

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7115  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERYLE EUGENE PETERSON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. CR L-92-236-1  
- - - - -  
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Geryle Eugene Peterson appeals from his conviction by a jury for possession of approximately 1,676 pounds of marijuana with intent to distribute. Peterson challenges the district court's instruction to the jury on deliberate ignorance and its comment on the evidence during the jury charge. Because Peterson did not object to the district court's instructions at trial, we review for plain error. See United States v. Anderson, 987 F.2d 251,

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

256 (5th Cir.), cert. denied, 1993 WL 233363 (U.S. Oct. 4, 1993) (No. 92-9147).

Peterson contends that the district court erred in giving the jury an instruction on deliberate ignorance because the thrust of the Government's case was that Peterson had actual knowledge of the marijuana. Peterson cites United States v. Daniel, 957 F.2d 162, 169 (5th Cir. 1992) for the proposition that a deliberate ignorance instruction is appropriate only when "the facts support an inference [1] that the defendant was subjectively aware of a high probability of the existence of illegal conduct, and [2] that he purposely contrived to avoid learning of the illegal conduct." He asserts that the second prong of Daniel was not met because he did not "purposely contrive" to avoid knowledge that he was carrying marijuana but did so out of fear based on duress. Peterson argues that the deliberate ignorance instruction as given constitutes plain error because, in the absence of an instruction "on the inter-relationship of deliberate ignorance and duress," the jury could convict Peterson "even though his decision to remain ignorant was a result of duress."

Deliberate ignorance "denotes a conscious effort to avoid positive knowledge of a fact which is an element of an offense charged. . . ." United States v. Lara-Velasquez, 919 F.2d 946, 951 (5th Cir. 1990). "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." Id. However, the instruction is

inappropriate "when the evidence raises only the inferences that the defendant had actual knowledge or no knowledge at all of the facts in question." Id. We examine the totality of the evidence, viewed in the light most favorable to the Government. Id. at 952.

Peterson's challenge to the second prong of the test-- whether he engaged in a purposeful contrivance to avoid learning of the illegal conduct--lacks merit. The Government offered testimonial evidence that Peterson had entered the trailer to secure the pallets and saw the wrapped bundles and duffle bags. His behavior with regard to the contents "suggests a conscious effort to avoid incriminating knowledge." Daniel, 957 F.2d at 169-70. Even if Peterson had not entered the trailer, his failure to inspect his truck in light of the suspicious circumstances was not an oversight but a significant omission. See Lara-Velasquez, 919 F.2d at 953.

Peterson's argument that the district court should have explained the "inter-relationship" between any decision to remain ignorant and the duress under which he agreed to haul the load is unconvincing. The district court explained to the jury on two occasions that the Government had the burden of proving the elements of the offense, i.e. that Peterson knowingly possessed the controlled substance with the intent to distribute it. The district court identified the contested issues as the element of knowledge and, "superimposed on that[,] . . . the defense of coercion or duress." As part of the instruction on the element of knowledge, the district court explained the concept of

deliberate ignorance as a form of knowledge. After explaining the elements of the charged offenses, the district court explained the defense of coercion or duress. At the request of the jurors, the district court repeated his explanation of the defense of duress and its relationship to the Government's burden to prove that the defendant acted willfully and voluntarily.

Considering the entire charge and the evidence presented, there is no showing that there has been a grave miscarriage of justice that rises to the level of plain error.

Peterson contends that the district court erred by commenting on the evidence in relationship to the applicable law outlined in the jury instructions. Peterson argues that the comments were tantamount to a directed verdict because the district court's instructions to the jury as to the weight of his comments were insufficient.

"[I]t is not error for judges to guide jurors in their deliberations by remarking on the evidence." United States v. Esparza, 882 F.2d 143, 146 (5th Cir.), cert. denied, 493 U.S. 969 (1989) (internal quotation and citation omitted). However, "if the trial judge chooses to comment on the evidence, he must instruct the jury that they are not bound by his comments. . . ." Id. (emphasis original).

The district court informed the jury that they must make their own decisions, stating that they must follow the law and disregard any questions or comments made by the district court. The disclaimer was sufficient to instruct the jury that the comments were not binding.

Moreover, the district court's comments were an accurate reflection of the evidence, the disputed issues, and the law. See Esparza, 882 F.2d at 146. The evidence showed that Peterson was in constructive possession of the marijuana because he owned the truck and exercised dominion and control over the marijuana. See United States v. Richardson, 848 F.2d 509, 512 (5th Cir. 1988). It was undisputed that the substance was marijuana, and intent to distribute was inferred from the large quantity. See United States v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992), cert. denied, 113 S.Ct. 1826 (1993). Further, at the pretrial conference, the case was characterized as a "knowledge case." The unanswered question was whether Peterson knowingly possessed the marijuana; and if he did, whether he was coerced. The district court's comments on the evidence did not amount to such a grave miscarriage of justice as to constitute plain error.

AFFIRMED.