Opposition to Jewell Instruction [2000]

The defense objects to the government's proposed jury instruction for deliberate ignorance, Ninth Circuit Model Jury Instruction 5.7. The proposed instruction reads as follows:

5.7 DELIBERATE IGNORANCE

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that [*e.g.*, drugs were in the defendant's automobile] and deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that [*e.g.*, no drugs were in the defendant's automobile], or if you find that the defendant was simply careless.

Ninth Circuit Model Jury Instruction 5.7 (2004).

Introduction

The deliberate ignorance instruction is inappropriate in this case for several reasons. First, the evidence presented by the government suggests that Mr. XX had either*actual*, knowledge or that he had *no* knowledge, of the facts in question (that the packages in his possession contained drugs). There is no evidence that he acted with deliberate ignorance. Second, at most, the government has shown that Mr. XX negligently or recklessly failed to discover the truth. It has not shown that he was aware of a high probability of the existence of the facts in question and purposely contrived to avoid learning the truth in order to have a defense in the event of prosecution. Finally, the underlying requirement of the deliberate ignorance doctrine, that a person consciously avoided learning the truth, is inherently inconsistent with the extra *mens rea* required for charges in Count One through Five, aiding and abetting.

Discussion

The Ninth Circuit has repeatedly warned that the deliberate ignorance, or *Jewell*instruction, should only be given with great hesitation. *See, e.g., United States v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir.1996) ("We emphasize again today, as we have in the past, that a *Jewell* instruction is rarely appropriate.") (citations omitted). For the reasons discussed below, this case does not meet the strenuous evidentiary requirements that warrant this instruction. Therefore, the deliberate ignorance instruction is not appropriate in this case.

- **The Evidence Presented at Trial Suggests Either Actual Knowledge, or a Lack of Knowledge, Not Deliberate Ignorance.**

"The *Jewell* instruction should not be given in every case where a defendant claims lack of knowledge." *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir. 1977). Rather, the Ninth Circuit has laid out specific evidentiary requirements that must be met before a deliberate ignorance instruction is appropriate.

The instruction should be given *only* when the government presents specific evidence showing that a defendant (1) actually suspected that he or she might be involved in criminal activity, (2)

deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself or herself with a defense in the event of prosecution.
Baron, 94 F.3d at 1318 n.3. The rare cases where this stringent evidentiary requirement is met must be distinguished from cases, such as the present one, where the evidence points only to actual knowledge or no knowledge at all, rather than deliberate ignorance. *See United States v. Perez Padilla*, 846 F.2d 1182 (9th Cir. 1988), *per curium*; *see also United States v. Sanchez-Robles*, 927 F.2d 1070, 1075 (9th Cir. 1991); *United States v. Garzon*, 688 F.2d 607, 609 (9th Cir. 1982).

Sanchez-Robles is an instructive case. There, the defendant was arrested after attempting to drive a van from Mexico to the United States. 927 F.2d at 1072. Within the van Customs officials discovered contained forty-three pounds of cocaine and 417 pounds of marijuana. *Id.* Customs officials were tipped off to the illegal contents of the vehicle due to the extremely strong odor of marijuana that was emanating from inside the van. *Id.* The defendant denied any knowledge that the vehicle contained illegal substances, and claimed that she did not recognize the smell of marijuana. *Id.* The district court gave a *Jewell* instruction and the defendant was convicted. *Id.* at 1072-73. The Ninth Circuit overturned defendant's conviction, finding that the *Jewell* instruction was inappropriate because "the evidence point[ed], either directly or circumstantially, only to actual knowledge of illegality, not to deliberate ignorance." *Id.* at 1075. The Court in *Sanchez-Robles* reasoned that if the defendant recognized the smell of marijuana, she had actual knowledge that she was acting illegally. *Id.* If, on the other hand, the defendant did not recognize the smell of marijuana, she would have no reason to suspect illegality, and thus, could not be acting with deliberate ignorance. *Id.*

Similarly, in *Garzon*, the Ninth Circuit overturned the defendant's conviction after the district court gave an inappropriate *Jewell* instruction. 688 F.2d at 608. There, the defendant was present during a drug deal between his father and two undercover DEA agents. *Id.* At one point, the defendant opened a package containing one pound of cocaine, and showed the contents to the undercover agents. *Id.* The defendant testified that he had no knowledge that a cocaine deal was taking place, and that he did not recognize the appearance of cocaine. *Id.* at 608-09. The Ninth Circuit pointed out that defendant's actions were inconsistent with deliberate ignorance. *Id.* at 609. If he had been trying to avoid knowledge of the illegal activity taking place, he would not have opened the bag. Rather, the evidence pointed either to actual knowledge of the narcotics transaction, or a mere innocent presence with no knowledge whatsoever. *Id.* It was up to the jury to determine whether the defendant was telling the truth in denying that he knew the package contained cocaine. *Id.* No evidence suggested the middle ground of deliberate ignorance. *Id.*

Similarly, in the instant case, the prosecution has failed to present evidence of the three factors noted in *Baron*: that the defendant (1) actually suspected that he might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself with a defense in the event of prosecution. Rather, the evidence suggests that Mr. XX either knew he was involved in illegal narcotics activity, or was totally ignorant of that fact. Mr. XX had no reason to suspect his roommate was involved in illegal narcotics trafficking. Thus, he was not acting with deliberate ignorance when he failed to inspect the packages entrusted to him by his roommate. Furthermore, Mr. XX is not a known drug user or distributor, and has no knowledge regarding the smell and appearance of methamphetamine,

cocaine, or marijuana. Thus, he was not suspicious of the packages stored in his room, because he did not recognize the appearance to be that of illegal substances. He testified that he did not know the contents of the packages in his safe, or the package delivered to the informant. Finally, Mr. XX's behavior is inconsistent with that of a person acting with deliberate ignorance. When the police entered Mr. XX's house with a search warrant, he voluntarily pointed them to his room. He did not act suspicions or make statements that suggested that he had knowledge that the police would find drugs there. If Mr. XX had been acting with deliberate ignorance of the presence of drugs, he would not have been so nonplused when the police entered his house.

In sum, the prosecution has not satisfied its burden of providing evidence that Mr. XX willfully closed his eyes to facts that he suspected to be true in order to avoid prosecution.
The *Jewell* instruction is therefore not appropriate. Whether Mr. XX is telling the truth about his awareness of the contents of the packages stored in his room goes to the issue of actual knowledge - a question that is squarely within the province of the jury.

- **Mere Negligent or Reckless Failure to Learn the Truth is Not Sufficient to Warrant a Deliberate Ignorance Instruction**.

Deliberate ignorance (also known as willful blindness) is considered equivalent to knowledge and is not an alternative to that *mens rea* requirement. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1977). The doctrine, first enunciated in *Jewell*, is based on a long standing legal principal described in that case:

One with a deliberate antisocial purpose in mind . . . may deliberately 'shut his eyes' to avoid knowing what would otherwise be obvious to view. In such a case, so far as criminal law is concerned, the person acts at his peril in this regard, and is treated as having 'knowledge' of the facts as they are ultimately discovered to be.

Id. (quoting R. Perkins, Criminal Law 776 (2d ed. 1969). Therefore, to warrant a *Jewell* instruction, "it is not enough that the defendant was mistaken, recklessly disregarded the truth, or negligently failed to inquire." *United States v. Aguilar*, 80 F.3d 329, 332 (9th Cir. 1995) (*en banc*). Even if the facts in question were highly suspicious, and even if a defendant *should have known* that the conduct was illegal, a *Jewell* instruction is inappropriate barring evidence that the defendant was actually aware of a high probability of the facts in question, and purposely avoided learning the truth in order to have a defense to prosecution. *Id.* at 332; *see also Garzon*, 688 F.2d at 609 ("The instruction should rarely be given because of the risk that the jury will convict on a standard of negligence").

Cases where a deliberate ignorance instruction has been approved often contain the same pattern of facts: the circumstances surrounding the defendant's activity are highly suspicious and the defendant suspects that he or she might be involved in something illegal, but chooses not to inquire. *Jewell* itself follows this pattern. In that case, the defendant was approached in Tijuana, Mexico by a stranger identified only by his first name. 532 F.2d at 699 n.1. The stranger offered to sell the defendant marijuana, and when the defendant declined, the stranger offered the

defendant $100 to drive his car across the border into the United States. *Id.* Further, after being stopped at the border, the defendant conceded to DEA agents that he suspected there was probably something illegal in the vehicle and that he knew there was a hidden compartment in the trunk, but that he failed to investigate. *Id.* at 699 n.2.

Similarly, in *United States v. Nicholson*, the defendant was introduced by a friend to a man named Rankin, whom he knew had been involved in marijuana smuggling in the past. 677 F.2d 706, 707 (9th Cir. 1982). Rankin asked the defendant to invest $20,000 in a "business venture" but told the defendant that "he was not at liberty to tell him what the money was being invested for." *Id.* The defendant delivered $10,000 to Rankin as cash carried in a brown paper bag. The other $10,000 was delivered to an associate of Rankin's. *Id.* The defendant testified that later, he did suspect that the money was being used in a marijuana deal, but when he asked his friend about it, he was reassured that Rankin would have told him so. *Id.* The Ninth Circuit found that a deliberate ignorance instruction was appropriate in this case. *Id.* at 711.

In another case, *United States v. Suttiswad*, the defendant was a Thai citizen who had met an American while giving him a tour in Thailand. 696 F.2d 645, 647 (9th Cir. 1982). The American, whom the defendant knew only as XXm, gave the defendant money to secure a passport, money for an airplane ticket, $1,500 in cash, new clothes and a perfumed suitcase, and arranged to meet the defendant at a motel in Los Angeles. *Id.* When the defendant was stopped at customs, five million dollars worth of heroin was found in the lining of his suitcase. Id. at 651. The Ninth Circuit found that these facts warranted a *Jewell* instruction. *Id.* at 651.

In all of these cases, the circumstances surrounding the defendants' activities are highly suspicious. Each defendant was involved with people they did not know, and the defendants were not given information about the nature of the business. The interactions concerned large sums of cash, unusual modes of travel or communication, and often, the defendants harbored suspicions about the illegality of the activity. Overall, the conduct they were asked to participate in was identifiable as common to drug trafficking activity.

The facts of the instant case do not follow this pattern. Here, Mr. XX received the packages later found to contain drugs not from a stranger or mere acquaintance, but from a roommate with whom he had lived for several years. Mr. XX was not offered any money or other benefit for storing his roommate's packages. And Mr. XX had no reason to believe that his roommate was involved in illegal activity and no reason to suspect that the packages contained narcotics (as noted above, he had no experience with illegal narcotics and did not recognize their appearance).

Additionally, Mr. XX is mentally ill. As Dr. YYYY testified, Mr XX has been diagnosed with Posttraumatic Stress Disorder, Recurrent Major Depression with Psychotic Features, and Personality Disorder with paranoid, avoidant, and dependant trait, among other things, making him more prone to trusting, non-confrontational behavior. The appropriateness of the *Jewell* instruction - namely, Mr. XX's subjective awareness of the risk that he was involved in illegal activity, and the likelihood that he intentionally avoided learning the truth in order to have a defense to prosecution - must be evaluated in the unique context of his illness. *See Jewell*, 532 F.2d at 704 n.21. The question here is not whether a *reasonable* person would have been actually aware of the risk. Rather, in order to satisfy the test for deliberate ignorance, the

evidence must show that Mr. XX himself, a mentally ill Cambodian immigrant, with no prior experience with narcotics trafficking, was aware of the risk based on the facts and circumstances that he understood. *See id.* Evaluated in the context of his illness, it is clear that Mr. XX did not act with this level of sophistication.

The defense specifically moves this Court to evaluate the appropriateness of the *Jewell* instruction in the context of the unique characteristics of this defendant: a mentally ill man prone to dependent and submissive behavior who has no prior arrests or convictions for drug-related offenses. The defense posits that a *Jewell* instruction is inappropriate given the unique characteristics of Mr. XX.

"A court can properly find wilful blindness only where it can almost be said that the defendant actually knew." *Jewell*, 532 F.2d at 704 (citation omitted). The government has presented no evidence that Mr. XX was aware of a high probability that the packages in his room contained drugs, and no evidence that he deliberately avoided learning the truth to escape criminal liability. Even if it can be said that Mr. XX *should have known* that his conduct was illegal, negligent or reckless failure to learn the truth is not sufficient to warrant an instruction on deliberate ignorance, especially when considered from the viewpoint of a mentally ill defendant. Therefore, the *Jewell*instruction is inappropriate in this case.

- **The Doctrine Underlying Deliberate Ignorance is Inherently Inconsistent with the Extra *Mens Rea* Requirement of Aiding and Abetting, Charged in Counts One Through Six.**

From the inception of the deliberate ignorance doctrine in *Jewell*, there has been doubt as to the appropriateness of its application in cases where a defendant is charged with a crime requiring a level of intent beyond mere knowledge. In his dissent in *Jewell*, then Ninth Circuit Judge Kennedy wrote:

At the outset, it is arguable that the "conscious purpose to avoid learning the truth" instruction is inherently inconsistent with the additional *mens rea* required for count two intent to distribute. It is difficult to explain that th defendant can specifically intend to distribute a substance unless he knows that he possessed it.

532 F.2d at 705 (Kennedy, J. dissenting).

Justice Kennedy is not alone in his concern. Circuit Courts are divided on the issue of whether the deliberate ignorance instruction is appropriate in conspiracy cases, where a finding of both knowledge *and* intent is required to satisfy the elements of the offense. The Second Circuit allows use of the deliberate ignorance instruction only when the jury is properly instructed that the doctrine may only be used to infer *knowledge* of the conspiracy's unlawful objectives, but not *intent* to participate in the conspiracy. *United States v. Ferrarini*, 219 F.3d 145, 155 (2d Cir. 2000) (emphasis added); *see also United States v. Ciambrone*, 787 F.2d 799, 810 (2d Cir. 1986) ("[M]embership in a conspiracy cannot be proven by conscious avoidance, since the requisite mental state for conspiracy is intent."); *United States v. Mankani*, 738 F.2d 538, 547 (2d Cir. 1984) ("How can a person consciously *avoid* participating in a conspiracy and also be a member

of the conspiracy? The two notions are obviously mutually exclusive."). The Seventh Circuit, on the other hand, has allowed deliberate ignorance instructions in conspiracy cases, though not explicitly considering the issue of *mens rea*. *See United States v. Diaz*, 864 F.2d 544, 549-50; *United States v. Kehm*, 799 F.2d 354, 362 (7th Cir. 1986). While the Ninth Circuit has allowed deliberate ignorance instructions in at least one conspiracy case, it, like the Seventh Circuit, has not dealt explicitly with the *mens rea* issues raised here. *See United States v. Nicholson*, 677 F.2d 706, 711 (9th Cir. 1982) (allowing *Jewell*instruction where defendant was charged with conspiracy to import marijuana).

Mr. XX argues that the problems associated with using a deliberate ignorance instruction in the context of a conspiracy charge are also present in cases such as the present one, where a defendant is specifically and explicitly charged with violation of 18 U.S.C § 2, aiding and abetting because aiding and abetting, like conspiracy, requires a two tiered *mens rea.*[1]

Aiding and abetting is similar to conspiracy in that both crimes explicitly require two levels of *mens rea*: knowledge and intent. The Ninth Circuit Model Jury Instruction for aiding and abetting reads in part, "A defendant may be found guilty of [*crime charged*] ... [if] the defendant *knowingly* and *intentionally* aided, counseled, commanded, induced or procured that person to commit [*crime charged*]." Ninth Circuit Model Jury Instruction 5.1 (2004) (emphasis added). Similarly, the Ninth Circuit Model Jury Instruction for conspiracy reads in part, "[T]he defendant became a member of the conspiracy *knowing* of at least one of its objects and *intending* to help accomplish it." Ninth Circuit Model Jury Instruction 8.16 (2004) (emphasis added).

Based on the similarities between these aiding and abetting, Mr. XX argues that allowing a deliberate ignorance instruction on a charge of aiding and abetting would lead to logically inconsistent result. Mr. XX cannot deliberately avoid knowledge of an illegal activity and still intend to aid in its commission. *See Jewell*, 532 F.2d at 705 (Kennedy, J. dissenting); *Mankani*, 738 F.2d at 547. Thus, the government may not use the doctrine of deliberate ignorance to prove that Mr. XX "knew" of the crime, and yet also claim that he had the requisite intent to aid and abet in its commission. Furthermore, in order to avoid the prejudice to the defendant resulting from an inappropriate *Jewell* instruction, the Court would have to separate out, count by count and charge by charge, which crimes, and which elements of those crimes, may be proven using the deliberate ignorance instruction. This task will no doubt be confusing for a jury, and time consuming for the Court. Therefore, the giving of a deliberate ignorance instruction in this case is both unwarranted and unadvisable.

Conclusion

The deliberate ignorance, or *Jewell* instruction, is not appropriate in the present case. The evidence presented by the government suggests that Mr. XX had either actual knowledge or

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[1] The deliberate ignorance instruction is also inappropriate where a defendant is charged with violation of 21 U.S.C § 841(a)(1), possession of a controlled substance with intent to distribute, as that charge also requires two levels of *mens rea*: knowledge and intent. Mr. XX preserves that issue for appellate review.

insufficient knowledge of the facts in question - either Mr. XX knew he was possession narcotics or he did not. There is no evidence of the middle ground of deliberate ignorance. Moreover, at most, the government has shown that Mr. XX negligently or recklessly failed to discover that he was involved with illegal narcotics. As noted above, however, the standard for the deliberate ignorance instruction is higher than either "negligence" or "recklessness." The government must prove that Mr. XX actually suspected that he might be involved in criminal activity, and deliberately avoided taking steps to confirm or deny those suspicions in order to provide himself with a defense in the event of prosecution. It has not done so here. Finally, the underlying requirement of the deliberate ignorance doctrine - that a person consciously avoided learning the truth - is inherently inconsistent with the extra *mens rea* required to prove aiding and abetting, as charged in Counts One through Five. Mr. XX could not consciously avoid knowledge of the underlying crimes, yet still intend to assist in their commission.

For the foregoing reasons, the deliberate ignorance instruction is inappropriate in this case, and the defense respectfully requests that this Court rule accordingly.