LEGAL PUBLICATIONS IN SPANISH

TO THE POINT

PRINT EDITION 60

Sufficiency of Evidence to Support Finding a Defendant Had Actual Knowledge of Destination

By David Zapp, Esq.

May 29, 2013

Narcotics importation laws require that the defendant have actual knowledge or intent that the drugs would be imported to the United States. Proof of the requisite intent or knowledge can be shown through direct and/or circumstantial evidence. When finding the defendant lacked actual knowledge of the destination of the drugs, courts have particularly focused on the defendant's limited role in the conspiracy.

Discussion

The Role of the Defendant

When the defendant plays a minor role, the evidence may not support a finding of actual knowledge even if it is shown the actual destination of the drugs was the United States, and even if the defendant knew he was involved in transporting drugs *somewhere*. U.S. v. Londono-Villa. In Londono-Villa, the defendant acted only as a guide for an informant-pilot. The evidence was insufficient to support a finding that he knew the drugs were bound for the U.S., even though a) he knew he was assisting in the transport of drugs, b) evidence showed that the drugs were in fact bound for the United States, and c) an expert testified that Panama is sometimes used as a transshipment point when drugs are ultimately intended for the United States. In another case, the defendant acted only as a courier between Holland and Germany. Absent additional evidence, the minor role of the defendant suggested that he lacked actual knowledge of the destination of the drugs. See U.S. v. Manuel.

While serving a very minor role in a conspiracy can help a defendant with this issue, serving a supervisory role can hurt a defendant In United States v. Martinez, the court focused on the defendant's supervisory role in an international drug conspiracy that he knew often exported drugs to the U.S. In U.S. v. Vega, the court said that the defendant, who served an integral role in the conspiracy, was unlikely to lack knowledge of the ultimate destination of the drugs. But in all those cases there is always other evidence pointing to knowledge.

In Vega, the defendant was associated with the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), a guerilla organization turned into a major international cocaine trafficking organization. But there was testimony that it was normal to hear members talking about the destination of the drugs being the United States, which was relevant in finding that the defendant had knowledge of the destination. In Cabrera, the defendant was a FARC associate who supervised a laboratory. There, too evidence was presented that the destination of the drugs was a common topic of conversation in the laboratory. That evidence, coupled with testimony from a high-level member who spoke of this as FARC policy, helped support the inference that the defendant had knowledge of the destination.

While it is common to use expert testimony regarding drug routes to support a finding that the defendant had knowledge of the destination of the drugs, no reported case has relied exclusively on such testimony and rightly so. What an expert knows cannot be imputed to a defendant. In one case the court did not even allow expert testimony finding it irrelevant. The government had to prove the defendant knew with direct or circumstantial evidence. In some cases, courts have noted that the defendant was carrying U.S. currency or had handled U.S. currency in the course of the conspiracy so be aware of that.

What all this shows is that courts and juries are looking for ways to find sufficient evidence to show knowledge and not give the defendant the benefit of the doubt. For example, in one case, Martinez, the defendant was personally involved with unloading and reloading bricks of cocaine some of which were marked with an eagle. The court reasoned that this was evidence that the cocaine was bound for the U.S. C'mon!

Whenever a defendant claims lack of knowledge, the government will try to show that the defendant may have remained ignorant deliberately, "consciously avoiding" knowing where the drugs were going. Knowledge, however, may be established under such a theory, according to one court though no cases have been reported. "Conscious avoidance" instructions are very common when the defendant denies knowledge that he was in possession of narcotics. For example, if a defendant is paid a thousand dollars to take a suitcase from one place to another place less than a mile away, he certainly would wonder why someone would pay him that kind of money to do so. He would think it must have to do with what is in

the suitcase, so to escape "knowing" and play the innocent, he would not attempt to find out. "Conscious avoidance" is how the government gets around that strategy. But it is not so clear that a person who knows that drugs are in the suitcase would "consciously avoid" knowing where it is going. In fact, 99 per cent of all drug traffickers outside the U.S. would not even think they were committing a crime against the U.S., and I am including even major players. They are drug dealers not lawyers.

In sum, courts and juries are disposed to find knowledge where they can and resistant to giving defendants, who admit being involved, the customary and legally required "benefit of the doubt." On the other hand, cases clearly show that if all the government can establish is that you are a peripheral figure where you would not be expected to know where the drugs were going you could prevail at trial.

Criminal Process - Part 2

By David Zapp, Esq.

If a defendant chooses to plead guilty before trial he can do so without benefit of a plea agreement with the prosecutor or with such a plea agreement. In most cases in New York and near as I can tell in Florida, the prosecutors give you "ice in winter."---nothing. They give you what you could have gotten if you had pled guilty to all the charges in the indictment. In a narcotics case for example a plea agreement is based on the quantity and type of drug, the role, and pleading guilty in a timely manner, with some aggravating or mitigating factors thrown in. But the trouble is that a plea agreement usually calls for the defendant to agree that if the judge gives you a guideline sentence you agree to it and promise not to appeal.

But if you plead to the indictment, you are in a position to challenge quantity, role, and even type of drug. Everything is open to challenge and you have a right to appeal. The prosecutors would argue that if you plead to the indictment you would have to plead to every charge and there could be fifteen charges each with its own penalty, but what the prosecutors do not tell you is that under guideline law, the charges are grouped together if they relate to the same conspiracy and the sentence would not change. I actually have never seen a plea to the indictment where a defendant received more time than if he had pled pursuant to a plea agreement.

Now if in a plea agreement you can get a concession from the government that you played a minor role and deserve a reduction, that is an altogether different situation. Nothing like a prosecutor's blessing. First of all conceding role reduction telegraphs to the judge that he pretty much can do what he wishes. If you plead to the charges in the indictment, however, rejecting a plea agreement you can be sure the prosecutors will make no concessions. But if you believe in your position, go for it, and this is especially true if the prosecutor is giving you nothing. I find that judges who are generally older than prosecutors and with more experience tend to be more charitable and more understanding of life's foibles.

So to plea to the indictment or plea pursuant to a plea agreement, that is the question. But now you know what to look for and what not to be scared of.

Patience is a Virtue

By Johanna S. Zapp, Esq.

You've been arrested, perhaps you've been extradited, and now what? You have a lawyer who tells you that the next step is that you'll be getting your "discovery" (another word for evidence) from the prosecutor. But when will you get your discovery? Over these past few years I've learned that you need to be patient. Often your patience pays off. If you are too aggressive, meaning you are pushing, pushing for your discovery- it can backfire in the long run. You don't want to anger the person who you may need something from down the road. Don't get me wrong, if something untoward or unfair is going on, you must speak up and address the issue. But understanding that these prosecutors are over worked and understaffed is a big part of why there may be a delay. It has nothing to do with your case on a personal level. I've had experiences where I made the conscious decision to leave the prosecutor alone, let him be, and it paid off in spades. A client of mine received everything I asked for in his plea agreement and there was an email from the prosecutor that said "thank you for your patience." That was a tremendous learning experience for me and because of that, I tell my clients to be patient. Patience (within reason) should serve you well when it's time for sentencing.

David Zapp and Johanna Zapp articles are available on the web at http://davidzapp.com

Mr. Zapp and Ms. Zapp (daughter) are criminal defense lawyers specializing in narcotics, extradition and money laundering cases.

Mr. Zapp can be contacted at 917-414-4651 or davidzapp@aol.com.

Ms. Zapp can be contacted at 917-742-4953 or jszapp@aol.com

Write to us:
Legal Publications in Spanish
P. O. Box 5024
ATTN: David Zapp, Johanna Zapp
Montauk, NY 11954