

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

LINH HOAN NGUYEN,

Defendant.

OPINION AND ORDER

05-CR-0165-C-01

Defendant Linh Nguyen has moved for judgment of acquittal or, alternatively, for a new trial, following his conviction by a jury of two counts of aiding and abetting the importation and distribution of marijuana. Defendant argues that the government did not prove its case beyond a reasonable doubt, that the court erred in its evidentiary rulings and that the government failed to turn over discovery it had an obligation to disclose. I find that the jury had ample evidence from which to find defendant guilty; defendant has not shown that any of the evidentiary rulings were erroneous; and he has failed to show that the government had any duty to turn over the evidence in question. Therefore, defendant's motion will be denied.

A. Insufficiency of Evidence

The government adduced extensive evidence that defendant was guilty of aiding and abetting the importation of marijuana into the United States. The government's primary witness was Manjot Singh, who had been convicted previously for his role in the importation and distribution scheme. Singh testified that he was recruited to escort a truck driven by Deepak Kad. Ostensibly, the truck carried a load of children's furniture, but both men knew that the furniture was camouflage for a large quantity of marijuana from British Columbia.

Kad and Singh began their trip in Canada. On December 1, 2003, they crossed the border at Detroit, where customs officials held the truck briefly for closer inspection. The delay in the release of the truck made the two men fearful that the officials had detected the controlled substances. (Their fear was well-founded. Customs inspectors had detected the clandestine load and put Kad and Singh under surveillance for the rest of their trip.) Before going on, they called their boss in Canada for instructions: he told them he would supply them with new cell phones in case their conversations on their old ones were being monitored.

In northern Illinois, Kad and Singh stopped at a truck stop, where defendant met them with two new prepaid cell phones. The two truckers went on to northwestern Wisconsin and spent the night at another truck stop near a Wal-Mart's distribution center. On December 3, they received a call from their boss, telling them that their customers would

be arriving. A few hours later, Singh received a call asking for his location. Shortly thereafter, defendant and a passenger drove up in a rented mini-van. Singh climbed into the van and sat there with the two men for more than two hours while they discussed whether defendant wanted to take the shipment. When defendant said that he wanted to see whether the shipment was being followed, Kad drove his tractor over to the trailer and began to hook it up. He stopped when he noticed a tracking device on the back of the truck. In the meantime, defendant and Singh and defendant's passenger had taken the van through parking lots in the area looking for evidence of law enforcement officers. Singh called his Canadian boss again for instructions and was told not to drive the trailer but to disconnect it and leave it in the lot.

Customs Inspector Shawn Gibson testified that defendant and his passenger headed back to Chicago, without any marijuana, and were stopped on the interstate by a Wisconsin state trooper. The stop was not fortuitous; customs officials had asked the state patrol to look for evidence of a traffic violation and make a stop if they saw such a violation. As shown in the videotape of the stop, defendant told the trooper that he had been visiting a girlfriend in Minnesota. He said nothing about any truckload of marijuana.

Gibson testified that he interviewed defendant in October 2005 in a meeting room at the Chicago Police Department and that defendant had told him that he had been approached by an Asian female, Hien, who worked at the same cell phone store that he did.

Hien had offered him \$1,000 to deliver two cell phones to an individual. Gibson asked defendant whether that request seemed odd; defendant said that it did, but that he wanted the thousand dollars. He told Gibson that he had traveled to a gas station in Wisconsin near Minneapolis where he met with an Indian male driving a tractor-trailer, gave the Indian male the two cell phones and then left the area. Gibson asked whether the Indian male had gotten into defendant's van; defendant said that he had and that he had asked to be driven around. After more questioning, defendant admitted that the driving around had been for the purpose of determining whether he was being followed. He admitted that he knew drugs were probably involved but denied that he was a part of any drug transaction. His duties were limited to the delivery of the cell phones.

At trial, defendant testified that he had met Kad and Singh in northern Illinois and that he had driven to northwestern Wisconsin to meet them but that his only purpose in both meetings was to buy a small portion of the marijuana shipment for his own purposes. He admitted having sat with Singh in his van for two hours and to checking for possible surveillance.

Singh's testimony, the evidence of law enforcement officers who watched defendant turn over the cell phones, meet with Singh and try to detect surveillance, and defendant's inconsistent statements to Gibson and to the state trooper were sufficient to permit a reasonable jury to find beyond a reasonable doubt that defendant was guilty of aiding and

abetting the importation of marijuana into the United States and its subsequent distribution. Defendant contends, however, that the evidence against him would have been insufficient were it not for Singh's testimony. This contention leads to the issue of the propriety of the court's evidentiary rulings.

B. Court's Evidentiary Rulings

I. Restrictions on questioning of Singh

Defendant objects strongly to the court-imposed restrictions on his questioning of Singh, arguing that the importance of Singh's testimony made it critical for him to be able to show that Singh was not credible. He argues that the court erred in not allowing him to cross-examine Singh about the theory of defense Singh's attorney had presented at Singh's trial, about admissions Singh made through his attorney in a motion to suppress that he filed in this court and about assertions of the government (presumably at Singh's trial) that Singh was a liar. Defendant asserts that he should have been able to put into evidence Singh's attorney's denial of Singh's guilt so that the jury could consider it in determining Singh's credibility. Defendant does not rely on any statements of Singh himself, because Singh did not testify at his own trial.

Defendant's motion is inventive but not persuasive. Even assuming that statements made by Singh's counsel at trial or in support of a suppression motion may be used to

impeach Singh's credibility, defendant has never submitted to the court evidence of any such statements. The record does contain Singh's written motion for suppression but that motion includes no denial of guilt. Without a transcript of Singh's trial I cannot review the closing arguments to determine whether defense counsel did anything more than put the government to its proof. However, it stands to reason that defense counsel could not have argued that Singh denied his guilt when Singh did not take the stand. Had counsel made such an argument, the government would have objected to it and the objection would have been sustained.

As evidence of Singh's lack of credibility, defense counsel refers to statements by the government at Singh's trial that Singh was not to be believed. It seems unlikely that the assistant United States Attorney would have said something to that effect when Singh never testified. Even if he did, however, his opinion about Singh's credibility is not evidence, either in Singh's trial or in this one. In any event, the jury in this case knew that the jury in Singh's case had found him guilty of marijuana importation. It would not have been surprised to know that the government believed him to be guilty of that crime. Why else would the government have charged him?

2. Court's refusal to allow entire video to be played to jury

At trial, I denied defendant's request to show the jurors the complete videotape that

was made of his traffic stop on the interstate, rather than just the portion showing the trooper's questioning of defendant. There was a good reason for this ruling. Nothing in the rest of the videotape was of any relevance to defendant's guilt or innocence. It merely included some mostly unintelligible conversation among the officers present for the stop about the information they had received about the defendant and the drug investigation.

Defendant seems to think that the officers' conversation about the specifics of the investigation would be relevant. Defendant says that he did not intend to offer the information for the truth of the matter but rather to show what steps the officers took "during their investigation and its effect on the officers." Dft.'s Mot., dkt. #24, at 3. He did not explain at trial and he does not explain now what possible relevance there could be to "the steps the state patrol officers took." If defendant is suggesting that the troopers may have acted illegally in stopping him on the interstate, he is too late. Before the trial began, he abandoned the untimely motion he had filed to suppress evidence obtained through an illegal stop. (Even if he had not, the motives of the trooper are not relevant to the legality of a traffic stop; the only question is whether the trooper had objective evidence of a traffic violation. Whren v. United States, 517 U.S. 806, 819 (1996) (so long as officers have probable cause to believe that driver has violated traffic code, they are justified in stopping vehicle)). The highway stop was relevant only because of what defendant told the troopers and not because of any information the officers had gained from customs officials.

Defendant suggests in vague terms that the taped conversation would tend to impeach testimony of other witnesses, but he does not support the suggestion with any detail about which witnesses might be impeached or how. Moreover, he does not say that he laid the foundation for any impeachment before asking that the tape be played.

3. Court's failure to give pattern instruction on buyer-seller relationships

Defendant contends that once he introduced evidence that he was strictly a buyer of the marijuana that Singh was distributing, the court was obligated to give the Seventh Circuit's buyer-seller instruction. Defendant's position is correct only if such an instruction is proper in a case charging aiding and abetting rather than conspiracy and then only if the evidence adduced would have supported a buyer-seller instruction. United States v. Meyer, 157 F.3d 1067, 1074 (7th Cir. 1998) (defendant must show that proposed instruction is correct statement of law, theory of defense is not already part of charge, failure to include proposed instruction would deny defendant fair trial and evidence in case supports the theory of defense).

At trial, the government objected to a buyer-seller instruction, arguing that it was not proper when the defendant is charged with aiding and abetting, as in this case. Presumably the government would contend that when conspiracy is not in issue, the government does not have to prove that a defendant had a meeting of the minds with the other participants

in the scheme. When the government charges aiding and abetting, it need prove only that the defendant knowingly associated with the criminal activity, participated in it and tried to make it succeed. Distinguishing a mere buyer and seller from a co-conspirator makes sense when agreement is an element of the crime; it makes less sense when the defendant is trying to distinguish aiding and abetting from the “mere” willingness to buy from the same source on repeated occasions.

Even if the buyer-seller instruction may be appropriate to give in an aiding and abetting case, the evidence did not support giving the instruction in this case. That evidence showed that defendant met Manjot Singh and Derek Kad at a truck stop in northern Illinois, where he provided them with cell phones, and that he later drove to northwestern Wisconsin, where he met the two in a parking lot, spent two hours in his car talking with Singh, engaged in activities intended to ferret out any law enforcement presence and left the area without purchasing any marijuana or taking over either or both of the trucks that Singh and Kad were driving. Although defendant testified that his only interest was in buying a small portion (thirty pounds) of the marijuana from the shipment, the evidence would not have supported a jury finding that he was a “mere” buyer of controlled substances. He did not deny that he drove from Chicago to northwestern Wisconsin to meet the truckers, that he spent two hours talking with them in his van or that he drove around in an effort to detect surveillance. Such activities are hardly those of a mere purchaser of drugs. His

defense that his intent was to purchase a small part of the 400 pounds of marijuana in the truck is not very credible; the evidence showed that it would have been impossible to extract any part of the marijuana from the center of the truck without mechanical equipment to move the pallets of furniture surrounding the marijuana.

As the description of the evidence shows, this was not a situation in which a person purchases controlled substances from a seller episodically, for cash, in which there is no mutual trust between the buyer and seller, no commitments to one another and no stake in the other's success. E.g. United States v. Thomas, 284 F.3d 746, 752-54 (7th Cir. 2002) (describing factors that support finding of buyer-seller relationship). Defendant has not shown that any reasonable jury could have found from the evidence that he was a casual buyer of marijuana rather than someone who associated himself with the criminal activity and was helping to make it succeed. Casual buyers might drive some distance to meet a truck of marijuana and might even help them check for surveillance, but they do not supply their sellers with new cell phones.. I conclude that defendant has failed to show that it was error to deny his request for a buyer-seller instruction.

4. Answers to jury questions

Defendant objects to the answers the court gave to questions asked by the jury during its deliberations. The jury asked two questions. The first was whether, if defendant had the

intent to deliver less than 100 kilograms, he would still be guilty of aiding and abetting the distribution of marijuana. The second was whether the act of importation included only the physical crossing of the border into the United States or whether it included traveling from Canada all the way to the destination in Wisconsin. After conferring with counsel, I wrote the jury that

As to question #1, the defendant is not charged with possession with intent to distribute. He is charged with aiding and abetting. Weight is not an element of either aiding or abetting offense charge. Weight is a separate issue for your determination only as instructed at the bottom of page 8 and the top of page 9 of the jury instructions, and only if you find the defendant guilty of the charged offense.

As to question #2, the importation is not necessarily complete upon crossing the border. Refer to the instructions on page 8.

Defendant argues that, in response to question #1, the court should have either told the jury to re-read the instructions or answered “no” to the question. I am not persuaded that defendant is correct. Obviously, the jury was confused about the interplay between the verdict questions relating to the substantive charge and those relating to weight. It was not improper to try to clarify their confusion. Answering the question “no” would have been error; the jury did not have to find that defendant had intended to deliver 100 kilograms or more in order to find him guilty of the aiding and abetting offenses.

As to question #2, the jury was confused about the concept of importation and whether it covered more than simply crossing the border into the United States. The answer

did not prejudice defendant.

C. Withholding of Evidence

Defendant's last point is his assertion that the government withheld evidence from him improperly, specifically the notes taken during the proffer session with Manjot Singh. He contends that these notes were not protected work product and should have been turned over under the Jencks Act, 18 U.S.C. § 3500(e)(1) and Goldberg v. United States, 425 U.S. 94 (1976). Goldberg confirms that government lawyers must turn over any "statements" of government witnesses that are signed or otherwise adopted or otherwise approved by the witness. Defendant does not say that the proffer notes at issue are statements within the meaning of Goldberg or the Jencks Act. If defendant has evidence that notes made during Singh's proffer were signed or otherwise adopted and were not turned over to him, he should have said so. In the absence of any evidence that the notes were statements of a government witness, I cannot find that the government failed to carry out its duties under the Jencks Act.

ORDER

IT IS ORDERED that defendant Linh Hoan Nguyen's motion for a new trial or

judgment of acquittal is DENIED.

Entered this 2d day of May, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge