UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil
#5.

STATUS REPORT OF CASE ON APPEAL

Docket: Pikeville

Date: September 20, 1983

To: Judge G. Wix Unthank

Re: (style) John A. Turner vs: Judge W. B. Hazelrigg, Et Al (No.) 83-205

Date of Entry of Order/Judgment appealed: September 6, 1983

Date Notice of Appeal filed: September 20, 1983

By: Plaintiff - Defendant - Both

Appeal dismissed on motion of: Appellant - By Agreement

6CCA Action:

Judgment - Date filed District Court: _____

Order - Date filed District Court: 9/6/83

Mandate - Date filed District Court: 5/29/84

Affirmed - Reversed - Modified 5/24/84
(date filed)

Dismissed for lack of prosecution: _____
(date filed)

Gayle Smith
Deputy Clerk

Copy: G. Wix Unthank
9-20-83
mw

No. 83-5674

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN ALFRED TURNER,

Plaintiff-Appellant

v.

HONORABLE JUDGE HAZELRIGG;
JOHN DAVID PRESTON;
EDWARD SPENCER; OWEN DOYLE;
ATTORNEY GENERAL, S.L. BESHEAR;
THE COMMONWEALTH OF KENTUCKY,

Defendants-Appellees

O R D E R

Judge Unthank

BEFORE: LIVELY, Chief Judge; KENNEDY, Circuit Judge; and PECK, Senior Circuit Judge

This matter is before the Court upon consideration of appellees' motion to dismiss and the motion of appellant's counsel to withdraw. This appeal has been referred to this panel pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the record, the appellant's brief and the briefs of the appellees, this panel agrees unanimously that oral argument is not necessary. Rule 34(a), Federal Rules of Appellate Procedure.

Appellant was convicted on two different occasions in Johnson Circuit Court (Ky.) in 1979 for trafficking in marijuana. He had previously been convicted of felonies in North Carolina. In 1982, he was arrested and subsequently convicted for being a felon in possession of a firearm in violation of 18 U.S.C. §1202(a)(1). In 1983, his Kentucky convictions were vacated. Thereafter, he filed in district court a pro se civil rights action pursuant to 42 U.S.C. §1983, naming as defendants, various persons involved with his Kentucky drug trials. District Judge Unthank on September 6, 1983 entered a judgment dismissing appellant's complaint. The action was dismissed against appellee Hazelrigg because of judicial immunity, against appellee Preston because of prosecutorial immunity, against appellees Doyle and Spencer because actions of private

attorneys are not under color of state law, and against appellees Beshear and Commonwealth of Kentucky because no actions violated his civil rights. Appellant thereafter timely filed pro se a notice of appeal from the September 6 judgment of dismissal.

Appellant's attorney entered an appearance in this Court and filed an appellate brief. In the brief, one issue is addressed: Whether plaintiff-appellant's imprisonment and conviction for possession of a firearm by a convicted felon under 18 U.S.C. §1202(a)(1) was improper, due to the fact that the required predicate conviction was vacated by the court.

The appellees in their motions to dismiss and appellate briefs urge that the appellant's appeal be either dismissed or the district court judgment be affirmed. Appellees contend that the issue presented by appellant in his brief has never been decided by the district court, via the September 6, 1983 judgment, and cannot be presented on appeal without first being presented to and decided by the district court. Singleton v. Wulff, 428 U.S. 106, 120 (1976). Appellees further contend that since appellant has presented no issue in his brief concerning the September 6 judgment's accuracy, any potential issues have been waived. Brown v. Sielaff, 474 F.2d 826, 828 (3rd Cir. 1973); United States v. White, 454 F.2d 435, 439 (7th Cir. 1972); Grand Trunk Western R. Co. v. H. W. Nelson Co., 116 F.2d 823, 830 (6th Cir. 1941); and C. & D. Motor Delivery Co. v. United States, 150 F.2d, 250, 253 (6th Cir. 1945). Upon a review of the district court's memorandum opinion, the brief of appellant and those of the appellees, appellees' arguments are well-taken.

Appellant's counsel has moved to withdraw because prior financial arrangements between him and his client have not been complied with, and because he has had difficulties in maintaining contact with appellant. This motion will be granted.

The September 6, 1983 judgment was a final judgment pursuant to 28 U.S.C. §1291 from which an appeal can be taken. Appellant filed a timely notice of appeal,

and there does exist, proper appellate jurisdiction. The motions to dismiss for lack of jurisdiction are not well taken.

It is ORDERED that the motions to dismiss be and are hereby denied. It is further ORDERED that the motion to withdraw by appellant's counsel be and hereby is granted. It is further ORDERED that the judgment of the district court be and hereby is affirmed. Rule 9(d)3, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

In the

UNITED STATES COURT of APPEALS

For the Sixth Circuit

No. 83 - 5674

JOHN ALFRED TURNER, ---------- APPELLANT,

versus

JUDGE W.B. HAZELRIGG,
JOHN DAVID PRESTON,
EDWARD SPENCER,
OWEN DOYLE,
S.L. BESHEAR, Attorney General,
THE COMMONWEALTH of KENTUCKY, ---------- APPELLEES.

On Appeal from the United States District Court
Eastern District of Kentucky, Pikeville
No. 83 - 205
G. WIX UNTHANK, Judge
Presiding

BRIEF for APPELLEE,
W.B. HAZELRIGG, Judge

J. K. WELLS,
Wells, Porter, Schmitt and Walker
80 Main Street, Post Office Drawer 1179
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Counsel for Appellee.

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In the

UNITED STATES COURT of APPEALS

For the Sixth Circuit

No. 83 - 5674

JOHN ALFRED TURNER, APPELLANT,

versus

JUDGE W.B. HAZELRIGG,
JOHN DAVID PRESTON,
EDWARD SPENCER,
OWEN DOYLE,
S. L. BESHEAR, Attorney General
The COMMONWEALTH of KENTUCKY, APPELLEES.

On Appeal from the United States District Court
Eastern District of Kentucky Pikeville
No. 83 - 205
G. WIX UNTHANK, Judge
Presiding

BRIEF FOR APPELLEE, JUDGE W.B. HAZELRIGG

STATEMENT OF ISSUES PRESENTED FOR REVIEW

First: May a conviction for possession of a fire arm by a convicted Felon, under 18 U.S.C. 1202 (a) (1) be reviewed on an appeal from a Judgment dismissing a civil rights action (42 U.S.C. , Section 1983), growing out of the initial felony conviction?

Second: Is a Judge subject to civil suits for damages, from

Judicial acts done in a suit in which party and subject matter jurisdiction are conceeded?

STATEMENT of the CASE

In this order:

(1) Appellant was convicted in Johnson (County, Kentucky) Circuit Court for trafficking in Marijuana, second offense. The various Defendants-Appellees in this action participated in that trial as Judge and Attorneys.

(2) Appellant was arrested for possession of a firearm by a convicted Felon, under 18 U.S.C. 1202 (a) (1).

(3) The conviction in Johnson Circuit Court was vacated.

(4) Appellant was convicted in U.S. District Court, Eastern District of Kentucky on the possession of a Firearm by a Convicted Felon charge. No Notice of Appeal from this Judgment was filed.

(5) Appellant sued the Judge and Attorneys who participated in the Marijuana conviction and the State, in a civil rights action under 42 U.S.C., Section 1983, in the U.S. District Court, for damages.

(6) The District Court dismissed the civil rights action as to all Defendants, on the grounds, as to Appellee, Judge Hazelrigg, of Judicial immunity.

(7) Appellant's Notice of Appeal (NR 36) was expressly

" ... from the order of dismissal by the United States District Court for the Eastern District of Kentucky at Pikeville, Kentucky, entered in this action on September 6, 1983."

(8) Appellant's Brief (Conclusion – page 5) seeks only that this Court :

"...reverse Appellant's conviction under 18 U.S.C. 1202 (a) (1) of Possessing a Firearm by a Convicted Felon."

ARGUMENT

I. NOTICE OF APPEAL IS JURISDICTIONAL

Timely filing of a Notice of Appeal is "mandatory and jurisdictional". United States v. Robinson, 361 U.S. 220, 224 (1960).

II. NOTICE OF APPEAL IS CONTROLLING

FRAP Rule 3 (c) requires that the Notice of Appeal designate among other things,

"... the Judgment, order or part thereof appealed from ..."

The Judgment or portion thereof designated, is controlling of the parameters of the appeal. Symons v. Mueller Co. (C.A. Kan. 1975) 526 F. 2d 13.

III. ERRORS NOT URGED IN BRIEF ARE ABANDONED

If Appellant had objection to the Judgment dismissing Appellee, Judge, W.B. Hazelrigg, because of judicial immunity, he has abandoned it by failing to include it in his brief. Brown v. Sielaff (C.A. 3rd-1973), 474 Fed. 826; U.S. v. White (C.A. 7th - 1971), 454 F. 2d 435.

IV. JUDICIAL IMMUNITY REQUIRED DISMISSAL

The Court's jurisdiction in the Maijuana case was not questioned in the Civil Rights action, and since the Court had jurisdiction of the parties and the subject matter of the action, he is immune from civil prosecution for his acts on the Bench. Cuiska v. Mansfield, 250 F. 2d 700 (CA 6th - 1957); Dennis v. Sparks, 100 S. Ct. 1336 (1980).

CONCLUSION

The U.S. District Court Judgment of Dismissal should be affirmed.

RESPECTFULLY SUBMITTED.

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Paintsville, Kentucky 41240 5179

COUNSEL for APPELLEE,
JUDGE W.B. HAZELRIGG

CERTIFICATE of SERVICE

This is to certify that on December 19, 1983, I served copies of the foregoing Brief on the parties by mailing copies in duly addressed envelopes, with first class postage prepaid, to their Attorneys of Record, as follows: HON. ROBERT N. TRAINOR, 314 Greenup Street, Suite 201, Covington, Kentucky 41011, Attorny for Plaintiff; Appellant; HON. MICHAEL FLEET JOHNSON, Combs and Lester, P.S.c, 207 Caroline Avenue, Pikeville, Kentucky, Attorney for Appellee, Owen Doyle; HON. JOHN V. PORTER, Wells, Porter, Schmitt & Walker, 80 Main Street, Paintsville, Kentucky, 41240, Attorney for Appellee, Ed Spencer; HON. WOLODYMYR CYBRIWSKY, Perry & Preston, Post Office Drawer C, Paintsville, Kentucky 41240, Attorney for Appellee, John David Preston; HON. CARL MILLER, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601 - 3494, Attorney for the Commonwealth of Kentucky and S. L. Beshear; to HON. G. WICK UNTHANK, Pikeville, Kentucky 41501, the Presiding Judge.

J. K. WELLS
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ATTORNEY FOR APPELLEE,
JUDGE W.B. HAZELRIGG

In the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit
No. 83-5674

JOHN ALFRED TURNER, APPELLANT,

VERSUS

JUDGE W.B. HAZELRIGG,
JOHN DAVID PRESTON,
EDWARD SPENCER,
OWEN, DOYLE,
S.L. BESHEAR, Attorney General,
THE COMMONWEALTH OF KENTUCKY, APPELLEES.

On Appeal from the United States District Court
Eastern District of Kentucky, Pikeville
NO. 83-205
G.WIX UNTHANK, Judge
Presiding

BRIEF FOR APPELLEE EDWARD SPENCER

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COUNSEL FOR APPELLEE

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In the

UNITED STATES COURT of APPEALS
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No. 83-5674

JOHN ALFRED TURNER, APPELLANT,

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G. Wix Unthink, Judge, Presiding

BRIEF FOR APPELLEE, EDWARD SPENCER

STATEMENT OF ISSUES PRESENTED FOR REVIEW

First: May a conviction for possession of a fire arm by a convicted Felon, under 18 U.S.C. 1202(a)(1) be reviewed on an appeal from a Judgment dismissing a civil rights action (42 U.S.C., Section 1983), growing out of the initial felony conviction?

Second: Whether or not error not urged in brief for Appellant are abandoned.

STATEMENT OF THE CASE

Appellant was convicted in the Johnson County Circuit Court for trafficking in Marijuana, second offense. The parties in this action are the Trial Judge, Commonwealth Attorney, the Attorney General, and attorneys who allegedly represented the Appellant in the trial of this case. The Appellant was arrested for possession of a firearm by a convicted Felon, under 18 U.S.C. 1202(a)(1). The conviction therefor was vacated by the Johnson Circuit Court. Appellant was convicted in U.S. District Court, Eastern District of Kentucky on the possession of a firearm by a Concicted Felon charge. No Notice of Appeal from this Judgement was filed to the knowledge of the undersigned.

In this action, Appellant sued the the Trial Judge and the other attorneys due to the fact that Appellant alleged that said parties had violated his civil rights pursuant to 42 U.S.C., Section 1983. The action was filed in the U.S. District Court, for damages. The District Court dismissed the civil rights action as to all Defendants, on the grounds, as to the Appellee, Edward Spencer, on the grounds that Edward Spencer was a private attorney, not within the purview of Section 1983 in this instance. Notice of Appeal (NR 36) was filed expressly:

"***from the order of dismissal by the United States District Court for the Eastern District of Kentucky at Pikeville, Kentucky, entered in this action on September 6, 1983."

Appellant's Brief (Conclusion - page 5) seeks only that this Court:

"***reverse Appellant's conviction under 18 U.S.C. 1202(a)(1) of Possessing a Firearm by a Convicted Felon."

ARGUMENT

I. NOTICE OF APPEAL IS JURISDICTIONAL

Timely filing of a Notice of Appeal is "mandatory and jurisdictional". United States v. Robinson, 361 U.S. 220, 224 (1960). The Federal Rules of Appellate Procedure Rule 3(c) requires that Notice of Appeal designate among other things,

"***the Judgment, order or part thereof appealed from***".

The Judgment or portion thereof designated, is controlling of the parameters of the appeal. Symons v. Mueller Co. (C.A. Kansas 1975) 526 F.2d 13.

II. ERRORS NOT URGED IN BRIEF ARE ABANDONED

A thorough review of the Brief for Appellant in this case, reveals that there is no issue raised in the Brief for the Appellant which indicates that the Trial Court erred in any way in dismissing Edward Spencer from this action. Due to the fact that there is nothing mentioned said brief, any claim against Edward Spencer has been abandoned.

Brown v. Sielaff, (C.A. 3rd-1973), 474 Fed. 826;

U.S. v. White (C.A. 7th -1971), 454 F.2d 435.

CONCLUSION

The U.S. District Court Judgment of Dismissal should be Affirmed.

RESPECTFULLY SUBMITTED,

WELLS, PORTER, SCHMITT & WALKER
80 Main Street
P.O. Drawer 1179
Paintsville, Kentucky 41240

BY: _____
JOHN V. PORTER
Counsel for Appellee
EDWARD SPENCER

CERTIFICATE OF SERVICE:

This is to certify that on December 22, 1983 I served copies of the foregoing Brief on the parties by mailing copies in duly addressed envelopes, with first class postage prepaid, to thier attorneys of record, as follows:

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 83-5674

JOHN ALFRED TURNER — APPELLANT

VS.

JUDGE W.B. HAZELRIGG;
JOHN DAVID PRESTON;
EDWARD SPENCER;
OWEN DOYLE;
S.L. BESHEAR, Attorney General,
THE COMMONWEALTH OF KENTUCKY — APPELLEES

On Appeal from the United States District Court
Eastern District of Kentucky, Pikeville
No. 83-205
G. WIX UNTHANK, Judge
Presiding

BRIEF FOR APPELLEE, JOHN DAVID PRESTON

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STATEMENT OF ISSUES

I

Whether a conviction for Possession of a Firearm by a Convicted Felon under 18 U.S.C. Section 1202(a)(1) may be reviewed on appeal from a Judgment and Order dismissing a civil rights action, under 42 U.S.C. Section 1983, which arose from an underlying felony conviction.

II

Whether a state prosecuting attorney is subject to civil suits for damages for actions done within the scope of his duties--initiating and pursuing a criminal prosecution and in presenting the State's case.

STATEMENT OF THE CASE

This is an appeal from a Judgment and Order dated September 6, 1983 from United States District Court, Eastern District of Kentucky, Pikeville Division, Civil Action number 83-205, dismissing Appellant's civil rights case for damages against the Commonwealth of Kentucky, state officials, judicial officers, and local counsel for actions arising from one of the Appellant's underlying felony convictions.

STATEMENT OF FACTS

Appellant was convicted in Johnson Circuit Court, Johnson County, Kentucky, on January 26, 1979, and June 6, 1979 for the crimes of Trafficking in Marijuana, second offense, felonies. The various Defendants-Appellees of this suit participated in that trial as Judge and Attorneys with the exception of Defendant-Appellee John David Preston, who was not sworn into office as Commonwealth's Attorney for the 24th Judicial District until January, 1982. That prior to these convictions, Appellant had been convicted in the Superior Court of Robeson County, North Carolina on December 2, 1955 for the crime of Assault With a Deadly Weapon, a felony; and again in Superior Court in Robeson County, North Carolina, on May 18, 1956, for the crime of Felonious Hit and Run, a felony.

Thereafter, Appellant was arrested and indicted for possession of a firearm by a convicted felon, under 18 U.S.C. Section 1202(a)(1). Thereafter, Plaintiff was convicted in United States District Court, Eastern District of Kentucky for the crime of possession of a firearm by convicted felon, under 18 U.S.C. Section 1202(a)(1) on August 6, 1982. No Notice of Appeal from this Judgment has ever been filed.

On June 10, 1983, Appellant's conviction in Johnson Circuit Court was vacated. Subsequently, Appellant, pro se, sued the Judge and Attorneys who had participated in the marijuana conviction and the Commonwealth of Kentucky, for damages in a civil rights action arising under 42 U.S.C. Section 1983, which was filed in United States District Court, Eastern District of Kentucky,

on June 15, 1983. The United States District Court, in a Judgment and Order dated September 6, 1983, dismissed the Appellant's civil rights action as to all Defendants, and as to the Appellee, John David Preston, on the grounds of state prosecutorial immunity. Thereafter, Appellant, pro se , filed his Notice of Appeal on September 20, 1983 requesting relief from "the Order of dismissal by the United States District Court, Eastern District of Kentucky, at Pikeville, Kentucky, entered in this action on September 6, 1983". (NR 26). Appellant's brief, seeks the exclusive remedy of "reversing Appellant's conviction under 18 U.S.C. Section 1202(a)(1) of possessing a firearm by a convicted felon." (Appellant Brief, page 5).

ARGUMENT

I. NOTICE OF APPEAL IS BOTH MANDATORY AND JURISDICTIONAL

Timely filing of a notice of appeal is both mandatory and jurisdictional, and not an element that can be waived by the parties or the reviewing Courts. United States v. Robinson, 361 U.S. 220, 224 (1960); Moorer v. Griffin, 575 F.2d 87 (6th Cir. 1978); U.S. v. Hoye, 548 F.2d 1271 (6th Cir. 1977); Reed v. Michigan, 398 F.2d 800 (6th Cir. 1968).

II. NOTICE OF APPEAL DEFINES THE SCOPE OF APPEAL

The Federal Rules of Appellate procedure, Rule 3(c) requires that one of the elements of the Notice of Appeal is to designate "the judgment , order or part thereof appealed from..." The noted Judgment or portion thereof designated, controls the parameters of the subsequent appeal. Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365 (11th Cir. 1983); Elfman Motors, Inc. v. Chrysler Corp., 567 F.2d 1252 (3rd Cir. 1977); Cole v. Tuttle, 540 F.2d 206 (5th Cir. 1976); Symons v. Mueller Co., 526 F.2d 13 (10th Cir. 1975).

It is axiomatic that issues and arguments which were not raised before the District Court cannot be raised for the first time on appeal. Singleton v. Wulff, 428 U.S. 106 (1976); U.S. v. McDowell Contractors, 668 F.2d 256 (6th Cir. 1982).

III. ERRORS NOT ADDRESSED IN APPELLANT'S BRIEF ARE ERRORS CONSIDERED ABANDONED.

If the Appellant had any objections to the District Court's Judgment and Order dated September 6, 1983 dismissing Defendant-Appellee, John David Preston, because of state prosecutorial immunity, he has abandoned it by failing to address this issue in his brief. U.S. v. White, 454 F.2d 435 (7th Cir. 1971).

IV. PROSECUTORIAL IMMUNITY MANDATED DISTRICT COURT'S DISMISSAL

Since the only allegations made against the Defendant-Appellee, John David Preston, was that he acted within the scope of his duties in initating and pursuing criminal prosecution of the Appellant, the District Court correctly dismissed the suit against John David Preston, on the grounds that he was immune from civil suit for damages under Civil Rights Acts of 1871, pursuant to Imbler v. Pachtman, 424 U.S. 409 (1976); Coffy v. Multi-County Narcotics Bureau, 600 F.2d 570 (6th Cir. 1979); Hilliard v. Williams, 540 F.2d 220 (6th Cir. 1978).

CONCLUSION

The U.S. District Court's Judgment of dismissal of the Appellant's civil rights action for damages against John David Preston should be affirmed.

Respectfully submitted,

Perry and Preston
82 Main Street
P.O. Drawer C
Paintsville, KY 41240

by: Wolodymyr Cybriwsky
WOLODYMYR CYBRIWSKY
ATTORNEY FOR THE
HONORABLE JOHN DAVID
PRESTON

CERTIFICATE OF SERVICE:

This is to certify that a true and correct copy of the foregoing has been mailed to the Hon. Robert N. Trainor, 314 Greeup Street, Suite 201, Covington, KY 41011, Attorney for Plaintiff; Appellant; Hon. Michael Fleet Johnson, Combs and Lester, P.S.C. 207, Caroline Avenue, Pikeville, Kentucky 41501, Attorney for Appellee, Owen Doyle; Hon. John V. Porter, Wells, Porter, Schmitt and Walker,80 Main Street, Paintsville,KY 41240, Attorney for Appellee, Ed Spencer; Hon. J.K. Wells, Wells, Porter, Schmitt and Walker, 80 Main Street, P.O. Drawer 1179, Paintsville, KY 41240, Attorney for Appellee, Judge W.B. Hazelrigg; Hon. Carl Miller, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, Attorney for the Commonwealth of Kentucky and S.L. Beshear; and to Hon. G. Wix Unthank, Pikeville, Kentucky 41501 on this the 22 day of December, 1983.

Wolodymyr Cybriwsky
ATTORNEY AT LAW

Then they go to the next place, the NLRB comes in and they stop. They go somewhere else. Next Darin and Armstrong. The companies they were doing business with, well, it is the cost of doing business as long as it doesn't hurt them and in the case of Darin and Armstrong they admitted it until it really started messing up their construction schedule. They were willing to put up with it themselves. It didn't hurt them. They weren't responsible for those drivers. Those drivers weren't their employees. But these groups always work well together. That is what makes construction sites themselves, the ability of those two groups, the big union and the big company working together.

The reality of this case is, it is not a feud or dispute between union and management or contractor. Mr. Conley put it, they had their own games they play in negotiations. The outrage is that the NLRB civil remedies and actions have done nothing for these drivers, nothing. Their rights have been ignored, and in that regard I believe the Court will instruct you on what the right-to-work law is and I sincerely ask you to listen to it when he describes it to you and indicates what is. The victims in this case were those drivers.

Based on all the evidence, we would ask you to find the Defendants guilty of all the charges.

THE COURT: Members of the jury, now that you have heard the evidence and arguments the time has come to instruct

you as to the law governing this case.

Although you as jurors are the sole judges of the facts you must follow the law as stated in these instructions of the Court and apply the law so given to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole and should pay particular attention to my reading of these instructions since you will not be given a copy for use during your deliberations.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTR. NO. 2

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the not-guilty plea of the accused. You are to perform this duty without bias or prejudice to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court and reach a just verdict regardless of the consequences.

INSTR. NO. 3

An indictment is but a formal method of accusing a Defendant of a crime. It is not evidence of any kind against the accused and does not create any presumption or permit any inference of guilt.

There are two types of evidence from which a jury may properly find a Defendant guilty of an offense. One is direct evidence, such as the testimony of an eyewitness. The other is circumstantial, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a Defendant, the jury be satisfied of the Defendant's guilt beyond a reasonable doubt from all the evidence in the case.

INSTR. NO. 4

The law presumes a Defendant to be innocent of crime. Thus, although accused, a Defendant begins the trial with a clean slate with no evidence against him, and the law permits nothing but legal evidence presented the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a Defendant unless the jurors are satisifed beyond a reasonable doubt of the Defendant's guilt from all the evidence in the case.

A reasonable doubt, as the name implies, is a doubt

based on reason, a doubt for which you can give a reason. It is such a doubt that would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the Defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt which is based on conjecture. It is a doubt which is based on reason. The Government is not required to establish guilt beyond all doubt or to a mathematical certainty or scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential of the crime charged, a Defendant has the right to rely upon failure of the prosecution to establish such proof. A Defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution. The law does not impose upon a Defendant the duty of producing any evidence.

INSTR. NO. 5

Unless otherwise indicated, each instruction given should be considered by you as referring separately and

individually to each Defendant.

INSTR. NO. 6

The 16-count indictment in this case charges the Defendants Harry J. Wilford, Everett G. Dague, Herman J. Casten and Herman B. Boeding, while officers and representatives of Local 238 of the Teamsters Union, with violating certain federal conspiracy and labor laws by allegedly conspiracy to obstruct commerce by extortion; by obstructing and attempting to obstruct commerce by extortion; and by unlawfully obtaining money from the Darin and Armstrong Construction Company and its various suppliers and truck drivers while engaged in the construction of a sewage disposal plant in Cedar Rapids, Iowa.

Specifically, Count 1 charges all of the Defendants with conspiracy to obstruct commerce by extortion in violation of Title 18 United States Code, Section 1951.

Counts 2, 4, 5 and 6 charge Defendants Dague and Boeding with obstructing and attempting to obstruct commerce by extortion in violation of Title 18 United States Code, Section 1951.

Count 3 charges Defendants Casten and Boeding with obstructing and attempting to obstruct commerce by extortion in violation of the same statute.

Count 7 charges Defendants Wilford, Casten and Boeding with unlawfully demanding and receiving money from an employer on behalf of a union, and aiding and abetting in

violation of Title 29 United States Code, Section 186-B-1 and Title 18 United States Code, Section 2.

Counts 9 and 10 charge Defendants Wilford, Dague and Boeding with unlawfully demanding and receiving money from an employer on behalf of a union, and aiding and abetting in violation of Title 29 United States Code, Section 186-B-1 and Title 18 United States Code, Section 2.

Counts 11, 13 and 16 charge Defendants Wilford, Dague and Boeding with demanding an unlawful loading fee, and aiding and abetting, in violation of Title 29, Section 186-B-2 and 28 United States Code, Section 2.

Counts 12 and 14 charge Defendants Wilford, Casten and Boeding with demanding an unlawful loading fee, and aiding and abetting, in violation of Title 29, United States Code, Section 186-B-2 and Section 2.

Counts 8 and 15 have been dismissed by the Government.

INSTR. NO. 7

The Defendants are charged with a separate crime in each count. Each crime and the evidence pertaining to it should be considered separately by the jury and a separate verdict should be returned as to each count. The Defendants' guilt or innocence of the crime charged in one count should not affect the jury's verdict on any other count. If the jury finds that the Defendants are guilty beyond a reasonable doubt of any one of the crimes charged, a verdict of guilty should be

returned as to that count.

INSTR. NO. 8

Section 1951, Title 18 provides in part that whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by extortion or attempts or conspires so to do, shall be guilty of an offense against the laws of the United States.

Section 186 of Title 29 provides in part that it shall be unlawful for any employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce; or to any labor organization or officer or employee thereof, which represents, seeks to represent, or would admit to membership any of the employees of such employer who are employed in an industry affecting commerce.

Section 186-B further provides that it shall be unlawful for any person to request, demand, receive or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by the subsection previously read.

Another subsection of Section 186 -- this is Section B-D -- it shall be unlawful for any labor organization or for any person acting as an officer, agent, representative or employee of such labor organization, to demand or accept from the operator

of any motor vehicle employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof, as a fee or charge for the unloading or in connection with the unloading of the cargo of such vehicle. Provided that nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for services as employees.

Section 2 of Title 18 provides that whoever commits an offense against the United States or aids, abets, counsels, command, induces or procures its commission, is punishable as a principal.

INSTR. NO. 9

The following are the elements which the Government must prove beyond a reasonable doubt as to each Defendant for that Defendant to be found guilty under these statutes:

Title 18 United States Code, Section 1951, conspiracy as alleged in Count 1 of the indictment, the elements are, one, that two or more persons conspired to obstruct commerce by extortion; Paragraph 2, that the Defendant knowingly and willfully participated in this conspiracy with the intent to commit the offense which was the subject of the conspiracy; Paragraph 3, that during the existence of the conspiracy at least one overt act was committed by one or more of its members in furtherance of

the objectives of the conspiracy.

Title 18 United States Code, Section 1951, dealing with obstructing commerce by extortion, it would be Counts 2 to 6, the elements are, one, that the Defendant intentionally induced or attempted to induce a victim to part with money; Paragraph 2, that he did so by extortion; Paragraph 3, that interstate commerce was delayed, obstructed or affected in any way or degree.

Title 29 United States Code, Section 186-B-1 and D, unlawfully demanding or receiving money on behalf of the union, these are Counts 7, 9 and 10, and the elements are, one, that Defendant demanded or received from an employer or person acting in the interest of an employer; Paragraph 2, that the money was paid or delivered to a labor organization either representing, seeking to represent or would admit to membership any of the employees of the employer who made the payment, or any representative of his employees; Paragraph 3, that the employer was engaged in an industry affecting commerce; Paragraph 4, that the acts were done knowingly and willfully.

Title 29 United States Code, Section 186-B-2 and D, demanding an unlawful unloading fee, Counts 11, 12, 13, 14 and 16, the elements are, one, that a labor organization or any person acting as an officer, agent, representative or employee of a labor organization; Paragraph 2, demanded or accepted money from the operator of any motor vehicle transportating property in

interstate commerce, or from his employer; Paragraph 3, that such money was a fee or charge for unloading the cargo of the motor vehicle; Paragraph 4, that these acts were done knowingly and willfully.

INSTR. NO. 10

A conspiracy is a combination of two or more persons who accomplish an unlawful purpose or lawful purpose by unlawful means. While it involves an agreement to violate the federal law, it is not necessary that the persons charged met together and entered into an expressed or informal agreement or that they stated, in words or writing, what the scheme was or how it was to be effected. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act.

Such an agreement may be inferred from the circumstances and conduct of the parties, since ordinarily a conspiracy is characterized by secrecy. However, mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury

should consider the actions and declarations of all the alleged participants. However, in determining whether a particular Defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed and that he was one of its members.

If the jury should find beyond a reasonable doubt from the evidence in the case that the existence of the conspiracy charged in the indictment has been proved and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of a conspiracy offense charge is complete; whether or not the object or purpose of the conspiracy was actually accomplished and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

To be a member of the conspiracy, a Defendant need not know all the other members nor all the details of the conspiracy nor the means by which the objections were to be accomplished. Each member of the conspiracy may perform separate and distinction acts. It is necessary, however, that the Government prove beyond a reasonable doubt that the Defendant

was aware of the common purpose and was a willing participant, with the intent to advance the purpose of the conspiracy.

An overt act means any act committed by one or more of the conspirators to accomplish a purpose of the conspiracy. It need not be in violation of the law, and the other conspirators need not join in it, or even know about it. It is necessary only that such act be in furtherance of the purpose or objects of the conspiracy. It is not necessary that all of the overt acts charged in the indictment were performed. One overt act is sufficient.

INSTR. NO. 11

The Defendants are also charged in Counts 2 through 6 with attempting to obstruct, delay and affect commerce by extortion. To attempt an offense means to willfully do some act in an effort to bring about or accomplish something the law forbids. To establish the offense of attempted extortion, the Government must prove beyond a reasonable doubt that the Defendants have attempted to induce their victims to part with property or money. However, it is not necessary for the Government to prove that the Defendants themselves, or Teamsters Local 238, either directly or indirectly received any money or property as a result of the attempted extortion.

INSTR. NO. 12

Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal.

In order to aid or abet commission of a crime a person must associate himself with the criminal venture, participate in it and try and make it succeed. Mere association and presence at the scene is not sufficient to establish guilt. Presence must be accompanied by participation and a culpable purpose before it can be equated with aiding and abetting.

INSTR. NO. 13

Extortion is defined as the obtaining of property or money from another person with his consent, induced by the wrongful use of actual or threatened fear of economic loss; in other words, under some form of compulsion. As used here, "wrongful," means without lawful right.

INSTR. NO. 14

The word, "knowingly," as used in the crimes charged means that the act or omission was done voluntarily and purposely and not because of mistake, inadvertence, accident or other innocent reason. Knowledge may be proven by Defendant's conduct and by all the facts and circumstances surrounding the case.

INSTR. NO. 15

The word, "willfully," means that the Defendant knowingly and intentionally committed the acts which constitute the particular offense charge; and that he was either aware of the specific law which he allegedly violated or acted in reckless disregard of that law.

INSTR. NO. 15-A

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may say and here and thus be able to give direct evidence of what a Defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a Defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

INSTR. NO. 16

For the purposes of this case and within the meaning of the statute involved: Teamsters Union Local 238 is a labor organization; Darin and Armstrong, Inc., was engaged in an industry affecting commerce; that the trucks driven by the alleged victims were motor vehicles; and Defendants Wilford, Dague and Casten were acting as officers, agents or representatives of Local 238.

INSTR. NO. 16-A

Interstate commerce is defined as the movement or transportation of goods, including construction materials, supplies and machinery from a point located in one state to a point located in a different state, no matter how slight the distance between these two states.

INSTR. NO. 17

The term, "representative," means and includes any person authorized by the employees to act for them in dealings

with their employers, including union stewards.

INSTR. NO. 18

The laws of the State of Iowa provide that no person within its boundaries shall be deprived of the right to work at his chosen occupation for any employer because of refusal to join any labor union and that any contract which contravenes this policy is null and void.

The Iowa law also makes it unlawful for any labor organization to enter into any understanding, contract, agreement, whether written or oral, to exclude from employment any person who does not belong or refuses to join a labor union, organization, or association.

This law was enacted in 1947, and is relevant solely as to the intent and knowledge of the Defendants.

INSTR. NO. 19

Evidence that an act was done at one time or on one occasion is not any proof whatever that a similar act was done at another time or on another occasion. That is to say, evidence that a Defendant may have committed an earlier act of a like nature may not be considered in determining whether the accused committed any offense charged in the indictment.

Nor may evidence of alleged earlier acts of a like nature be considered for any other purpose, unless the jury first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the

particular acts charged in the particular counts of the indictment then under deliberation.

If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the acts charged in the particular counts under deliberation, then the jury may consider evidence as to an alleged earlier acts of a like nature in determining the state of mind or intent with which the accused did the acts charged in the particular count and where proof of an alleged early act of a like nature is established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the particular counts under deliberation, the accused acted willfully and with specific intent and not because of mistake or inadvertence or other innocent reason.

INSTR. NO. 20

You may consider the testimony of the state of mind of an alleged victim of extortion in determining whether economic fear existed and whether such fear was reasonable. The testimony of an alleged victim as to what people other than the Defendant had told him is admissible not for the truth of what was said but only as to whether or not the victim heard the statements and whether or not the hearing of such statements would have tended to produce a reasonable fear in the victim's mind. Statements by people other than the Defendant to a victim may only be considered in determining the victim's state

of mind.

Likewise, testimony of the alleged victims as to their own state of mind was admitted solely for the purpose of showing their state of mind and not for the truth of what was said. If you find that such testimony did show a state of mind, you can consider it for that purpose only and for no other purpose. You are not bound by the statements of the alleged victims, but you may consider all the facts and circumstances in determining the state of mind of the alleged victims at the time they agreed to pay the money to the Defendant, if you do in fact find that the payment of monies were made.

INSTR. NO. 21

The Defendants claim that their actions were not with the intent to extort money or to charge an unloading fee, but were for the purpose and with the intent of enforcing their rights under a contract with the general contractor, or to enforce area standards of wages and pay or other legal rights.

You may consider these claims on the issue of intent, and unless the Government has convinced you beyond a reasonable doubt that a Defendant had the requisite criminal intent you should find that Defendant not guilty.

INSTR. NO. 23

A Defendant who wishes to testify is a competent witness; and the Defendant's testimony is to be judged in the same way as that of any other witness.

INSTR. NO. 24

The Defendant has introduced evidence of his good reputation in his community. Such evidence may indicate to you that it is improbable that a person of good character would commit the crime charged. Therefore, you should consider this evidence along with all the other evidence in the case in determining the guilt or innocence of the Defendant.

The circumstances may be such that evidence of good character may alone create a reasonable doubt of a Defendant's guilt, although without it, the other evidence would be convincing. Notwithstanding evidence of good character and reputation, however, you may convict the Defendant if, after weighing all the evidence, including the evidence of good character, you are convinced beyond a reasonable doubt that the Defendant is guilty of the crime charged.

INSTR. NO. 26

Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated and all applicable presumptions stated in these

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences that seem justified in the light of your own experience.

INSTR. NO. 27

You are the sole judge of the weight of the evidence, the credibility of the witnesses and the conclusions to be drawn from the facts and circumstances proved.

If the testimony or any part of it is conflicting, you will reconcile it, if you can, that it may all have weight and effect, but if you cannot, you will then give credit to the testimony and those witnesses that to you, as fair-minded persons, seem most entitled thereto.

In passing on the credibility of the witnesses and weighing their testimony, you should consider their appearance and conduct on the witness stand; their age, intelligence, strength of memory, and means of knowledge whereof they speak; their interest or lack of interest in the result of the trial; their relation or feeling, if any, toward the parties; the motive, if any, actuating them as witnesses; their candor,

fairness, bias or prejudice; the time that has elapsed since the occurrence of which they testify; the reasonableness and probability of their statements or the want thereof; whether their testimony is corroborated or contradicted by other witnesses or by facts proven; and every fact and circumstance proved, thus giving to the testimony of each witness and to every fact and circumstance proved, such weight and only such weight as it ought reasonably and justly to be given in view of all the evidence.

INSTR. NO. 28

The verdict must represent the considered judgement of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with the other jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest convinction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans. You are judges of the facts. Your sole interest is to ascertain the truth from all the evidence in the case.

INSTR. NO. 29

In your consideration of the evidence you are expected to use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the accused be proved guilty, say so. If not proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

Remember also that the question before you can never be: Will the Government win or lose the case? The Government always wins when justice is done regardless of whether the verdict is guilty or not guilty.

INSTR. NO. 30

The punishment provided by law for the offenses charged is a matter exclusively within the province of the Court and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

INSTR. NO. 31

It is proper to add the caution that nothing said in these instructions nor in the form of verdict is to suggest any intimation whatsoever what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of you the jury.

INSTR. NO. 32

Upon retiring to the jury room you will select one of your number to act as foreman or forewoman who will preside over your deliberations.

A form of verdict has been prepared for your convenience.

(Forms of verdict read.)

You will take this form to the jury room and when you have reached unanimous agreement as to your verdict you will have your foreman or forewoman fill in, date and sign the form which sets forth the verdict upon which you agree; place the verdict in the envelope marked, "sealed verdict," seal it, deliver the sealed envelope together with the exhibits to the Marshall who shall forthwith deliver them to the Clerk. Thereafter your duties in this case are at an end and you may return to your homes. Bear in mind you are not to reveal to anyone how the jury stands, numerically or otherwise until you have reached an unanimous verdict.

INSTR. NO. 33

Finally, after you have completed your deliberations

and returned your verdict, you are instructed that you are under no obligation to discuss or talk about your verdict to anyone, including the attorneys for the parties, although you are free to do if you wish.

Mr. Marshall, would you come forward. I would hand you the form of verdict and the envelope and together with copy of the indictment and you may obtain the exhibits from the clerk and now conduct the jurors to their room where they will commence their deliberations. I want the two alternates, Mrs. Smith and Mr. Kern to come down and take these two seats in the front of the jury box.

(Whereupon, at 3:20 p.m., the jury retired to deliberate upon a verdict.)

THE COURT: Is there anything further, gentlemen? I might suggest that you leave your telephone numbers where you can be reached, your addresses, with the Clerk, who will mail you a copy of the verdict, mail it to your address and also call you as soon as it is returned to let you know what the verdict is. We are using the sealed verdict and I would appreciate any counsel that might plan to leave to make some arrangements in the event we have a question from the jury. I don't know what your plans are, Mr. Rosenberg, but in the event you leave, whether or not it would be agreeable, if Mr. Riley or Mr. Wilson, or both of them, could answer any questions that might come up, represent your clients on any

STRIBUTION COPY 2 (PINK) -- TO DEFENDANT

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☆U.S.GPO:1982-0-368-694/2153

nited States of America vs.

United States District Court for

EFENDANT: LINVILLE MOSLEY

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

DOCKET NO. 83-8-17

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
April 7, 1984		

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[x] WITH COUNSEL Lowell Ed Spencer
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea,

[ ] NOLO CONTENDERE,

[ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~xxxxx~~/verdict of

[x] NOT GUILTY/ to Counts 1 and 2 Defendant is discharged, and exonerated from bond.

[ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

[signature]

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☆U.S.GPO:1982-0-368-694/2153

nited States of America vs.

United States District Court for

DEFENDANT: DONAHUE HALBERT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

DOCKET NO. 83-8-14

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

****

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH DAY YEAR: April 7, 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Hershel Branson, Jr.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of [X] NOT GUILTY/ Defendant is discharged to Count One and exonerated from bond. [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

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COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

▶ [signature]

mained in effect and he, having paid the debt, is entitled to contribution from Knight as co-guarantor. The District Court found that Knight's guaranty was cancelled because the conditions set out in the letter of February 28 were met. Knight's argument on appeal is that the court was correct and that in fact both guaranties were cancelled.[3]

[2, 3] Wirotzious contends that Knight's guaranty could not be terminated by the conditions of the February 28 letter being met, because the terms of the guaranty itself provided for termination only upon written notice given by the guarantor and acknowledged by the bank (which termination would not apply to obligations already incurred by the debtor). We agree with the District Court that the benefit of the guaranties could be waived or surrendered by the bank without regard to the means prescribed for cancellation by a guarantor. Arguably the bank might not be able to surrender the benefit of one guaranty to the detriment of the other guarantor who, subsequently becoming obligated to pay, might have been deprived of his right to contribution. This question we need not explore, because we think that the joint letter to Knight and Wirotzious surrendered the bank's rights against both guarantors upon performance of the recited conditions.

The District Court found that the conditions were met. The bank maintained a single ledger sheet showing loans, advances and payments for the account of Saltzman Machine, and the balance thereon on February 28 was $49,772.47, the total of the two notes referred to in the letter of that date.[4] Between May 1, 1968 and July 30, 1968 Saltzman Machine paid the bank more than $50,000. Meanwhile, however, the bank had made other advances to Saltzman Machine, represented by new notes. The court found that the payments totalling $50,000 were under Alabama law properly applied to the charges on the bank's ledger sheet in the order in which the charges accrued, citing Mayer Bros. v. Gewin, 200 Ala. 391, 76 So. 307 (1917), with the result that the notes referred to in the February 28 letter had been paid and, the conditions of the letter having been met, Knight's guaranty[5] was at an end. We are not able to say that this conclusion is wrong.[6]

Affirmed in part and reversed and remanded in part. Each party shall bear his own costs.

3. So that Wirotzious paid Saltzman Machine's debt to the bank when he was not obligated to do so.

4. The parties attach no significance and we do not to the difference of $10.07 in the ledger figures and the figures in the letter.

5. And presumably Wirotzious's also, though the court did not refer to that question.

6. The bank officer who calculated the amount to be discharged by Wirotzious's executing his own note testified that she considered the principal amount to be the aggregate of unpaid balances on the two notes described in the February 28 letter. Wirotzious himself testified, however, that the accounts receivable note was paid off with Saltzman Machine funds.

WEST KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff-Appellee,

v.

Frank AMATO, Samuel Salvatore Brunello, Donald Lambert, aka Louis Lamberti, Defendants-Appellants.

No. 73-2069.

United States Court of Appeals, Fifth Circuit.

June 7, 1974.

Rehearing and Rehearing En Banc Denied July 12, 1974.

By judgments of the United States District Court for the Southern District of Florida, at Miami, Norman C. Roettger, Jr., J., three defendants were convicted of violation of Hobbs Act, for conspiring to obstruct interstate com-

merce by extortion achieved by physical violence and they appealed. The Court of Appeals, Tuttle, Circuit Judge, held, inter alia, that proof that lounge and restaurant bought liquor and meat supplies from suppliers who obtained their goods from out of state was sufficient to permit jury reasonably to infer an effect on interstate commerce by the closing of restaurant and lounge, but that evidence as to one defendant was insufficient on element of intent to join or knowledge of conspiracy.

Judgments of conviction as to two defendants affirmed and judgment of conviction and sentence of one defendant reversed and case remanded for entry of judgment of acquittal as to him.

1. Threats ⇐1(1)

To establish violation of Hobbs Act, it is not necessary that the subject of extortion constitute interstate commerce or that the purpose of extortion be to affect interstate commerce; all that is required is that trade be affected by extortion in any way or degree and that the victim be induced to part with property through the use of fear. 18 U.S.C.A. § 1951.

2. Threats ⇐8

From proof that cocktail lounge and restaurant purchased liquor and meat products from suppliers who purchased their products from out of-state sources and that the restaurant and lounge was closed for a month because of the coercion of the conspirators, jury could reasonably infer, in prosecution for violation of Hobbs Act, an effect on interstate commerce as required by Act. 18 U.S.C.A. § 1951.

3. Criminal Law ⇐741(1)

Test for sufficiency of evidence to submit criminal case to jury is whether taking view most favorable to government a reasonably minded jury could accept relevant evidence as adequate and sufficient to support conclusion of defendant's guilt beyond reasonable doubt. Fed.Rules Crim.Proc. rule 29(c), 18 U. S.C.A.

4. Conspiracy ⇐23, 47(2)

No formal agreement is necessary to establish conspiracy whose existence is often proved by inferences from actions of actors or circumstantial evidence of a scheme.

5. Conspiracy ⇐47(1)

To establish person as a participant in a conspiracy, evidence must show that accused intended to join and cooperate in illegal venture.

6. Conspiracy ⇐47(1)

Knowledge that a conspiracy exists is minimum requirement for establishing requisite intent of accused, and to establish the intent evidence of knowledge must be clear.

7. Conspiracy ⇐44½

Association with alleged coconspirator may raise strong suspicion of knowledge and intent of accused, but this is not the only reasonable inference which may be drawn from such conduct.

8. Conspiracy ⇐44½

Although any violence perpetrated by particular defendant, who was shown to only have been involved in violence on a single night could not be condoned, in absence of any showing of an element of intent on his part to join in extortion conspiracy in violation of Hobbs Act his conviction could not be sustained. 18 U.S.C.A. § 1951.

Harvey I. Silverman, Hallandale, Fla. (Court-appointed), for Lambert.

Arthur W. Tifford, Miami, Fla. (Court-appointed), for Amato.

Neale J. Poller, Miami Beach, Fla. (Court-appointed), for Brunello.

Robert W. Rust, U. S. Atty., Miami, Fla., Marshall Tamor Golding, Atty., Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Before BROWN, Chief Judge, and TUTTLE and SIMPSON, Circuit Judges.

TUTTLE, Circuit Judge:

Defendants-appellants, Amato, Lambert, and Brunello, were convicted by a jury under the Hobbs Act, 18 U.S.C.A. § 1951[1] for conspiring to obstruct interstate commerce by extortion achieved by physical violence and threats of violence. On appeal appellants allege numerous errors by the district court. However, we find meritorious only the claim of insufficiency of evidence.[2]

Appellants were indicted with five other co-defendants. The indictment charged a conspiracy continuing over a period of one year, November 1, 1970 through November 1, 1971, to extort money, goods, and services from Sheldon, Frederick, and Selma Arthur and a family corporation, "Oliver's," which was a restaurant and cocktail lounge. The government alleged that the evidence demonstrated that the defendants first induced fear in the Arthurs by threatened and actual violence, and then attempted to obtain money and employment for themselves and others at Oliver's. While unsuccessful, the government argues that the defendants did obtain food, drink, and services without payment. Three of the eight co-defendants were granted judgments of acquittal by the district court. Two were found innocent by the jury. Appellants, Amato, Lambert, and Brunello, were found guilty.

The Hobbs Act applies to one who ". . . affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspire so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section . . . ."[3] Appellants assert, individually, that there was insufficient proof on the elements necessary for conviction, specifically: (1) Failure to show an effect on interstate commerce; (2) Failure to prove formation of a conspiracy; (3) Failure to demonstrate each appellant's intent to join the conspiracy; (4) Failure to prove a reasonable fear on the part of the victims.

INTERSTATE COMMERCE

The essence of appellants' interstate commerce argument is that the government's proof only discloses *intrastate*

1. This provision provides:
"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
"(b) As used in this section—
"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

2. Among other errors urged were: (a) Denial of a fair trial by the conduct and hysterics of two prosecution witnesses; (b) Denial of motions for severance; (c) Admission of declarations by co-conspirators contrary to United States v. Puco, 476 F.2d 1099 (2d Cir. 1973), cert. denied, 414 U.S. 844, 94 S. Ct. 1067, 38 L.Ed.2d 82 (1973); (d) The jury instructions on intent; (e) Denial of cross-examination; (f) Designation of an improper time period for the conspiracy in the indictment; and (g) Discriminatory selection of grand and petit juries.

3. *See* the text of the Hobbs Act, 18 U.S.C.A. § 1951, quoted in note 1, *supra*.

sales by wholesale liquor and meat suppliers, who purchased their goods from out-of-state, to Oliver's. Appellants contend that the flow of the interstate goods stopped with the supplier, therefore, the interruption eliminates the interstate nature and effect of any intrastate sale between Oliver's and the supplier's. Secondarily, appellants state that there is no evidence that the flow of goods to the supplier ceased or slowed down, affecting commerce, as a result of the conspiracy.[4]

[1, 2] This Court described the manner in which the interstate commerce requirement of the Hobbs Act had to be satisfied in United States v. Nakaladski, 481 F.2d 289, 298–299 (5th Cir. 1973):

". . . Under the Hobbs Act it is not necessary that the subject of the extortion constitute interstate commerce, or that the purpose of the extortion be to affect interstate commerce. All that is required is that trade be affected by extortion 'in any way or degree,' Carbo v. United States, 9 Cir. 1963, 314 F.2d 718, 732; *see* United States v. Addonizio, *supra*, 451 F.2d [49] at 77, and that the victim have been induced to part with property through the use of fear." *Id.* at 298.

It is clear that:

"The impact of extortion need affect interstate commerce only in a minimal degree, United States v. Hyde, 5 Cir., 1971, 448 F.2d 815, cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745." United States v. Nadaline, 471 F.2d 340, 343 (5th Cir. 1973).

At trial the government called two witnesses who testified that their employers, one a liquor, the other a meat supplier, purchased their products from out-of-state sources. The government then offered documentary proof, i. e., invoices, that Oliver's purchased liquor and meat products from these suppliers. Finally, the government demonstrated that Oliver's was closed for a month because of the action and coercion of the conspirators.[5] From these facts, the court and the jury could reasonably infer an effect on interstate commerce.

The intermediate stop of the goods shipped interstate with the middle man supplier before receipt by Oliver's, does not make the effect on interstate commerce too attenuated. United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967); Battaglia v. United States, 383 F.2d 303, 305 (9th Cir. 1967). Likewise, the evidence of the closing of Oliver's as a consequence of the conspiracy furnishes sufficient inferences of the reduction of sales from suppliers who purchased out-of-state products. United States v. DeMasi, 445 F.2d 251, 257 (2d Cir. 1971);[6] United States v. Pranno, *supra*, 385 F.2d at 389.

APPELLANT BRUNELLO

While inadequate proof of the effect on interstate commerce would have invalidated all convictions, the alleged in-

4. *See* note 5, *infra*.

5. Two of the factors causing the closing of Oliver's were the destruction of the furnishings and the beating of Frederick Arthur allegedly inflicted by defendant Peter Allen and two unidentified men on September 28, 1971. However, defendant Allen was granted an acquittal by the court because of the government's failure to comply with the Jencks Act. Because of the acquittal, there might be some question of the competence of this evidence to support a conclusion of an effect on interstate commerce if it were the sole cause of the closing of Oliver's. However, the evidence revealing that Sheldon Arthur felt compelled to ask Lambert and Amato for permission to reopen Oliver's was sufficient for the jury to infer that other factors, in addition to defendant Peter Allen's alleged actions, forced the closing of Oliver's.

6. In *DeMasi*, the court stated:
"With reference to the argument that the Government failed to prove an effect on interstate commerce, we note only that the Club purchased its meat in Connecticut and its liquor both nationally and internationally, and that when the Club closed these deliveries were stopped. The requisite effect was proven." *Id.*

sufficiency of proof on the other elements of the conspiracy charge have had to be examined individually, as to each appellant. Having carefully reviewed the record we reverse the conviction of appellant Brunello, and affirm the convictions of appellants Amato and Lambert.

[3] Brunello moved for a judgment of acquittal at several points within the trial and at the close of evidence. In addition, he filed a motion notwithstanding the verdict pursuant to Fed.R.Crim. P. 29(c). The district court denied these motions. This Court has stated most recently in United States v. Jeffords, 491 F.2d 90 (5th Cir. 1974):

"The test in a criminal case to determine whether there is sufficient evidence to submit the case to the jury is:

"On a motion for judgment of acquittal, the test is whether, taking the view most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. Sanders v. United States, 5 Cir., 1969, 416 F.2d 194, 196; Jones v. United States, 5 Cir., 1968, 391 F.2d 273, 274; Weaver v. United States, 5 Cir., 1967, 374 F.2d 878, 881.

"United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 825, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). *See also* Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941); United States v. Stephenson, 5 Cir., 1973, 474 F.2d 1353." *Id.* at 91.

The government's case against Brunello is grounded on his involvement with one of the other appellants, Amato, and the Arthurs in two incidents occurring on *one* night, May 28, during the one year conspiracy. The first incident was Brunello's participation in an altercation at Oliver's. He was accompanying appellant Amato, who began the fight. Although the testimony is conflicting on whether Brunello was aggressively aiding Amato or attempting to separate the participants and terminate the fracas, we must take the view most favorable to the government—that Brunello was an active aggressor. During the scuffle, Selma Arthur testified that Brunello warned her that if the police were called that next time both her sons would be killed. For that reason she later testified that she told the police that Brunello was not one of the perpetrators of the altercation. Later that evening, Selma Arthur followed Amato and Brunello to the Gold Doubloon, a neighboring cocktail lounge, to plead that no further injuries be inflicted on her sons. Sheldon Arthur then appeared. He had an automatic hand gun in the waist band of his trousers. Brunello yoked Sheldon around the neck, grabbed the pistol from him, and threatened him. At the request of Amato, Brunello then gave the pistol to Selma Arthur, and the Arthurs left.

[4–7] No formal agreement is necessary to establish a conspiracy, whose existence often is proved by inferences from the actions of the actors or circumstantial evidence of a scheme. United States v. Nadaline, *supra*, 471 F.2d at 344; United States v. Anderson, 352 F. 2d 500 (6th Cir. 1965). The question arises, however, whether this single night's involvement is sufficient to prove Brunello's *intent* to join, or knowledge of, the conspiracy. The proof on conspiracy charges, in general, requires:[7]

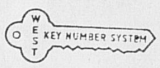
7. *See* Roberts v. United States, 416 F.2d 1216, 1221 (5th Cir. 1969) ("In sum, we are left with an abiding conviction that the jury's verdict of guilty as to Bookout is based upon suspicion and surmise only. She associated with the wrong people and was convicted because of guilt by association only."); Wood v. United States, 283 F.2d 4, 6 (5th Cir. 1960) ("This record demonstrates that these appellants spent much of their time during the period of the alleged conspiracy in company with proven bootleggers. This fact, coupled with their game of 'cops and robbers' in and around the area in

"In order to establish a person as a participant in a conspiracy, the evidence must show that the accused intended to join and cooperate in the illegal venture. Knowledge that a conspiracy exists is a minimum requirement for establishing the requisite intent. 'Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal.' Direct Sales Co. v. United States, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269, 87 L.Ed. 1674. *See* Daily v. United States, 9 Cir., 282 F.2d 818, 821–822. Association with an alleged co-conspirator may raise a strong suspicion of knowledge and intent, but this is not the only reasonable inference which may be drawn from such conduct." Miller v. United States, 382 F.2d 583, 587 (9th Cir. 1967).

[8] Selma Arthur testified that she had never seen Brunello before or after May 28th. There was no other evidence even portraying Brunello as an associate or close companion of the other conspirators. Both Selma and Fred Arthur testified that Brunello had never solicited free liquor or food, or sought credit, money or employment. In fact, the government has not shown that Brunello had any interest at all in the outcome of the conspiracy. United States v. Noah, 475 F.2d 688, 697 (9th Cir. 1973). Although any violence perpetrated by Brunello cannot be condoned and is reprehensible, the record is devoid of any element of intent to join in an extortion conspiracy in violation of the Hobbs Act. *See* United States v. Nedley, 255 F.2d 350, 357–358 (3rd Cir. 1958). In sum, we find that as a matter of law the evidence against Brunello on the issue of intent to join, or even knowledge of, the conspiracy was insufficient to submit the case to the jury.

The Judgments of Conviction of Amato and Lambert are affirmed.

The Judgment of Conviction and sentence of Brunello is reversed and the case is remanded to the trial court for the entry of a Judgment of Acquittal as to him.



UNITED STATES of America, Plaintiff-Appellee,

v.

Robert Walker GUPTON, Jr., Defendant-Appellant.

No. 73-3726

Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

June 10, 1974.

Defendant was convicted in the United States District Court for the Middle District of Florida at Tampa, Anthony A. Alaimo, J., of threatening physical violence to the property of an airline in furtherance of a plan to obstruct interstate commerce by extortion, and he appealed. The Court of Appeals, Godbold, Circuit Judge, held that to prove a crime under the statute providing a penalty for obstruction of commerce by extortion, the government need not show that the accused set out with a specific conscious purpose or desire to obstruct commerce; it is only necessary to show a plan to embark upon a course of extortionate behavior likely to have the natural effect of obstructing commerce.

Affirmed.

which several stills were later found creates a strong suspicion that they had more than a passing interest in the stills and their product. Mere suspicion is, of course, not sufficient to warrant the submission of a criminal case to a jury.").

* Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5th Cir. 1970, 431 F.2d 409, Part I.