

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA

VS.

TROY R. SOLOMON

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CR. NO. 4:08-CR-00026

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL
PURSUANT TO RULE 29, OR, IN THE ALTERNATIVE,
MOTION FOR NEW TRIAL PURSUANT TO RULE 33

TO THE HONORABLE FERNANDO GAITAN JR., UNITED STATES DISTRICT JUDGE,
WESTERN DISTRICT OF MISSOURI:

The defendant, Troy Solomon, moves the Court for entry of a judgment of acquittal, pursuant to Fed. R. Crim. Pro. 29, for three reasons: I. The evidence is legally insufficient, as a matter of law, to support any counts of conviction; II. The jury convicted the defendant on the unsupported theory of willful blindness/deliberate indifference; III. The jury contained an objectionable juror due to a clerical error.

I.

The jury convicted the defendant on all twelve counts. Each count alleges the defendant unlawfully distributed a controlled substance. Thus, as the Court correctly charged the jury, two of the necessary elements of proof are: (1) the defendant unlawfully distributed or dispensed the controlled substances in question and (2) the distribution or dispensation was other than for a

legitimate medical purpose and not in the usual course of professional practice.⁸

The evidence presented at trial is legally insufficient to support the guilty verdicts against the defendant as neither of these essential elements was proven beyond a reasonable doubt.

Specifically, the government wholly failed to prove the essential element of *distribution/dispensation*. Moreover, the government failed to establish the necessary national standard of care of medical treatment for the patients at issue in order to prove beyond a reasonable doubt that the distribution/dispensation was *other than for a legitimate medical purpose and not in the usual course of professional practice*.

The government's theory of prosecution can be summarized as follows: The defendant participated in a scheme in concert with others to distribute various pharmaceutical controlled substances on the streets of Houston, Texas. While the government's proof established the shipment of said pharmaceuticals to Houston, the record is devoid of any evidence supporting the government's theory of street-level distribution by the defendant. To the contrary, the record establishes that the patients contacted to confirm the receipt of their legitimately filled prescriptions all verified that they lawfully received their prescriptions.

The legal standard for evaluating sufficiency is well-established: the court will view the evidence in the light most favorable to the government, resolving all evidentiary conflicts in its favor and accepting all reasonable inferences that support the verdict. The court will reverse the verdict only if "no reasonable jury could have found [the defendant] guilty beyond a reasonable doubt." *United States v. Espino*, 317 F.3d 788, 792 (8th Cir. 2003).

⁸ Please see the initial application paragraph detailing the "*essential elements*" – Jury Instruction No. 22. Count Two (Money Laundering) alleges that the "defendant conducted the financial transaction with money or funds that

In this case, no reasonable jury could have found the defendant guilty of any of the counts of conviction given the utter lack of proof that any of these prescribed controlled substances were distributed to anyone other than the legitimate patients (to whom the prescriptions were written.)

Furthermore, the government failed to elicit any testimony to establish the final element of unlawful distribution of a controlled substance – *“other than for a legitimate medical purpose and not in the usual course of professional practice.”* Nowhere within the 53 pages of Dr. Morgan’s testimony does he address the appropriate standard of care necessary to establish the final element of the counts of conviction.^b

II.

Jury Instruction No. 44b is not supported by the evidence adduced at trial and it is directly contradictory to the government’s theory. The government never so much as intimated that, while the defendant may not have possessed the requisite guilty knowledge, he was presented with facts that put him on notice that criminal activity was particularly likely and yet he intentionally failed to investigate those facts. Therefore, this instruction is inappropriate under the prevailing law of the Eighth Circuit. *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992). To the contrary, from opening statement through its case in chief and during cross-examination of the defendant, the government claimed that the defendant initiated and carried out the criminal conspiracy to illegally distribute controlled substances. The evidence is clear:

involved the proceeds of the *unlawful distribution of...controlled substances.*” See Jury Instruction No. 30.

^b This is why the government fought so hard to persuade the Court to allow Officer Kowal’s testimony. The government is well aware that they must prove their theory of street-level distribution beyond a reasonable doubt. Without Kowal’s testimony, there is not even a scintilla of evidence to establish this necessary element of their case.

the defendant solicited and received the assurances of pharmacists, doctors and lawyers that the filling of prescriptions in Belton, Missouri for delivery to patients in Houston, Texas was lawful. The defendant testified to these facts without contravention and free from impeachment. The defendant's testimony and the evidence at trial show that the defendant: located a pharmacy which would fill the prescriptions, faxed prescriptions, mailed UPS packages to Belton, Missouri and helped the business in various other ways during the time of the alleged conspiracy. At no time has the defendant maintained nor the evidence shown that the defendant was presented with "facts that put him on notice that criminal activity was particularly likely and yet he intentionally failed to investigate those facts" as required to permit a willful blindness instruction. See *United States v. Hiland*, 909 F.2d 1114, 1130-31 (8th Cir. 1990).

The government submitted jury instruction number 44b solely to lower its burden of proof and permit the jury to convict the defendant based on a mens rea in direct contravention to its theory of the case and evidence presented. A jury cannot be led to convict the defendant improperly on a lesser negligence/careless standard. See *United States v. Parker*, 364 F.3d 934, 947 n.3 (8th Cir. 2004).^c

^c "A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance." **United States v. Gruenberg**, 989 F.2d 971, 974 (8th Cir. 1993) (citations omitted). Ignorance is deliberate if the defendant was presented with facts that put her on notice that criminal activity was particularly likely and yet she intentionally failed to investigate those facts. We look to whether there was sufficient evidence to justify the instruction, reviewing "the evidence and any reasonable inference from that evidence in the light most favorable to the government." **United States v. Hiland**, 909 F.2d 1114, 1130-31 (8th Cir. 1990). A willful blindness instruction is not appropriate if the evidence implies that the defendant could only have had "either actual knowledge or no knowledge of the facts in question." **United States v. Parker**, 364 F.3d 934, 946 (8th Cir. 2004) (citation omitted). Additionally, a jury cannot be led to convict the defendant improperly on a negligence standard where, as here, the instruction states that the jury must not conclude that the defendant had knowledge of criminal activity if it finds that she is simply careless or negligent. See **Parker**, 364 F.3d at 947 n.3.

Simply stated, the government sought to shore up its case through this unsupported jury instruction. This case was never about the defendant's willful blindness, deliberate indifference or the like. The defendant's theory of the case centered around his good faith reliance on the assurances made by the doctors, pharmacists and lawyer associated with South Texas Wellness Center, The Medicine Shoppe and Ascensia. By definition, the defendant attempted to verify the validity of this prescription arrangement with the professionals involved. This verification (good faith reliance) established his knowledge of the arrangement as well as his knowledge of his co-actors' activities. Clearly, instruction 44b is unsupported by the evidence and should not have been submitted to the jury.

III.

Through a clerical error, an objectionable juror (potential juror # 21) was included on the petit jury. During the strike process, counsel and both defendants retired to the attorney room to make peremptory strikes. Counsel used Mr. Lewis' seating chart as a guide to work through the eligible jurors.^d One of the first jurors identified as a defense strike was juror # 21. This juror was a former probation officer and goes to church with the lead prosecutor on the case, Mr. Rudolph Rhodes. As counsel worked through Mr. Lewis' seating chart, they discussed each potential strike with each other and with each defendant. It was a unanimous decision to use the first peremptory strike on juror # 21 as reflected in Exhibit One. At the conclusion of the review process, Mr. Osgood attempted to record the defendants intended strikes on the official form provided by the clerk of the Court. Unfortunately, Mr. Osgood made a clerical error and failed

to transfer our intended strike of juror # 21 from Mr. Lewis' seating chart to the official form.

After the clerk announced the names of the jurors from her list, but before the jurors were sworn, Mr. Lewis approached the bench with an objection to the composition of the jury. Mr. Lewis explained the clerical error and asked the Court to replace juror # 21 as the defense intended to exercise one of its peremptory challenges on this juror for the reasons explained herein. After listening to Mr. Lewis' objection, the Court declined to replace juror # 21 with any of the remaining non-objectionable jurors who were still present in the courtroom.

While there appears to be a dearth of case law on this issue, *Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977) provides valuable insight for the proper protocol under these circumstances. As seen in *Morgan*, when counsel pointed out the clerical error, the strike process was repeated and the resulting jury was seated, thereby, correcting the previous clerical error.

In the instant case, only one member of the jury panel belonged to the same race as the defendant (African American). Thus, the pursuit of the constitutionally guaranteed right to trial by a jury of his peers was already compromised. The defendant timely objected to the inclusion of juror # 21 and the Court had the ability to correct the clerical error prior to swearing and formally seating the jury. Consequently, the Court erroneously allowed an objectionable juror to be seated.

WHEREFORE, PREMISES CONSIDERED, the defendant requests that the Court grant a judgment of acquittal as to all counts of conviction or, in the alternative, the defendant

^d Please see Exhibit One – this exhibit is filed under seal as to protect the identity of juror # 21. As you can see from Exhibit One, this juror was one of the first jurors isolated by the defense as a defense strike.

respectfully requests that a new trial be granted for the following reasons: (I) the verdict is against the weight of the evidence, (II) plain error occurred with respect to the inclusion of the government's requested jury instruction number 44b – willful blindness and (III) an objectionable juror (potential juror # 21) was seated over the defendant's objection due to a clerical error. The defendant incorporates by reference the arguments heretofore advanced relative to the insufficiency of the evidence. The Supreme Court held that, "The trial court may weigh the evidence and may assess the credibility of the witnesses during its consideration of the motion for new trial." *Tibbs v. Florida*, 457 U.S. 31, 37-38 (1982). The district court is invested with "broad discretion" in deciding whether to "set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Ferguson*, 246 F.3d. 129, 133 (2d Cir. 2001).

Respectfully submitted,

/s/Chip Lewis

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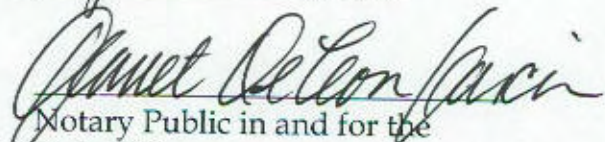
VERIFICATION

I hereby swear that the information contained in the foregoing Motion is true and correct to the best of my knowledge.



CHIP LEWIS

SUBSCRIBED AND SWORN TO before me on August 16, 2010.



Notary Public in and for the
State of Texas

