

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10354
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES WILLIAM NEAL,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(4:93-CR-104-A(02))

(December 6, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Charles William Neal was convicted by a jury of conspiracy and the theft of goods being transported in interstate commerce.

Co-defendant Gary Floyd, a long-haul truck driver for Peterson Transportation, was dispatched to North Carolina to pick up a load

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of fresh chicken, which he was to transport to California in a Peterson tractor-trailer rig. Floyd picked up 31,600 pounds of chicken, packed in ice in 40-pound boxes. A seal had been placed on the trailer after the chicken was loaded; that seal was not to be broken until the shipment arrived in California. The trip from North Carolina to California generally takes an average of three days. Floyd was provided with a bill of lading, which was required by law to be kept in the truck.

When the owner of Peterson Transportation did not hear from Floyd for several days, he became suspicious and reported the vehicle missing. The truck was recovered several days later in Fort Worth, Texas. There were only two pallets of spoiled chicken left in the truck. Articles belonging to Neal were found in the sleeper portion of the truck, and the parties stipulated that Neal had stayed in the truck for several days. Floyd and a woman companion, "Brenda," had stayed in a motel while Floyd was in Fort Worth with Neal.

The evidence reflected that Neal approached several individuals at a motel in Fort Worth and inquired whether they were interested in purchasing chicken from the truck. Neal indicated that he had picked up the chicken in North Carolina and that he was in possession of the key to the truck. Neal personally made a sale from the truck. In other instances, Floyd was also present during the sales transactions. Both Neal and Floyd accepted the money for the chicken. Neal told some of the individuals that the order had not been accepted by the intended buyer and that he had to sell the

chicken. Neal advised other purchasers that the load was to be delivered to Weatherford, but that the sale was not completed because the buyer could not pay in cash and his boss would not accept a check.

A couple who observed the truck parked outside of a nightclub, and saw people unloading "stuff" from the back of the truck into a car, reported the activity to police. The bartender in the club observed the police approaching the truck, then saw Brenda, Floyd's female companion, enter the bar looking for Floyd. Floyd had been in the bar earlier and had suddenly "disappeared." The police questioned Brenda outside while Neal remained in the bar. A short time later, while the police were checking out Brenda's story, the bartender heard a discussion between Neal and Brenda about splitting up and going to different hotels. Neal also asked Brenda to go to the truck to get his check and medicine, but Brenda answered that she was afraid to go back to the truck. Neal and Brenda left the bar and went off in different directions. Neal subsequently called the bar and told the waitress to tell Brenda that he would meet her at the motel in the morning and that they would attempt to locate Floyd. The police impounded the truck after Neal left the bar.

Neal testified that he had been previously employed as an oil-field hauler, but had also performed some "refrigerated work, cross-country." Neal explained that he performed work for truckers to supplement his fixed Social Security disability income. He stated that he would drive short distances for truckers who were

too tired to continue driving. Evidence was admitted that it is illegal to hire a third party to drive while a driver rests, because all drivers must undergo drug testing. Neal acknowledged that the law prohibits truckers from allowing others to drive the truck.

Neal testified that he met Floyd at a truck stop and indicated to him that he was looking for work. Floyd told him that he was running late with a load due in Weatherford, Texas, and offered to pay Neal to help him drive the route. Neal, who had previously owned and operated his own truck, testified that Floyd convinced him that Floyd and his cousin owned and operated several rigs. Neal observed that the truck door was not sealed, and he acknowledged that he is aware that such a seal is not to be broken until the truck reached its destination. Neal also acknowledged that he is also aware of the importance of a bill of lading, which indicates the destination of the goods being carried. Neal denied seeing the bill of lading for the load that the truck was carrying.

Neal testified that, after remaining in Fort Worth for a few days, he realized that Floyd was not proceeding to his intended destination. Floyd told Neal that he had to "get rid" of the chicken because he had another load to pick up. Neal contended that Floyd conducted the sales of the chicken, and he denied selling any of the chicken or receiving any money for it. Neal testified that he understood that the chicken had been refused at its delivery point and that Floyd's boss told him to get rid of the chicken. Neal stated that in his experience in the trucking

business, it is a common procedure to try to sell the load as quickly as possible if a delivery of perishables is not accepted. Neal admitted on cross-examination that it crossed his mind that Floyd might be selling stolen property, but he stated that Floyd's calls to his office convinced him that Floyd was legitimate. Neal testified that he did not insist on seeing the bill of lading for the load because Floyd then might not have hired him, and he needed the money.

The prosecution introduced documentary evidence reflecting that Neal had pleaded guilty to theft of copper tubing from an interstate shipment of freight in Arkansas in November 1991. Neal acknowledged that the offense, for which he served prison time, involved stolen property that he purchased from a trucker at a truck stop, but he testified that he was not aware that the copper tubing was stolen at the time that he purchased it.

The presentence report (PSR) stated that the applicable guideline for the conspiracy offense is based upon the guideline for the underlying offense of theft from interstate commerce. See U.S.S.G. § 2X1.1. The base offense level for theft is 4, and the PSR recommended that the level be increased by nine additional levels because the offense resulted in a total loss of \$137,567. See § 2B1.1(a) & (b)(1)(J). The probation officer recommended that Neal be held accountable for the theft of the tractor-trailer rig, which was valued at \$123,450, and the chicken's wholesale value of \$11,060 because Neal aided and abetted Floyd in the theft from an interstate shipment. Id. at ¶ 19.

Neal objected to the recommendation that the truck be considered in the loss calculation. See PSR Addendum, p.2. The probation officer responded that Neal participated in the jointly undertaken criminal activity with Floyd and that it was foreseeable to Neal that the truck was stolen. Id. at 2-3.

During the sentencing hearing, Neal argued that Floyd picked up the truck in North Carolina and removed the company's decals prior to meeting Neal in Louisiana. Neal argued that it was subsequent to such meeting that he agreed to assist Floyd in driving the truck and to assist in the chicken sales. The district court overruled the objection and determined that the truck was an integral part of the criminal activity and that Neal knew or reasonably should have known that it was stolen. The district court sentenced Neal to concurrent terms of imprisonment of 27 months on each count, to be followed by concurrent two-year terms of supervised release.

OPINION

Neal argues that the district court committed reversible error in giving a "deliberate ignorance/willful blindness" instruction over his objection. Neal argues that the evidence did not show that he was "subjectively aware of a high probability of the existence of illegal conduct." Neal testified that perishables are commonly sold in that manner, and the government did not refute such common industry practice. Neal argues that the government did not prove

that he consciously avoided learning that the goods were stolen.

The district court's decision to give an instruction is reviewed for an abuse of discretion. See United States v. Coleman, 997 F.2d 1101, 1105 (5th Cir. 1993), cert. denied, 114 S. Ct. 893 (1994). In reviewing a claim that the district court gave an inappropriate jury charge, this Court should consider "whether the court's charge as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." United States v. Faulkner, 17 F.3d 745, 766, (5th Cir.) (internal quotations and citations omitted), cert. denied, 115 S. Ct. 193 (1994) .

Although this Court has held that a "deliberate ignorance" instruction "should be rarely given," such instruction will be upheld "as long as sufficient evidence supported its insertion into the charge." Id. A two-part test is employed in determining whether a "deliberate ignorance" instruction can be given. "The evidence must show that: (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." Id. In reviewing a defendant's challenge to a "deliberate ignorance" charge, the instructions must be considered in "their totality and the jury's verdict; in so doing, [the Court] must view the evidence in the light most favorable to the government." Id. at 766-67 n. 31 (citation omitted).

Viewing the evidence in light most favorable to the government, it reflects that Neal was subjectively aware of the

high probability of illegal conduct and that he purposely contrived to avoid learning of the illegal conduct. Neal's own testimony reflected that he was an experienced trucker who was aware that it was illegal for him to be driving the rig and that the truck's door should have been remained sealed until the scheduled destination was reached. Having been previously convicted of a similar crime, Neal should have been highly suspicious of the manner in which Floyd was conducting business. Neal's admission that he was suspicious of Floyd's activities, but purposely did not ask to inspect the bill of lading to confirm Floyd's story, reflects that Neal chose to avoid learning about the true nature of Floyd's activities. The district court did not abuse its discretion in giving the "deliberate ignorance" instruction.

Neal argues that the district court committed reversible error by refusing to give his requested charge on "good faith." Neal argues that he was prejudiced because the jury was not made aware of the existence of a valid defense of good faith. Neal argues that the district court is required to give the instruction if there is "any evidence" presented to support it and that he presented evidence of good faith.

"A trial court's refusal to give a requested instruction constitutes reversible error when (1) the requested instruction is substantially correct, (2) the actual charge given to the jury did not substantially cover the content of the proposed charge, and (3) the omission of the instruction would seriously impair a defendant's ability to present a given defense." United States v.

Daniel, 957 F.2d 162, 170 (5th Cir. 1992). However, if "the jury was properly instructed on the elements of the offense, including the requisite mental state[,] [a] good faith instruction was not necessary." Id.

The trial court's refusal to give an instruction is reviewed for an abuse of discretion. See United States v. St. Gelais, 952 F.2d 90, 93 (5th Cir.), cert. denied, 113 S. Ct. 439 (1992). Neal relies on case law holding that a district court is required to give an instruction if there is "any evidence" to support it. However, these cases have been modified by case law holding that a failure to give the "good faith" instruction is not reversible error if the jury receives a detailed instruction on specific intent and the defendant has the opportunity to argue good faith to the jury. See St. Gelais, 952 F.2d at 93.

The district court instructed the jury that the government was required to prove that Neal knew that the property was not his and had the intent to deprive the owner of the use and benefit of the property. The district court also gave the jury a detailed instruction on specific intent immediately after giving the "deliberate ignorance" instruction. Neal testified, and his counsel argued at closing, that Neal believed that the chicken sales were legitimate. The district court did not abuse its discretion in refusing to give the requested "good faith" instruction.

Neal argues that the district court misapplied the sentencing guidelines by including the value of the truck in determining the

loss enhancement applicable to Neal. Therefore, he contends that the standard of review is de novo. Neal argues that the theft of the truck by Floyd was not reasonably foreseeable to him and was not within the scope of their agreement and, further, that the theft of the truck occurred prior to his entry into any conspiracy with Floyd.

Neal's contention that he is entitled to de novo review of the "loss" issue is without merit, because he is arguing that the district court's findings concerning the extent of his relevant conduct are erroneous. See blue brief, 26-28; see United States v. Cockerham, 919 F.2d 286, 289 (5th Cir. 1990) (a determination of relevant conduct is subject to the clearly erroneous standard of review); United States v. Dozie, 27 F.3d 95, 99 (5th Cir. 1994) (the calculation of the loss is a factual finding reviewable for clear error).

In the case of jointly undertaken criminal activity, relevant conduct includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . . that occurred during the commission of the offense, [and] in preparation for that offense" See § 1B1.3(a)(1)(B). The district court is required to determine the scope of the criminal activity that the defendant agreed to undertake jointly and whether the conduct of other members in furtherance of the scheme was reasonably foreseeable to the defendant. In making this determination, "the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the

defendant and others." See § 1B1.3 comment. (n.2).

The district court determined that the sales of the chicken could not have been accomplished without the use of the stolen truck and, thus, that the "stolen truck was an integral part of the criminal activity that [Neal] agreed to participate in." The district court determined that, even though Floyd may have been responsible for the initial theft of the truck, the theft was reasonably foreseeable to Neal. The district court further determined that Neal "actually knew that the truck was a stolen vehicle" and that he knew that it was being used as part of the jointly undertaken criminal activity.

Neal's claim of limited involvement in the scheme is contradicted by the overwhelming evidence that he was in actual possession of the truck and its contents and that he personally conducted sales from the stolen vehicle and received payments for the chicken. Based on that evidence, Neal's criminal history, and his knowledge that Floyd was operating in an illegal manner, it was not clearly erroneous for the district court to determine that the theft of the truck was a part of the joint criminal activity and that it was foreseeable to Neal. See United States v. Patterson, 962 F.2d 409, 414 (5th Cir. 1992) (because two brothers were involved in a conspiracy involving stolen vehicles, defendant could have foreseen that his brother would obtain other vehicles as part of the joint enterprise); United States v. Cryer, 925 F.2d 828, 831

(5th Cir. 1991) (district court properly considered use of stolen vehicle as relevant conduct because credit cards and checks that did not belong to the defendant were found in the car).

AFFIRMED.