RECORD NO. 11-4992

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRUCE JAMES ABRAMSKI, JR.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

REPLY BRIEF OF APPELLANT

William H. Cleaveland
WILLIAM H. CLEAVELAND, P.L.C.
Suite 101
40 British Woods Drive
Roanoke, VA 24019
(540) 777-0170 Telephone
bill.cleaveland@cleavelandlaw.com

Counsel for Appellant

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LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
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Statutes

Comes now the Appellant, Bruce J. Abramski, Jr., by counsel, pursuant to Federal Rule of Appellate procedure 4(b), and 18 U.S.C. Section 3242, and submits to the following in support of his appeal to this Honorable Court:

ARGUMENT

Abramski's reply will address both the legal and factual mischaracterizations the United States has made in order to make its arguments.

ABRAMSKI'S CHALLENGES TO HIS CONVICTIONS FOR VIOLATION OF U.S.C. §922(a)(6) and §924 (a)(1)(A)

The United States misstates Abramski's claim as to why this conviction should be reversed. (US Br 6) Abramski does not contend that the issue of guilt turns on the fact that "he and Alvarez were both legally entitled to purchase a firearm." Rather Abramski claims his statements were not "material" to constitute a violation of §922(a)(6), and the transaction did not constitute a "straw purchase" intended to be prosecuted under either §922(a)(6) or §924 (a)(1)(A).

The government in its brief cites *Huddleston v. United States*, 415 U.S. 814, 825 (1974) for the proposition that Section 922(a)(6) was "enacted as a means of providing adequate and truthful information about firearms transactions." The government omitted the heart of this quote. The rest of it is:

> "Information drawn from records kept by dealers was a prime guarantee of the Act's effectiveness in keeping "these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too

> high a price in danger to us to allow." 114 Cong. Sec. 13219 (1968) (remarks by Sen. Tidings). "Thus any false statement with respect to the eligibility of a person to obtain a firearm from a licensed dealer was made subject to a criminal penalty."

The reference to the ***Huddleston*** case in no manner relates to the present case. Huddleston, a convicted felon redeemed several firearms from a pawn broker, and lied about his status as a felon.

The government ignores Abramski's contention that his statement that he was the actual buyer, on the 4473 form was "not material." Of the cases cited by the government, none deal with the fact situation similar to Abramski's case. In fact, the government has conceded the lawfulness of the transaction between Abramski and Alvarez in Pennsylvania.

The government's entire argument hinges on the premise that had the Virginia FFD known that Abramski was going to drive to Pennsylvania to exercise a "transfer" to Alvarez through another FFD in Pennsylvania, they would not have sold the Glock to him.

However, no one has disputed that had the conversations not taken place between Abramski and Alvarez about the Glock, and if Alvarez had not sent the check, Abramski could have purchased the Glock, immediately thereafter decided to transfer it to Alvarez, and could have done so with impunity.[1]

[1] It is clear that Abramski did not use Alvarez's money to make the gun purchase.

Section 922(a)(6) reads: it shall be unlawful

> "for any person in connection with the acquisition or attempted acquisition of any firearm…..knowingly to make any false or fictitious oral or written statement…..intended or likely to deceive such…..dealer…..with respect to any fact material to the **lawfulness of the sale or other disposition of such firearm…..**" (emphasis added)

The uncontested facts are that Abramski did not reveal his intention to travel to Pennsylvania and conduct what he understood, from other FFDs, would be a completely legal transfer of the Glock firearm to his uncle Alvarez.

The government has conceded that the Pennsylvania transfer was completely legal. [2] There is nothing about the subsequent transfer to Alvarez that indicates either Abramski or his uncle intended to purchase/transfer this Glock under circumstances that would avoid providing accurate, truthful information about the ownership of this gun.

THE AFFIDAVIT FOR AND THE EXECUTION OF THE SEARCH WARRANT ON THE 2009 IRON RIDGE ROAD PROPERTY, WERE ILLEGAL UNDER THE 4TH AMENDMENT

The government begins its argument of the validity of the search warrants in this case with a detailed summary of the robbery investigation. (US Br 15-19)

[2] Abramski contends that he never intended to deceive the Virginia FFD about the "other disposition of this firearm," a fully registered, documented transfer. He contends that under the facts of this transfer, his statement cannot be considered material. The additional documentation with the Pennsylvania transfer makes it clear that Abramski never intended to deceive anyone, or subvert the intent of the record keeping provisions of 18 U.S.C. §924(a)(1)(A).

"The affidavit specifically stated that the agents were seeking evidence for crimes related to the FCB robbery," and attached a list of items to be seized. (JA 224)

Item #9 on the list describes "any Glock handguns, a Ruger SR556 rifle, and one Mossberg model 500A 12 gauge tactical shotgun." The inventory reflects the seizure of a 12 gauge ER Amantino shotgun, and one Westernfield rifle, in addition to the identified authorized items. There was no connection between these two long guns and the FCB robbery.

This unauthorized extension of the seizure authority by the agents is indicative of the nature of their attitude that, once they were on the premises, they proceeded with the search, as though they were no longer limited by the particular items related to a robbery investigation.

Similarly, in the application for the warrant for 2009 Iron Ridge Road, Agent Brodee specifically stated that since they had already seized a green money bag, they were not requesting authority to seize one at the second location.

Now, in its Brief at page 27, the Government claims that the FCB green money bag is a "fruit of the FCB robbery!" There is no fact that supports such a conclusion.

Probable cause is established when, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76.6 Ed 527.

The facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist at the time of the search and not simply as of sometime in the past. *United States v. Wagner*, 989 F 2d 69.75 (CA 1953).

The determination of timeliness does not depend on simply the number of days that have passed between the facts relied upon, and the issuance of the warrant; instead whether the information is too stale to establish probable cause depends on the nature of the criminal activity, the length of the activity, and the nature of the property to be seized. Where the offense is ongoing and continuous, the passage of time is not of critical importance. *United States v. Jardine*, 364 F. 3d 1200, 1205 (10th Cir).

Although the government argues that "the police may reasonably believe that a suspected robber will keep firearms, clothing, and other personal property at his residence well after the robbery," there is no such assertion by either agent in the two affidavits filed for the search warrants in this case.

Cases cited by the government to support the contention that evidence of the FCB robbery could "reasonably" be found in Abramski's home(s), are all inapplicable.

For example, citing *Andresen v. Maryland*, 427 U.S. 463, 480, 481 (1976), the government relies upon the 'catch all' provision of the search warrant,

explaining "the court reasoned that the "catch all" provision would be construed to limit the search and seizure for evidence of the false pretenses crime."

The analogy to this case fails because the green and white FCB bag cannot possibly be characterized as evidence of the robbery.[3]

The only connection with this entire case and the FCB bag is the reference in the search warrant affidavits that "Abramski withdrew currency for this purchase from a green zippered money pouch with white lettering." (JA 391)

There is no reference to such a bag being taken from the bank during the robbery; neither of the two affidavits suggests that such a bag was taken during the robbery. Finally, during the hearings for defendant's motion to suppress, there was absolutely no suggestion that the FCB bag "belonged to FCB," and as such could be considered "fruits of the FCB robbery."

When defense counsel was examining FBI Kenya Gillis, he made it clear to agent Gillis that "We're talking about the question of whether or not the items you've seized are fruits of a crime or evidence of a crime." (JA 290) at page 293, counsel asks the agent:

Q: Anything illegal about having a green money pouch?

A: There's nothing illegal about it.

Q: So what connection was that purchase and pouch with the robbery?

[3] The government's entire argument with regard to the receipt is based upon the legitimate, legal and proper seizure of the FCB green money bags.

A: Through further investigation, we learned the green money pouches are issued from Franklin Community Bank.

Q: To employees?

A: Well.

Ms. Neese: Your Honor, we would object to this line of questioning.

The Court: It's all not relevant. None of this is relevant to the issue before the Court today.

At JA 296, however, Gillis acknowledges she "seized it," meaning one of three bank bags seized from 2009 Iron Ridge Road.[4]

Likewise, the government's assertion that the "agents reasonably believed that the bag belonged to FCB and was therefore a fruit of the FCB robbery," is without any foundation in the record.[5]

[4] Although Gillis had numerous opportunities to declare the green money bag "fruits of a crime," she failed to do so because such a statement was simply not supportable under the facts of this case.

[5] It is telling that there is no, (as there cannot be) any reference to the joint appendix that supports such a brazen assertion. Since the government has taken such unwarranted liberties with the record, defense counsel feels compelled to assert as an officer of the court, that the government's investigation established that green FCB money bags were freely distributed to employees, and since Abramski's wife was an FCB employee at this time, there is absolutely no incriminating implication that can be drawn from the presence of these bags being found at the 2009 Iron Ridge Road home.

CONCLUSION

For the foregoing reasons, Abramski respectfully requests that this Court reverse the District Court's judgment of guilt on both counts, and dismiss these two charges alleging violations of 18 U.S.C. §922(a)(6) and 18 U.S.C. §924(a)(1)(A).

REQUEST FOR ORAL ARGUMENT

The Appellant, Bruce J. Abramski, Jr., hereby requests oral argument.

Dated: April 16th, 2012

/s/William H. Cleaveland
William H. Cleaveland
WILLIAM H. CLEAVELAND, PLC
40 British Woods Drive, Suite 101
Roanoke, Virginia 24019
540-591-5959 Telephone
540-591-5909 Facsimile
bill.cleaveland@cleavelandlaw.com
Counsel for Appellant

Donald Ray Wolthuis
Thomas Booth
Ashley Brooke Neese
310 First Street, S.W., Room 906
P. O. Box 1709
Roanoke, Virginia 24008-1709
donald.wolthuis@usdoj.gov
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14 point, proportionately spaced Times New Roman typeface in Microsoft Office Word 2007.
2. Exclusive of the table of contents; table of authorities; statement with respect to oral argument; certificate of service and the certificate of compliance, the brief contains 1,730 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

April 16, 2012.

/s/William H. Cleaveland
William H. Cleaveland
WILLIAM H. CLEAVELAND, PLC
40 British Woods Drive, Suite 101
Roanoke, Virginia 24019
540-591-5959 Telephone
540-591-5909 Facsimile
bill.cleaveland@cleavelandlaw.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on April 16th, 2012, I served the Reply Brief by placing a copy in an envelope, with First Class postage affixed and placing it for mailing with the United States Postal Service addressed as follows:

/s/William H. Cleaveland
William H. Cleaveland
WILLIAM H. CLEAVELAND, PLC
40 British Woods Drive, Suite 101
Roanoke, Virginia 24019
540-591-5959 Telephone
540-591-5909 Facsimile
bill.cleaveland@cleavelandlaw.com
Counsel for Appellant

Donald Ray Wolthuis
Thomas Booth
Ashley Brooke Neese
310 First Street, S.W., Room 906
P. O. Box 1709
Roanoke, Virginia 24008-1709
donald.wolthuis@usdoj.gov