

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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WAYNE WHITTAKER : NO. 01-107

MEMORANDUM

Dalzell, J.

December 7, 2001

Wayne Whittaker was on November 16, 2001 convicted of one count of mail fraud, in violation of 18 U.S.C. § 1341. After the jury's verdict that day, Whittaker renewed his motion under Fed. R. Crim. P. 29 for judgment of acquittal, and after argument on the point, and acknowledging that the question was very close, we nevertheless denied the motion.

Whittaker has now filed a motion for reconsideration of that denial, which has occasioned a round of formal briefing and then, pursuant to our Order of November 27, 2001, the submission of supplemental memoranda. Because the issue is one upon which reasonable minds can differ, we here canvass at some length why we adhere to our November 16 ruling.

Legal Standards

Defendants who challenge the sufficiency of a jury verdict face a high hurdle. As our Court of Appeals summarized the jurisprudence a few days ago in United States v. Sean Hart, ___ F.3d ___, No. 00-2244 (3d Cir., Nov. 29, 2001):

Our review of the sufficiency of the evidence after a conviction is "highly deferential." See United States v. Helbling, 209 F.3d 226, 238 (3d Cir. 2000), cert. denied,

531 U.S. 1100 (2001). We must determine whether the evidence submitted at trial, "when viewed in the light most favorable to the government, would allow a rational trier of fact to convict." Id.; United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987) (holding that the court must determine "whether all the pieces of evidence against the defendant, taken together, make a strong enough case to let the jury find him guilty beyond a reasonable doubt.").

Slip op. at 8.

The day before our Court of Appeals decided Hart, it also had occasion to summarize the jurisprudence of mail and wire fraud in United States v. Frank Antico, No. 00-1446 (3d Cir., Nov. 28, 2001):

To prove mail or wire fraud, the evidence must establish beyond a reasonable doubt (1) that defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails or interstate wire communications in furtherance of the scheme.

Slip. op. at 23, citing United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir. 1984).

In essence, Whittaker contends that, even viewed in a light most favorable to the Government, the evidence at his trial failed to prove beyond a reasonable doubt his "knowing and willful participation in a scheme or artifice to defraud." We therefore must examine the trial's evidence in some detail.

The Government's Case Against Whittaker

Whittaker's name came to the attention of the Government during its protracted investigation of widespread "chop-shop" operations in Philadelphia. This investigation eventually produced the cooperation of at least three criminals engaged in this unedifying business, most notably one Frank Ozga who ran such an operation through the fronts of two shops he owned, A-OK Auto Parts and Frankford Auto Salvage. Ozga's identity was brought to light through the cooperation of a young man named William Stauffer, who was on Ozga's payroll from 1994 through 1998. Stauffer regularly worked at a building Ozga had in the Kensington section of Philadelphia that the parties referred to as the "Hacienda", where the stolen cars were on a large scale "chopped", that is to say, taken apart to supply parts to buyers who ordered them in this black market.

Another worker at A-OK from 1992 through 1999 was Michael Dyke, who also testified at Whittaker's trial. Dyke was present when professional car thieves, Len DeWoolfson and his son, Len, Jr., delivered a black Jeep Cherokee. The DeWoolfson père and fils were paid a "couple hundred dollars" for this service.

While the Government never contended that Whittaker had anything to do with the sordid business of chopping or ever associated with criminals like Ozga, Stauffer or Dyke, Whittaker's black Jeep Cherokee found its way to the Hacienda by June 11, 1999, a fact that Stauffer reported to the FBI the

following Monday, June 14, 1999. Stauffer peeled the mylar identification strip off the Jeep, thereby producing indubitable evidence that this was indeed Whittaker's car.

All three of this criminal trio testified that the condition of the Jeep Cherokee was consistent with an "insurance give-up", that is, where the owner or lessor of a car affirmatively assists in the theft of the insured vehicle in order to get insurance money. The indicia of such give-ups are in essence that there is little damage to the car and keys are present in the ignition. By contrast, vehicles subject to the crude act of raw auto theft typically have broken steering columns, shattered windows and other significant damage.

By the Government's own description, Whittaker was a "little fish"¹ who became interested in the possibility of an insurance give-up when he fell behind in his lease payments on the Jeep to World Omni Financial Corporation, then of Bridgeton, Missouri. After Whittaker on June 6, 1999 contacted the Philadelphia Police Department and reported that his 1998 Jeep Cherokee had been stolen, he made a similar report to his insurer, Colonial Penn Insurance Company. In the summer of 1999, the insurer ultimately remitted \$25,664.50 to World Omni Financial, to cover all but \$3,000 of the capitalized lease balance on Whittaker's Jeep.

¹ In the Government's closing, after describing its criminal trio as "big fish", the prosecutor said, "I'll admit Wayne Whittaker is a little fish."

Besides this evidence of motive and aspects of insurance give-ups, the Government's only proof that Whittaker engaged in a scheme or artifice to defraud, within the meaning of the mail fraud statute, came out of Whittaker's own mouth. Whittaker met with two FBI agents on May 10, 2000, and was interviewed for about forty-five minutes. While there are, in the Government's case alone, no less than four versions as to what Whittaker actually said,² the most incriminating came from the trial testimony of Special Agent Jennifer Usleber, who conducted the May, 2000 interview.

According to Special Agent Usleber, about mid-way through the interview Whittaker admitted receiving an unsolicited phone call in April of 1999 from an unidentified individual who said he could help resolve Whittaker's financial problems with his car. According to the Special Agent, Whittaker admitted that he gave the caller information about the make and model of his car, and where he lived. She reported that Whittaker also disclosed a second call, a few days later, where Whittaker again spoke briefly with the unidentified caller, who claimed he would take care of Whittaker's problem by making it "disappear".

Although this most incriminating evidence refers to two conversations in April of 1999, the evidence showed that the car in fact disappeared during the weekend of June 4-6, 1999. Billy

² See our opinion denying Whittaker's motion to suppress, United States v. Whittaker, Cr. No. 01-107, 2001 WL 632916 (E.D.Pa., June 5, 2001).

Stauffer testified that he saw the Jeep Cherokee at the Hacienda on June 11, 1999, still intact.

Viewed in a light most favorable to the Government, there was therefore at least a period of five weeks -- that is, from April 30, 1999 until June 4, 1999 -- when the car was not stolen, notwithstanding the April conversations. The Government never called either Len DeWoolfson to testify, and never identified Whittaker's caller.³

The Parties' Contentions

In its brief in opposition to Whittaker's motion for reconsideration, the Government contends that:

Additionally, any reasonable juror could have concluded based upon the motive and other evidence presented, that the defendant was even more directly involved in the jeep [sic] arriving at the chop shop, than simply having the two alleged telephone conversations with a stranger.

Gov't. Mem. at 7.

As this contention constitutes the crux of the Government's argument, we ordered the parties to submit detailed

³ The Government was also inattentive to other details pertaining to the liberty of this "little fish". Although the Indictment charged that the requisite mailing took place "[o]n or about September 10, 1999," the insurer's representative testified that the check was in fact mailed on July 27, 1999. See Gov't Ex. 15. In denying Whittaker's Rule 29 motion, we held that, although not free from doubt, this discrepancy did not undermine the Indictment's legitimacy because it put Whittaker on notice that it was Colonial Penn's mailing at issue. It is also clear that Whittaker suffered no prejudice in his defense because of the Government's inexact pleading.

views on whether such a conclusion would constitute a permissible reasonable inference based on the evidence or impermissible speculation. We so directed because it is undisputed that there was no evidence of any contact between Whittaker and the stranger after April of 1999. This lack of evidence is significant because the Government never contradicted Whittaker's testimony that he parked his car on the street and that in Whittaker's neighborhood (Queen Village) he never knew from day to day where he would park his car.

In his supplemental memorandum, Whittaker argues that:

[W]hat flows here is that Mr. Whittaker at one point may have been receptive to the taking of the car during the first telephone conversation in April of 1999. During the second telephone conversation Mr. Whittaker appeared to have a change of heart, although assuming for the sake of the argument the jury did not believe there was an abandonment, we will assume for the sake of argument that Mr. Whittaker still wished the car to be taken. But, the gap in proof is that no one has proven that his car was taken by the unidentified person or his co-conspirators. The gap is because the car could have been taken by anyone in Philadelphia.

Def.'s Sup. Mem. at 3.

Conceding that Whittaker had the motive and the temptation in April of 1999 to have the car stolen, his counsel contends that:

Whatever motive Mr. Whittaker may have had about having the car taken

and whatever desires he may have had that the car be taken and whatever hopes he may have had that the scheme of the unidentified caller would succeed, there was not one iota or scintilla of evidence that the person who took the car was connected to Mr. Whittaker's phone conversations with the unidentified caller. Mr. Whittaker cannot be held responsible if an unrelated, intervening third party who had no relationship to the unidentified caller took the car.

Id. at 7. Whittaker therefore concludes "that the verdict is based on impermissible guesswork and speculation by the jury" and that "[t]he evidence of the earlier conversation does not support the contention that the car was stolen by the persons involved."

Id. at 8.

In its supplemental memorandum, the Government responds by stressing again its strong evidence of the presence of an insurance give-up and Whittaker's financially embarrassed state in the spring of 1999.⁴ See Gov't.'s Sup. Mem. at 7, 9. It even

⁴ In addition to citing the testimony about the Jeep's condition demonstrating the existence of an insurance give-up, the Government in its memoranda puts great stock in its powerful proof of Whitaker's motive to defraud his insurance company. But this undoubted evidence of financial distress at once proves too much and too little.

It proves too much because of the reality that overextending oneself is a familiar part of the American way of economic life. On the Government's theory, the millions who file consumer bankruptcies presumably all become mail fraud suspects.

History shows why motive evidence also proves too little. When Henry II spoke aloud the complaint, "Not one will deliver me from this low-born priest!", even his enemies did not think that outburst made him the author of a scheme for four knights to draw their swords and cleave Thomas à Becket's head at Vespers in Canterbury Cathedral that infamous December 29.

goes so far as to suggest that "the evidence supports the determination that Whittaker actually handed over the keys to his jeep [sic]." Id. at 2.

Analysis

As we observed during the oral argument on November 16, if Whittaker had from April 30 left his keys in the Jeep's ignition in the hope each night that his thief-tempter would make his car and his financial problems "disappear",⁵ it would involve a species of miracle for the car to survive untaken until June 4. We suspect that no one familiar with urban life in America, or just with life in downtown Philadelphia, would expect such a car to see sunrise the next day in the same place it was left the night before.

As the Government tacitly conceded in its initial brief, these realities required that for the jury to convict Whittaker, it must have concluded that he did more "than simply having the two alleged conversations with a stranger." Gov't Mem. at 7. Specifically, those realities compel an inference that Whittaker remained in contact with the thief-tempter, e.g., to let him know on June 4 where Whittaker had parked the car. Does the imagination this inference requires take the jury into the realm of impermissible speculation?

At one level, it most assuredly does. At a minimum, the jury would have to surmise that the thief-tempter had left,

⁵ Whittaker's reported euphemism.

say, a pager number so that Whittaker could contact him, or, absent such knowledge, that the caller happened to ring Whittaker on June 4. Without some contact on June 4, the thief-tempter simply could not have known where the car would be. No city dweller can tell five minutes in advance, much less five weeks in advance, where he will park his car on the downtown streets.

It is important here to note that Whittaker, who elected to testify, never disputed that he had the two conversations Special Agent Usleber reported. While, to be sure, he took sharp issue with the Special Agent's characterization of exactly what he admitted about the content of those two conversations, he never denied that they in fact took place. He did deny, on direct examination, that he had any further contact with the caller. What Whittaker in effect asks us to do here is to hold the jury to his word that he had only two conversations, and no more.

After careful reflection, we conclude that the jury was not so limited. That is to say, it being undisputed that there were two conversations, the jury was free to infer that those communications did not constitute the only contacts Whittaker ever had with the unknown caller. The jury could therefore legitimately infer that Whittaker had the kind of later conversation(s) that would be needed to carry out what the thief-tempter first proposed in April.

We recognize that we come uncomfortably close to permitting the conviction of a man exclusively on his words and

the negative inferences taken therefrom. As Judge Learned Hand put it almost half a century ago, "while a jury may be permitted to draw negative inferences from disbelieved testimony, a case cannot go to a jury solely on that basis." Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952). Accord Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512 (1984) ("Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion", citing Moore v. Chesapeake Ohio R. Co., 340 U.S. 573, 575 (1951)).

Although this is, as previously noted, a case on the razor's edge, given the "highly deferential" standard in this procedural context, cited supra, the scale of permissible inference tips in favor of the Government and against Whittaker.

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ORDER

AND NOW, this 7th day of December 2001, upon consideration of defendant's motion for reconsideration, the briefs and supplemental memoranda submitted in support and opposition thereto, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that defendant's motion is DENIED.

BY THE COURT:

Stewart Dalzell, J.