IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7588
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES COX,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR-036-S-D-5)

(February 3, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Charles Cox appeals his conviction of possession of stolen mail in violation of 18 U.S.C. §§ 1708 and 3571. Finding no error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In early May 1991, the American National Bank & Trust Company of Chicago issued three trust department checks totaling $42,639.47 to three separate business entities, representing interest payments on municipal bonds. The checks were mailed to the State Street Bank & Trust at their Boston, Massachusetts, and Newark, New Jersey, offices. The original checks never reached their intended destinations but surfaced in Mississippi.

On May 13, 1991, Cox opened a commercial checking account in the name of "Craft & Company" with a $50 cash deposit at the Clay County Bank and Trust Company (the "Bank") in Westpoint, Mississippi. Later that day, he returned to the Bank and unsuccessfully attempted to withdraw some money. The next morning, a Craft & Company deposit ticket and the three aforementioned checks totaling $42,639.40 were found in the Bank's night depository. The checks bore hand-written endorsements to Charles Cox and Craft & Co. Also on that day, Cox tried to make a withdrawal from the account at a different branch office but was informed that he would have to go to the main office to complete his transaction. Sometime later the same day, Cox telephoned the Bank to ascertain the account balance and was informed that the balance was $50 and that the three checks placed into the night depository had been improperly endorsed and that he would need to go the Bank and endorse them properly.

Approximately a week later, Officer Gary Turner of the Westpoint Police Department took handwriting and fingerprint samples from Cox and forwarded them to United States postal

inspectors. Turner also interviewed Cox, who denied ever going to the Bank, opening the account, seeing any of the checks, or endorsing them. Experts testified that Cox's thumbprint appeared on one of the checks and that he probably had signed the three checks as well as the Bank signature card.

Cox testified at trial that he had lied to Turner and that he had opened the Bank account in question. Cox testified that his cousin, also named Charles Cox (hereinafter referred to as Charlie), came to Westpoint from Chicago to open a landscaping business with the defendant and their cousin, Harold Cox. Cox also testified that, on the afternoon the account was opened, he went to Charlie's house and watched Charlie endorse false names on the three checks in question. Cox then endorsed his own name and the name "Craft & Co." on the same three checks. He admitted looking at the checks before endorsing them.

When asked to explain why he initially had denied his involvement when questioned by Turner, Cox stated that Charlie was supposed to reimburse him for the $50 used to open the account and that when the branch office would not permit him to withdraw any of the money, he "figured something was wrong." He stated that at the time he was questioned by Turner, he "didn't know everything that was going on" and "start[ed] getting suspicious."

II.

At trial, after a jury instruction conference, the district court gave, inter alia, Jury Instruction 1.35, which read in part

as follows:

> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

During the jury instruction conference, Cox's counsel objected to the submission of this instruction.

Also during the initial charge, the court gave Jury Instruction G-9, which delineated the elements of the crime of possession of stolen mail. The third element listed in that charge was that "the defendant knew the item was stolen." The court also gave Jury Instruction 1.05, which cautioned the jury not to disregard or give special attention to any one particular instruction.

During its deliberations, the jury requested additional information regarding "knowingly having possession of stolen property." In response, the court resubmitted Jury Instruction 1.35, denominated as Jury Instruction C-2, which was identical to Jury Instruction 1.35 previously quoted in part. At the same time it submitted Jury Instruction C-2, the court cautioned the jury that:

> with regard to all these instructions I am sending you in response to your questions, that you must remember that you're not to single out one instruction alone as stating the law, but you must consider my instructions to you on the law as a whole in arriving at your verdict.

III.

On appeal, Cox argues that the "deliberate ignorance" charge violated his due process rights because it amounted to "judicial legislation" and "extend[ed] the scope of" the offense "beyond the legislative intent" by allowing the government to avoid its burden of proving the "knowledge" element of the offense. Cox also makes an intertwined argument that Jury Instruction 1.35 was unconstitutionally vague because the "knowledge" instruction and the "deliberate ignorance" instructions conflict. His arguments are unavailing.

The standard of review of a claim that a jury instruction was inappropriate is "`whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors to the principles of law applicable to the factual issues confronting them.'" United States v. Lara-Velasquez, 919 F.2d 946, 950 (5th Cir. 1990) (quoting United States v. Stacey, 896 F.2d 75, 77 (5th Cir. 1990)) (emphasis added in Lara-Velasquez, further citation omitted).

The "deliberate ignorance" instruction did not extend the scope of the offense. It did allow the jury to infer the "knowledge" element of the crime based upon trial evidence.

> The purpose of the deliberate ignorance instruction is to inform the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge. "[T]he instruction is nothing more than a refined circumstantial evidence instruction properly tailored to the facts of a case . . . ."

Id. at 951 (quoting United States v. Manriquez-Arbizo, 833 F.2d 244, 248 (10th Cir. 1987)).

The "deliberate ignorance" instruction was proper in this case. We apply a two-part test in deciding whether the district court erred in giving a "deliberate ignorance" instruction. Id. at 951-54. Initially, the defendant must claim a lack of guilty knowledge, and the evidence adduced at trial, viewed in a light most favorable to the government, must show that he had a subjective awareness of a high probability of the existence of the illegal conduct in question. The evidence must also show that he purposely contrived to avoid learning about the illegal conduct in question. Id. A defendant's contrivance to avoid guilty knowledge may be established by direct or circumstantial evidence, including when he fails to question circumstances that are overwhelmingly suspicious. Id. at 952.

The facts are sufficient to conclude that Cox had a subjective awareness that he was involved in illegal activity. He testified that he "figured something was wrong." He also testified that he was becoming suspicious. Furthermore, when he had an opportunity to speak with Charlie, he was instructed not to go back to the Bank because Charlie had gotten the checks "from somebody and [Charlie] didn't know whether they was any good or not." Additionally, when Turner questioned Cox about the checks, Cox provided misinformation and incomplete information. See United States v. Farfan-Carreon, 935 F.2d 678, 681 (5th Cir. 1991) (lying to officers is evidence of subjective knowledge of illegal activity). The first prong of the test for giving the instruction is met by these factors.

The second prong of the test, whether there was a purposeful

contrivance to avoid learning of the illegal conduct, is also met in this case. Despite his suspicions, Cox failed to question Charlie about the legitimacy of the checks. Both the checks and Charlie ended up in Mississippi from Chicago. When coupled with Charlie's instruction not to contact the Bank, and the questionable nature of three checks drawn on the trust account of a Chicago bank in excess of $42,000, originally payable to three separate business entities unrelated to the Cox family, the evidence was sufficient for the jury to infer a deliberate contrivance to avoid guilty knowledge. See Lara-Velasquez, 919 F.2d at 952.

Cox asked no questions about the suspicious circumstances surrounding the checks, nor did he do anything else to verify the legitimacy of the transactions. The circumstances in this case were so overwhelmingly suspicious that Cox's failure to conduct further investigation or inquiry suggests a conscious effort to avoid incriminating knowledge. See id. at 953.

AFFIRMED.