

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-2326

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
versus  
MOHAMMAD AHMAD HAMMAD,  
Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
CR H 90 0305 02

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( May 11, 1993 )

BEFORE GOLDBERG, GARWOOD, and WIENER, Circuit Judges.

PER CURIAM:\*

I. FACTS AND PROCEEDINGS

Defendant-Appellant Mohammad Ahmad Hammad and codefendants Frank Amigo and Michael Pilato were indicted on one count of conspiracy to use unauthorized access devices with intent to defraud (Count 1) and on nineteen counts of aiding and abetting the unauthorized use of access devices to obtain long distance telephone services worth more than \$1,000 (Counts 2-20). Hammad moved for a judgment of acquittal on all counts, which the court

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

granted in partSOacquitting him on Counts 9-20. The jury convicted Hammad on the remaining Counts 1-8.

Prior to sentencing, Hammad, who had been released on bond, was arrested by federal authorities and charged with failure to pay state fuel tax, thereby violating the terms of his presentencing release. He then failed to appear to show cause why his bond should not be revoked and he later failed to appear for sentencing as well. Hammad was finally arrested, and the court sentenced him to sixty months imprisonment on Count 1 and a concurrent seventy-one months on Counts 2-8. Hammad objected to the calculation of his base offense level in the presentence report (PSR) as well as to his characterization therein as a leader. Amigo and Pilato were similarly convicted on a number of counts. We affirmed their convictions in an unpublished opinion.<sup>1</sup>

The underlying enterprise for which Hammad was convicted involved a telephone scam in which Amigo and his company, Amigo Satellite, fraudulently obtained telephone service by renting apartments and establishing phone service under false names. Using the phone service thus obtained, Amigo arranged conference calls for Palestinians living on the West Bank and Gaza Strip in Israel and in other countries, apparently using illicitly obtained long distance access numbers. Eventually, Amigo would skip out on the apartment lease and the phone bill. Before the fraud was interdicted, it cost MCI and US Sprint an estimated \$5.7 million in

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<sup>1</sup> No. 91-2850, United States of America v. Frank Ahmi Amigo & Michael Pilato (Summary Calendar Aug. 6, 1992).

gross revenues.

## II

### ANALYSIS

#### A. Standard of Review

When reviewing a conviction allegedly based on insufficient evidence, we consider whether a reasonable jury could find that the evidence establishes the defendant's guilt beyond a reasonable doubt.<sup>2</sup> All evidence adduced at trial<sup>SO</sup>as well as all inferences therefrom<sup>SO</sup>are viewed in a light most favorable to the government.<sup>3</sup>

#### B. Applicable Law

To prove a conspiracy under 18 U.S.C. § 1371, the government must show: (1) an agreement between two or more persons, one of whom was the defendant; (2) to commit a crime against the United States; and (3) an overt act committed in furtherance of that agreement.<sup>4</sup> The "agreement may be inferred from concert of action among the alleged participants, and voluntary participation may be inferred from a collocation of circumstances."<sup>5</sup> A person joins in the conspiracy if he knows of the conspiracy and voluntarily becomes part of it.<sup>6</sup> Hammad does not contest his conspiracy conviction.

To convict a defendant of aiding and abetting, the government

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<sup>2</sup> United States v. Menesses, 962 F.2d 420 (5th Cir. 1992)(citations omitted).

<sup>3</sup> United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.) cert. denied, 111 S.Ct. 2064 (1991)(citations omitted).

<sup>4</sup> United States v. Thorn, 917 F.2d 170, 173 (5th Cir. 1990).

<sup>5</sup> Id.

<sup>6</sup> Id.

must prove that the defendant was: (1) associated with the criminal venture; (2) participated in it as something he wished to bring about; and (3) sought by his actions to make it succeed.<sup>7</sup> "Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction."<sup>8</sup> The government insists that the evidence supporting Hammad's uncontested conspiracy conviction also supports a conviction of aiding and abetting.<sup>9</sup> We agree.

At trial, the government produced several witnesses whose testimony linked Hammad to Amigo. Hammad challenges this evidence, summarized below, as insufficient.

1. Angel De Jesus testified that Hammad offered to pay him \$100 to rent an apartment and obtain telephone service. He testified that Hammad instructed him to use Charles Cox as a reference. The conspiracy had rented another apartment in the same building under

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<sup>7</sup> United States v. Hinojosa, 958 F.2d 624, 629 (5th Cir. 1992)(citations omitted).

<sup>8</sup> United States v. Singh, 922 F.2d 1169 (5th Cir. 1991).

<sup>9</sup> Alternatively, the government argues that the evidence must be viewed in the context of the conspiracy. Hammad does not contest his involvement in the conspiracy and he does not controvert the evidence of Amigo's illegal acquisition of phone services. As the district court instructed, a party to a conspiracy may be held responsible for a substantive offense committed by a co-conspirator in furtherance of the conspiracy, even if that party does not participate in or have any knowledge of the substantive offense. A defendant is held responsible for the acts of his co-conspirators once the government proves beyond a reasonable doubt the existence of the conspiracy, the defendant's knowing participation in the conspiracy, and the foreseeability of the co-conspirator's acts. See Pinkerton v. United States, 328 U.S. 640 (1946). Although we find sufficient evidence to support the conviction on aiding and abetting, we also find sufficient evidence to hold Hammad liable for Amigo's fraudSOa foreseeable act of the conspiracy.

Cox's name. Apparently, however, this apartment did not form the basis for any counts charged in the indictment.

2. Tina Anderson, the manager of an apartment complex whose apartments were used in the conspiracy, testified that an individual who identified himself as Charles Cox leased an apartment (the basis for Count 7) and listed "Mike Hammond" as a reference. (Hammad used Hammond as an alias). Anderson called Hammond, who had an Iranian accent.

3. Brenda Lawley, De Jesus' wife, testified that Hammad paid her \$100 to rent an apartment, (the basis for Count 8) in which De Jesus established phone service.

4. Joann Deias testified that she leased three apartments (the basis for Counts 2-6) at the request of Amigo, thereby reversing her original assertion that Hammad was involved in the leasing of these apartments.

5. Mohammed Ayham Tibi, an employee of Amigo Satellite's, testified that Amigo referred to Hammad as his "right-hand" and his "manager." Although Tibi saw Hammad in the office, he admitted that he never had contact with him and he never saw Hammad actually do any work at the office.

Hammad insists that this evidence is insufficient to prove his involvement, because there is no evidence that he rented or directed the lease of the apartments on which the indictments were based. At most, he argues, there is evidence that Hammad and De Jesus searched for suitable apartments; but there is no evidence that they actually rented the apartments. This is not so. The

evidence demonstrates that Hammad was associated with the criminal activity. In fact, a jury crediting Tibi could find that Hammad was Amigo's "right hand man." Hammad's efforts to rent the apartments, even though unsuccessful, indicate not only participation in the crime, but also an attempt to make the criminal venture succeed. Consequently, we conclude that there is sufficient evidence to support a conviction on the aiding and abetting charge.

C. Hammad's Offense Level

Hammad also challenges the district court's adoption of the conclusions and recommendations of the PSR, which calculated the damage at \$2.2 million. He insists that the PSR relied on facts that had insufficient indicia of reliability. Hammad notes that the court itself observed that the amount was difficult to verify, but that the phone companies had estimated damages in excess of \$5 million. Moreover, Hammad argues that the government presented no evidence to support the loss figure. Finally, he argues that he is responsible only for the foreseeable amount of damages, which he claims, is far below the \$2.2 million amount used by the court.

In response to Hammad's arguments, the government argues that, as the district court's determination of the amount was affirmed by a Fifth Circuit panel in Amigo's and Pilato's appeal, this panel must accept that determination under the law of the case doctrine. The government misapprehends that doctrine. It applies only to findings of fact or law made by the appellate court in a prior appeal of the same case. Although Amigo, Pilato, and Hammad were indicted and tried together, their convictions do not qualify

collectively as the same case on appeal.

Even though the law of the case doctrine does not require us to defer to the earlier panel's determination on this issue, that panel decision is persuasive. In that opinion, the panel noted that the PSR did reflect indicia of reliability. The \$2.2 million amount was less than half the estimated \$5.7 million in damages. Moreover, the probation officer responsible for the report explained that she had numerous contacts with representative of the telephone companies concerning the amount of damages. Testimony at trial demonstrated the depth of the officer's investigation. Based on these facts, the PSR appears reliable on the amount of damages.

The government also argues that the amount of damages was foreseeable to Hammad because he was Amigo's "right-hand" man. The government emphasizes that the district court expressly found that the amount of loss was reasonably foreseeable by Hammad, and insists that "the court's conclusion finds support in the record and in law." In contrast, Hammad insists that the acts, or at least the scope of the acts, were not foreseeable. Rather, he argues, the only foreseeable (and reliable) amount was the amount of the unpaid bills. Moreover, he declares that there was no evidence at trial to suggest that he was involved with the overall operations of Amigo Satellite. This statement ignores Tibi's damaging testimony as to Hammad's importance in the scheme.

#### C. Upward Adjustment for Leadership Role

Hammad also objects to the three level increase for his alleged role as a manager or supervisor of the criminal activity.

He insists that there is no evidence that he played such a role except for Tibi's testimony that Amigo referred to Hammad as his "right-hand man." This testimony, Hammad urges, is contradicted by Tibi's testimony that Hammad did no work in the office. Moreover, he argues, there is no evidence connecting him to the apartments forming the basis of Counts 2-6. Rather, the evidence demonstrates at most that he was involved with De Jesus and Lawley. Therefore, the Guideline's requirement of supervision of five or more people has not been met.

Hammad again discounts the importance of Tibi's testimony. Hammad's absence from the office does not prove that he was not a manager. If he were responsible for acquiring apartments and obtaining telephone services, he would not be expected to be present in the office except on rare occasions. As the jury credited Tibi's testimony regarding Hammad's importance in the scheme, there is sufficient, reliable evidence to support the court's sentencing Hammad as a manager or supervisor.

AFFIRMED.