which were consistent with distribution quantities. *Id.*

In September 2022, nearly three years after the jury's verdict, Duerson filed a Rule 33 motion for a new trial based on new evidence: transcripts of the "unintelligible" recording of the jail call between him and McFarland that he obtained from four different transcription companies. He argued that the transcripts prove that he never discussed a "safe" with McFarland and never instructed her to remove a "safe" from his apartment. The district court denied Duerson's motion. The court explained that the transcripts did not constitute new evidence because Duerson knew about the conflicting interpretations of the recording before, during, and after trial and failed to explain why he could not obtain the transcripts during trial. The court further explained that the transcripts were cumulative and that, if they had been admitted at trial, they would not have resulted in his acquittal of the conspiracy charge. Duerson filed a motion for reconsideration, which the district court denied. *See* Fed. R. Civ. P. 59(e). Duerson now appeals and generally reiterates the arguments raised in his Rule 33 motion.

We review a district court's denial of a Rule 33 motion for new trial under an abuse-of-discretion standard. *United States v. Iossifov*, 45 F.4th 899, 920 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 812 (2023). A district court abuses its discretion "when it relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law." *United States v. White*, 492 F.3d 380, 408 (6th Cir. 2007).

A district court may, upon the defendant's motion, "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). To prevail on a Rule 33 motion based on newly discovered evidence, a defendant must show that "(1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce acquittal." *United States v. Carson*, 560 F.3d 566, 585 (6th Cir. 2009) (quoting *United States v. Seago*, 930 F.2d 482, 488 (6th Cir. 1991)). "Motions for a new

trial based upon newly discovered evidence are disfavored and should be granted with caution." *United States v. Turns*, 198 F.3d 584, 586 (6th Cir. 2000).

The district court did not abuse its discretion in denying Duerson's motion because Duerson meets none of the relevant requirements. First, the transcripts cannot be considered new evidence. "A defendant's 'prior knowledge of the potential existence of' exculpatory evidence forecloses his ability to present the evidence as 'new' after trial." *United States v. Allen*, No. 18-5315, 2018 WL 7893666, at *2 (6th Cir. Nov. 14, 2018) (quoting *United States v. Jenkins*, 726 F. App'x 452, 457-58 (6th Cir. 2018)). Here, Duerson was aware of the conflicting interpretations of the recording at trial. In fact, his attorney cross-examined government witnesses about the ambiguity in the recording and noted the recording's lack of clarity during her closing argument. To the extent that Duerson argues that the transcriptionists are new "witnesses" who were unknown to him at the time of trial, their testimony amounts to nothing more than a reinterpretation of evidence that was available at trial and therefore cannot be considered "new" under Rule 33. *See Barrow v. United States*, No. 96-1687, 1997 WL 31427, at *2 (6th Cir. Jan. 27, 2007) (rejecting defendant's attempt in a Rule 33 motion "to relitigate his case under a new theory by hiring a new lawyer and a new expert to reinterpret the legal significance of evidence that was either presented or available at trial").

Second, as the district court noted, Duerson did not adequately explain why he could not have obtained these transcripts during trial. He asserted that he "tried diligently to have the pre-trial issues with the recording resolved prior to trial, but he was dismissed" by his attorney, who purportedly advised him, "No one will believe you said safe." But all this shows is that he and his attorney disagreed over how to handle the recording at trial.[1] It does not show an inability to obtain the transcripts and cannot excuse his own lack of diligence.

[1] Duerson suggests that his attorney was ineffective for not obtaining a transcription of the recorded call for trial. As the district court noted, claims of ineffective assistance are more properly raised under 28 U.S.C. § 2255. And in fact, Duerson raised such a claim in his § 2255 motion. The district court denied the motion, however, and this court denied him a certificate of appealability. *Duerson v. United States*, No. 23-5219 (6th Cir. Aug. 11, 2023).

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Third, the transcripts are cumulative because they merely attempt to prove the argument that Duerson made at trial. And fourth, Duerson failed to show how the transcripts would result in his acquittal on the conspiracy count. Even if the transcripts could be admitted, it is not likely that this evidence would have led to Duerson's acquittal. As we explained on direct appeal, there was other evidence in the record apart from the jail recording that established the conspiracy.

The district court did not abuse its discretion when it denied Duerson's motion for a new trial. We **AFFIRM** the district court's order.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

UNITED STATES OF AMERICA,

Plaintiff,

V.

RICHARD C. DUERSON,

Defendant.

Criminal Action No. 5: 19-130-DCR

MEMORANDUM OPINION AND ORDER

*** *** *** ***

Following a three-day jury trial in November 2019, Defendant Richard Duerson was convicted of one count of conspiring to distribute methamphetamine and cocaine in violation of Title 21 § 846, and two counts of possession with intent to distribute methamphetamine and cocaine in violation of Title 21 § 841(a)(1)(B). [Record No. 48] He was later sentenced to 200 months of imprisonment. His conviction was affirmed on appeal. [Record No. 101]; *United States v. McFarland*, No. 20-5310, 2021 WL 7367157 (6th Cir. Oct. 4, 2021).

Duerson recently filed a motion requesting a new trial pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure. [Record No. 163] In support, Duerson claims that he recently obtained transcripts showing an alternative interpretation of a recorded phone call that was played during trial. [Record No. 163] More specifically, he argues that, during trial, Officer Scott McIntosh testified that he believed Duerson told co-Defendant Jennifer McFarland to check a "safe" for his car keys, but the newly-generated, third-party transcripts show that Duerson directed McFarland to look for the keys in a "vase." [*Id.* at pp. 2-3; Record No. 95, p. 142] He contends that a new trial is warranted because the transcripts indicating

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that he said "vase" are "in direct conflict with" the government's evidence. [Record No. 163, pp. 2-3]

Under Rule 33, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "[I]t is widely agreed that Rule 33's 'interest of justice' standard allows the grant of a new trial where substantial legal error has occurred." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010). For a motion for a new trial based on "newly discovered evidence," the defendant must "file the motion within three years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). Additionally, the defendant must show that the new evidence "(1) was discovered after the trial, (2) could not have been discovered earlier with due diligence, (3) is material and not merely cumulative or impeaching, and (4) would likely produce an acquittal." *United States v. Hanna*, 661 F.3d 271, 297 (6th Cir. 2011). "Motions for a new trial based upon newly discovered evidence are disfavored and should be granted with caution." *United States v. Turns*, 198 F.3d 584, 586 (6th Cir. 2000) (citation omitted). While Duerson's motion is not time-barred under Rule 33(b), it fails to satisfy any of the Rule's substantive requirements.

Duerson cannot show that his "newly discovered" evidence is, in fact, new. For evidence to be newly discovered, the defendant must show that he did not know about the evidence before or during his trial. In *United States v. Glover*, the defendant claimed that testimony from a witness who had refused to testify during the defendant's trial but later changed his mind was "newly discovered" evidence under Rule 33. 21 F.3d 133, 138 (6th Cir. 1994). The Sixth Circuit Court of Appeals disagreed, finding that the testimony was not "newly discovered" because the defendant knew about the testimony during his trial, even if the witness's refusal to testify made the testimony unavailable at that time. *Id.*; *see also United*

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States v. Turns, 198 F.3d 584, 588 (6th Cir. 2000) ("The key to deciding whether evidence is 'newly discovered' or only 'newly available' is to ascertain when the defendant found out about the information at issue."); *United States v. Pierce*, 62 F.3d 818, 825 (6th Cir. 1995) ("Evidence is not newly discovered when it is necessarily known by the defendant at the time of trial.").

Duerson was aware of the purported alternative interpretations of the phone recording at each phase of his trial. And his attorney raised the issue throughout trial and on appeal. [Record Nos. 94, pp. 106-07, 95, p. 142, and 124, p. 5]; *see also* Brief for Defendant-Appellant, *United States v. Duerson*, 2020 WL 7249161, at *16-17, 32-33, 41 (6th Cir. Nov. 30, 2020). Duerson acknowledges that he also knew of the disputed interpretations of the recording before trial, as he states in his motion that he attempted to have "the issue with the recording resolved prior to trial." [Record No. 163, p. 2] Duerson knew that the recording might be subject to conflicting interpretations before, during, and after his trial; therefore, he cannot now claim that the transcripts of that same recording constitute new evidence.

Duerson also fails to explain why he was unable to obtain the transcripts during his trial. A defendant moving for a new trial based on newly discovered evidence must account for his delay in discovering that evidence. *See Baumann v. United States*, 692 F.2d 565, 580 (9th Cir. 1982) (finding that testimony was not "newly discovered" when the "underlying facts relevant to [the defendant's] present allegations of [the evidence] were within his knowledge at the time of trial and could have been substantiated with the exercise of reasonable diligence"). Duerson asserts that he was "dismissed" by his attorney when he attempted to discuss his concerns about the recording with her, but that contention is undercut by trial records showing that his attorney addressed the purported ambiguity at trial when cross-

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examining the government's witness. [Record Nos. 94, pp. 106-07, 95, p. 142, 163, p. 2] While Duerson may have wished that his attorney introduced alternate transcripts of the recording instead of questioning the recording's accuracy during cross-examination, he has not shown that this strategy amounts to an inability to obtain the transcripts under Rule 33.

Additionally, the transcripts do not make Duerson eligible for relief under Rule 33 because they merely summarize arguments that Duerson already made at trial. *See Hanna*, 661 F.3d at 297. Duerson's attorney challenged the government's interpretation of the phone recording when examining Officer McIntosh and noted the ambiguity in her closing statement. Thus, the transcripts are merely an alternative strategy for making the same argument already made. The transcripts providing an alternative interpretation are merely cumulative and do not warrant relief.

Finally, Duerson has not shown that the transcripts would result in his acquittal. As the government correctly notes, the phone call at issue occurred after officers discovered the drugs supporting Duerson's possession with intent to distribute charges and, therefore, is unrelated to those charges. [Record No. 164, p. 7] While the phone call supports Duerson's conspiracy conviction (Count 1), the transcripts of that call would likely not have been admitted at trial or, at the very least, the disputed portions of the transcript would have been redacted. *See United States v. Robinson*, 707 F.2d 872, 879 (6th Cir. 1983) ("Where . . . there are inaudible portions of the tape, the court should direct the deletion of the unreliable portion of the transcript."); *United States v. Vinson*, 606 F.2d 149, 155 (6th Cir. 1979) ("[I]t is the preferred practice that transcripts of tapes not be submitted to the jury unless there is a stipulation as to their accuracy."). Because the disputed portions of the transcript would be inadmissible, they would have little to no bearing on the jury's decision with respect to the conspiracy charge.

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Finally, even if the transcript were admissible, the "vase"/"safe" distinction is not essential to Duerson's conspiracy conviction. Duerson' attorney stated in her closing argument that it was insignificant whether Duerson said "vase" or "safe" in the phone call. [Record No. 124, p. 5 ("I suppose reasonable people can differ on what was said, a safe or a vase . . . But honestly, that distinction doesn't even make a difference . . . .")]. And, as the Sixth Circuit noted, Duerson's statements in the phone call are not the only evidence of his conspiracy with McFarland. *See United States v. McFarland*, 2021 WL 7367157, at *5 (finding that "unique 'Superman' methamphetamine pills" found in both defendants' apartments and "amounts of drugs recovered from both apartments [that] were consistent with distribution quantities" supported Duerson's conspiracy conviction). To the extent the transcripts would change the jury's interpretation of Duerson's statement in the phone call, that change alone would not lead to a reversal of Duerson's conviction.

Based on the foregoing, it is hereby

ORDERED that the defendant's motion for a new trial [Record No. 163] is **DENIED**.

Dated: October 5, 2022.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

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No. 22-6051

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 12, 2023
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD C. DUERSON,

Defendant-Appellant.

ORDER

BEFORE: BATCHELDER, GIBBONS, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action No. 5: 19-130-DCR
	)	
V.	)	
	)	
RICHARD C. DUERSON,	)	**ORDER**
	)	
Defendant.	)	

*** *** *** ***

Defendant Richard Duerson was convicted in November 2019 of one count of conspiring to distribute methamphetamine and cocaine in violation of Title 21 § 846, and two counts of possessing with intent to distribute methamphetamine and cocaine in violation of Title 21 § 841(a)(1)(B). [Record No. 48] Duerson was sentenced to 200 months of imprisonment and his conviction was affirmed on appeal. [Record No. 101]; *United States v. McFarland*, No. 20-5310, 2021 WL 7367157 (6th Cir. Oct. 4, 2021).

Duerson previously filed a motion requesting a new trial pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure, claiming that he had obtained transcripts of a phone call recording that conflicted with the evidence the government presented at his trial. [Record No. 163] Duerson's motion was denied because it failed to satisfy Rule 33's substantive requirements. [Record No. 165] More specifically, Duerson did not show that the transcripts he obtained constitute "newly-discovered" evidence under Rule 33, that they are "material and not merely cumulative," or that they would lead to Duerson's acquittal if considered. [*Id.* at pp. 2-5 (citing *United States v. Hanna*, 661 F.3d 271, 297 (6th Cir. 2011))].

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Following this earlier ruling, Duerson filed a motion for reconsideration. [Record No. 170] He argues that the Court misunderstood the significance of the transcripts that he claims provide grounds for a new trial. Duerson explains that the key distinction between the government's testimony at trial regarding the call and the transcripts of the call is not whether he said "vase" or "safe," but whether he instructed his co-conspirator, Jennifer McFarland, to retrieve something from his residence. [*See id.* at p. 2 ("[A] new trial is warranted because the calls did not reflect a safe being "picked up.").] He also claims that he was prevented from obtaining the transcripts sooner because he was unable to meet with his attorney to review the phone recording and because prison restrictions prevented him from seeking transcripts of the call. [*Id.*] Finally, Duerson argues that evidence of the phone call served as the basis of his conspiracy charge, such that transcripts discrediting the government's testimony regarding the call would likely lead to his acquittal. [*Id.* at pp. 5-6]

While the Federal Rules of Civil Procedure do not apply directly to criminal cases, motions to reconsider "are permitted in criminal cases as ordinary elements of federal practice." *United States v. Banks*, No. 21-5382, 2021 U.S. App. LEXIS 26751, at *4 (6th Cir. Sept. 2, 2021) (citation omitted). District courts review motions to reconsider under the same standard as motions to alter or amend under Rule 59(e) of the Federal Rules of Civil Procedure. *See Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982)). Rule 59(e) allows the Court to alter or amend its previous decision based on "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Brumley v. United Parcel Serv., Inc.*, 909 F.3d 834, 841 (6th Cir. 2018).

Duerson does not raise any arguments that were not already addressed in the order denying his request for a new trial, nor does he provide any change in law or facts that would

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justify reconsideration. To be granted a new trial under Rule 33(a) on the basis of newly discovered evidence, a defendant must show that the evidence "(1) was discovered after the trial, (2) could not have been discovered earlier with due diligence, (3) is material and not merely cumulative or impeaching, and (4) would likely produce an acquittal." *United States v. Hanna*, 661 F.3d at 297. Duerson's claims in his motion for reconsideration do not affect the inquiry under any step of this analysis.

Duerson's claim that the Court's previous order misunderstood the significance of the transcripts is irrelevant. Whether Duerson told McFarland to retrieve a vase or a safe in his phone call, or whether he told her to retrieve anything at all, the fact remains that the transcripts fail to meet any of *Hanna*'s four prongs. Assuming that the transcripts somehow undermine the government's interpretation of the evidence at his trial, Duerson still has not provided any new information addressing why the transcripts constitute newly obtained evidence or how considering the transcripts would lead to his acquittal.

Duerson's claim that he was prevented from obtaining the transcripts sooner does not cast doubt on the Court's finding that the transcripts are not "newly discovered evidence" under Rule 33. Duerson admits that he knew about the phone call before and during his trial. [Record No. 170, p. 2] And for Rule 33's purposes, "[t]he key to deciding whether evidence is 'newly discovered' . . . is to ascertain when the defendant found out about the information at issue," not when the defendant possessed hard copies of the evidence or reviewed the evidence with counsel. *United States v. Glover*, 21 F.3d 133, 138 (6th Cir. 1994). To the extent Duerson alleges that he was unable to discuss the recordings with his attorney because she failed to meet with him, such a claim is better addressed in his petition for habeas relief alleging ineffective assistance of counsel. [*See* Record No. 167.]

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Finally, the defendant's assertion that the transcripts would lead to his acquittal lacks merit. As explained previously, the disputed portions of the transcript that Duerson focuses on in his motion for reconsideration would likely not be admissible at trial. [*See* Record No. 165, p. 4.] And even if the transcripts were admissible, that evidence would not likely lead to Duerson's acquittal. [*Id.* at p. 5] Indeed, the Sixth Circuit recognized that the government presented sufficient evidence to convict Duerson of conspiring to distribute controlled substances without considering the evidence of Duerson's phone call with McFarland. *See United States v. McFarland*, No. 20-5310, 2021 WL 7367157, at *5 (6th Cir. Oct. 4, 2021). His conclusory statements that the government "would have no basis" to charge him with conspiracy without the phone recording do not justify reconsidering his request for a new trial. [Record No. 170, p. 5]

Based on the foregoing, it is hereby

ORDERED that the defendant's motion for reconsideration [Record No. 170] is **DENIED**.

Dated: November 4, 2022.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

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